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SECOND SERIES

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33 Cal.2d 773

JABLON v. HENNEBERGER.

No. 20791.

Supreme Court of California, in Bank.

April 22, 1949.

1. Courts 🔑82

A material change in language in court rule tends to show an intention on part of rule-making body to accomplish a change, but, where it appears that there was no intention to disturb a rule of long standing, a change is not effected.

2. Motions 🔑56(1)

Generally, an order is ineffective unless filed with clerk or entered in the minutes. Code Civ.Proc. § 1003.

3. Appeal and error 🔑428(2)

Under rule on appeal, the 30 days within which plaintiff could file his notice of appeal did not commence to run from date of oral denial of motion for new trial in open court, but only from date of the order in the permanent record book in main office of county clerk. Code Civ. Proc. §§ 939, 1003; Rules on Appeal, rule 3(a)(1), (b).

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Louis Jablon against Marie Henneberger. From adverse judgment, plaintiff appeals. On motion to dismiss appeal.

Motion denied.

Prior opinion 196 P.2d 128.

Harry E. Ehrlich and Simon Miller, both of Beverly Hills, for appellant.

Bautzer & Silbert and Bertin Wevl, all of Los Angeles, for respondent.

SHENK, Justice.

This is a motion to dismiss an appeal from a judgment in favor of the defendant upon the ground that the notice of appeal was filed more than thirty days after the denial of the motion for a new trial and more than ninety days after the entry of the judgment.

On August 14, 1947, judgment was entered in favor of the defendant. Notice of entry of judgment was served and filed on August 22. On August 29 the plaintiff filed his notice of intention to move for a new trial. The motion was heard on October 10 and denied in open court in the presence of counsel for both parties. The following additional facts are stipulated: Preparatory to the calling of the calendar for October 10, 1947, in the Santa Monica branch of the Superior Court, the branch court clerk prepared a "trial calendar" in duplicate on which he listed each matter to come before the court, the nature of the proceeding and litigants' counsel. When the court orally denied the motion for a new trial, the clerk entered the disposition on the original and carbon copy of the "trial calendar" under the proper heading as follows: "Mo. denied. Notice waived." The original was retained by the branch court clerk and the carbon copy sent to the main office of the County Clerk in Los Angeles where, on October 23, an entry of the order was made in the Register of Actions and in the "Minutes and Orders" book which contains the record of all minutes and minute orders made in all departments of the Los Angeles superior court. These proceedings were in accordance with the accustomed practice in Los Angeles courts. The time lag of thirteen days between the disposition in the branch court and its entry in the records at the main office was not unusual.

The question is whether the thirty days within which the plaintiff could file his notice of appeal commenced to run from the date of the oral denial of the motion in open court or from the date of the order in the permanent record book in the main office of the county clerk. If the earlier date started the period running, the appeal was ineffective whereas if the period did not begin to run until October 23, the notice of appeal filed on November 15 was timely.

Section 3(a)(1) of the Rules on Appeal, provides: "When a valid notice of intention to move for a new trial is served and filed by any party within 60 days after entry of judgment, (1) if the motion is denied, the time for filing the notice of appeal from the judgment is extended for all parties until 30 days after denial of the motion by order of court or by operation of law."

The foregoing rule superseded in part section 939 of the Code of Civil Procedure which had declared: "If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial * * *." That section was interpreted as authorizing an appeal within thirty days after the official entry in the minutes of the order denying a new trial. Berman v. Blankenship, 140 Cal.App. 134, 34 P.2d 1035. The official entry referred to is not that made by the department court clerk in his rough minutes. The entry in the permanent minute records of the court constitutes the official record of the court. Brownell v. Superior Court, 157 Cal. 703, 109 P. 91; Van Tiger v. Superior Court, 7 Cal.2d 377, 60 P.2d 851; Jackson v. Thompson, 43 Cal.App.2d 150, 110 P.2d 470; Smith v. Ross, 57 Cal.App. 191, 207 P. 55; Berman v. Blankenship, supra, 140 Cal.App. 134, 34 P.2d 1035.

[1] The fact that section 939 of the Code of Civil Procedure was specific in declaring that the time for such an appeal was to be calculated from the date of entry, whereas the word "entry" does not appear in the rule, is not decisive. A material change in the language of a rule tends of course to show an intention on the part of the rule-making body to accomplish a change. People v. Santa Fe Federal S. & L. Ass'n, 28 Cal.2d 675, 685, 171 P.2d 713; Estate of Broad, 20 Cal.2d 612, 618, 128 P.2d 1; Whitley v. Superior Court, 18 Cal.2d 75, 78, 113 P.2d 449; Estate of Todd, 17 Cal.2d 270, 274, 109 P.2d 913; Loew's, Inc., v. Byram, 11 Cal.2d 746, 750, 82 P.2d 1. But where, as here, it appears that there was no intention to disturb a rule of long standing, a change was not effected. W. R. Grace & Co. v. California Emp. Comm., 24 Cal.2d 720, 729, 151 P.2d 215; County of Los Angeles v. Frisbie, 19 Cal.2d 634, 644, 122 P.2d 526; Hammond v. McDonald, 49 Cal.App.2d 671, 681, 122 P.2d 332; Dalton v. Baldwin, 64 Cal.App.2d 259, 264, 148 P.2d 665; 1 Sutherland, Statutory Construction (1943) secs. 1930, 1931, pp. 412-419.

[2] Section 1003 of the Code of Civil Procedure provides: "Every direction of a court, judge, or justice, made or entered in writing, and not included in a judgment, is denominated an order." It is the general rule that an order is ineffective unless filed with the clerk or entered in the minutes. Brownell v. Superior Court, supra, 157 Cal. 703, 109 P. 91; Jackson v. Thompson, supra, 43 Cal.App.2d 150, 110 P.2d 470; Smith v. Ross, supra, 57 Cal.App. 191, 207 P. 55. There may be exceptions to the general rule but this motion does not involve one of them and the general rule should be applied. This conclusion is further supported by the explanatory note prepared under the supervision of the Judicial Council and accompanying the rule in question. The explanatory note says that the rule, Rule 3(a)(1), "states existing statutory and case law." That law, as has been shown, is to the effect that the time for filing a notice of appeal should commence to run from the "entry" of the order in the minutes of the court. See Witkin, The Rules on Appeal, 1944, 17 So. Cal.L.R. 92.

[3] The respondent calls attention to the fact that under Rule 3(b) the time for

taking an appeal from the orders therein specified commences to run from the "entry" of the order and it is urged that an omission to use that word in the first subdivision of the rule indicates a purpose to provide a different rule, citing Estate of Corcofingas, 24 Cal.2d 517, 150 P.2d 194. However, sufficient has been said to show that uniformity was intended and that a change in the established practice was not accomplished.

The motion is denied.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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33 Cal.2d 749

SINZ v. OWENS.

Sac. 5982.

Supreme Court of California.

April 20, 1949.

1. Physicians and surgeons 🔑18(8)

The standard of care, against which the acts of a physician in a malpractice action are to be measured, is a matter peculiarly within the knowledge of medical experts, and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman.

2. Evidence 🔑538

The competency of a medical expert in a malpractice action is in every case a relative one.

3. Physicians and surgeons 🔑14(1)

In a malpractice action, criterion as to medical standard required is not the highest skill medical science knows, but the care ordinarily possessed and exercised by physicians under similar circumstances.

4. Physicians and surgeons 🔑18(8)

In a malpractice action, proof of standard of medical treatment required is made by the testimony of a physician who is qualified to speak as an expert, and who has occupational experience.

5. Evidence 🔑538

In malpractice action, a medical expert testifying as to standard of medical treatment must have basic educational and professional training as a general foundation for his testimony, but it is practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant physician that is of controlling importance in determining competency of the expert.

6. Appeal and error 🔑971(2)
Evidence 🔑546

The qualification of a medical expert to testify in a malpractice action as to standard of medical treatment is a question for sound discretion of trial court, and its ruling will not be disturbed on appeal unless a clear abuse is shown.

7. Evidence 🔑538

In malpractice action against physician in rural community, patient's medical witness, who was familiar with medical standards in neighboring towns which evidence showed were almost identical in regard to kind of medical services available in the rural community, was properly permitted to testify as to standard of care that should have been maintained by defendant physician.

8. Appeal and error 🔑1170(9)
Physicians and surgeons 🔑18(10)

In malpractice action against physician in rural community, instruction that if a physician undertakes service in a special medical branch, and if at that time and in the same locality there are members of the medical profession who specialize in such special branches, physician has duty to possess that degree of learning and skill ordinarily possessed by specialists in same locality, was erroneous, but not prejudicial, where patient offered no testimony to prove any standard of skill or care above that of the general practitioner. Const. art. 6, § 4½.

9. Evidence 🔑359(4)

In malpractice action, jury was properly permitted to examine X-rays of plaintiff's injuries, where experts who had testified for both of the parties had interpreted the X-rays for the jury.

10. Appeal and error ⚷933(1), 979(5)

Where a reviewing court is asked to review act of trial court in granting a new trial on ground that damages are excessive, every intendment is to be indulged in support of the trial court's action, and it will not be disturbed if question of its propriety is open to debate.

11. Physicians and surgeons ⚷18(11)

Trial court did not abuse its discretion in granting physician a new trial on ground of excessive damages, in malpractice action by 62-year-old rancher who was awarded verdict of $17,500 because of allegedly improper treatment of leg fractures. Code Civ.Proc. § 657, subd. 5.

CARTER, J., dissenting.

◆

Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Action by Rudy Sinz against Raymond L. Owens, M. D., to recover damages for alleged malpractice. From a judgment for plaintiff, defendant appeals, and from an order granting defendant a new trial on issue of damages alone after plaintiff failed to consent to a reduction of the verdict, the plaintiff cross-appeals.

Judgment and order affirmed.

Prior opinion 196 P.2d 52.

Miller & Kroloff, Jack J. Miller, Yale S. Kroloff, and Forrest M. Greenberg, all of Stockton, for plaintiff and appellant.

Gilbert L. Jones, Daniel S. Lane, Roy A. Weaver, and Richard B. Daley, all of Stockton, for defendant and appellant.

Gibson, Dunn & Crutcher, Philip C. Sterry and Samuel O. Pruitt, Jr., all of Los Angeles, Hartley F. Peart, Gus L. Baraty, Howard Hassard, and Alan L. Bonnington, all of San Francisco, Joseph F. Rankin, of Oakland, Rankin, O'Neal & Luckhardt, of San Jose, and Anthony J. Kennedy, of Sacramento, as amici curiæ on behalf of defendant and appellant.

EDMONDS, Justice.

A jury returned a verdict for $17,500 in favor of Rudy Sinz for damages occasioned by the medical treatment of Dr. Raymond L. Owens. Subsequently, the physician's motion for a new trial was denied upon condition that Sinz consent to a reduction in the amount of damages to $10,000. Sinz refused to accept the reduction and a new trial was granted on the issue of damages alone. Dr. Owens has appealed from the judgment and Sinz has filed a cross-appeal from the order granting a new trial.

As the result of a traffic accident, Sinz sustained a double comminuted fracture of the tibia and fibula of his left leg. The breaks were just below the knee and above the ankle. He was taken to a hospital in Lodi and, at his request, Dr. Owens was called to treat his injuries. The controversy centers around the treatment given by Dr. Owens upon the basis of a series of x-ray photographs and other evidence tending to show the patient's progress.

The first photographs were taken shortly after Sinz reached the hospital. According to Dr. Owens, because they showed good bone alignment, he applied a plaster cast. The photographs taken immediately after the cast was applied disclosed some angulation, but the doctor stated that he was satisfied with the results as shown by them. Photographs taken about twelve days later indicated further angulation and the absence of callus formation. When the cast was taken off, three months after the injury, the angulation was approximately twelve degrees and the callus formation still soft.

By the end of another two months, x-ray pictures showed that the angulation had increased to nineteen degrees at the upper fracture and five degrees at the lower one. At the time of trial, the angulation was thirty degrees at the upper fracture and the same amount as before at the lower break.

To prove malpractice, Sinz called Dr. Allen F. Morrison as an expert. Dr. Morrison testified that the standard of practice in California is to use skeletal traction on a double comminuted fracture. He also declared that, regardless of the choice of treatment made by Dr. Owens when he first saw his patient, the x-ray photographs subsequently taken showed the need for some form of traction, and traction would have been feasible as late as the time when the cast was removed. Other evidence in the record is to the effect that, at the time of the accident, it was the general custom of physicians practicing in Lodi to refer cases requiring skeletal traction to a specialist in Stockton, about twelve miles away.

As grounds for reversal of the judgment, Dr. Owens contends that Dr. Morrison was not qualified to testify as to the standards of medical practice in Lodi. He also relies upon error in the instructions to the jury, and asserts that he was prejudiced by the submission of the x-ray photographs to the jurors for their inspection. In his appeal from the order conditionally denying a new trial, Sinz takes the position that because insufficiency of the evidence was not specified as a ground for the ruling, the court had no authority to set aside the jury's determination fixing the amount of the damages.

The voir dire examination of Dr. Morrison shows that he was then practicing medicine in the town of Oakdale, about 27 miles south of Stockton. He testified that his practice was a general one and extended to Turlock, Modesto, and Escalon, the farthest of these places being approximately 40 miles south of Stockton. Lodi, where Dr. Owens had his offices, is about 12 miles north of Stockton. Oakdale and Turlock are smaller than Lodi; Modesto is somewhat larger.

[1,2] The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, Trindle v. Wheeler, 23 Cal.2d 330, 333, 143 P.2d 932; Pearson v. Crabtree, 70 Cal.App. 52, 232 P. 715, noted in 14 Cal.L.Rev. 70; VII Wigmore on Evidence, sec. 2090(a), p. 453, unless the conduct required by the particular circumstances is within the common knowledge of the layman. Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695. And competency of an expert "is in every case a relative one, i. e. relative to the topic about which the person is asked to make his statement." II Wigmore on Evidence, 3rd Ed., sec. 555, p. 634.

[3-5] The criterion in this regard is not the highest skill medical science knows; "the law exacts of physicians and surgeons in the practice of their profession only that they possess and exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of their profession under similar circumstances." 41 Am.Jur., Phys. & Surg., sec. 82, p. 201. The proof of that standard is made by the testimony of a physician qualified to speak as an expert and having in addition, what Wigmore has classified as "occupational experience—the kind which is obtained casually and incidentally, yet steadily and adequately, in the course of some occupation or livelihood." 2 Wigmore on Evidence, 3rd Ed., sec. 556, p. 635. He must have had basic educational and professional training as a general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged with malpractice that is of controlling importance in determining competency of the expert to testify to the degree of care against which the treatment given is to be measured.

The courts have encountered some difficulties in stating a general rule by which to measure the qualifications of a physician to testify on the issue of standard of care. As developed by succeeding decisions, it has not been uniformly phrased either in language or in substance, but originally, and for reasons of practical necessity, it was based upon geographical considerations which stemmed from the variations in facilities in various communities.

In California the standard has been variously limited to general medical custom in the "same locality" or "vicinity," Trindle v. Wheeler, 23 Cal.2d 330, 143 P.2d 932; McGuire v. Baird, 9 Cal.2d 353, 70 P.2d 915; Taylor v. Fishbaugh, 26 Cal.App.2d 300, 79 P.2d 174; Rasmussen v. Shickle, 4 Cal.App.2d 426, 41 P.2d 184; Howe v. McCoy, 113 Cal.App. 468, 298 P. 530; Hopkins

v. Heller, 59 Cal.App. 447, 210 P. 975, or "the same *or similar* communities" or "locality", Thomason v. Hethcock, 7 Cal.App. 2d 634, 46 P.2d 832, 835; Dameron v. Ansbro, 39 Cal.App. 289, 178 P. 874; Priestley v. Stafford, 30 Cal.App. 523, 158 P. 776, and in some cases the "same" locality is used interchangeably with the "same or similar" locality. Warnock v. Kraft, 30 Cal.App.2d 1, 85 P.2d 505; McLennan v. Holder, 1 Cal.App.2d 305, 36 P.2d 448. The distinction between the two statements of the requirement, insofar as technical interpretation is concerned, is obvious, and the parties, at considerable length, have argued as to the effect of the language used. However, in the majority of cases wherein the qualification as to locality has been stated, it constitutes mere dictum. Emphasis on strict interpretation of either statement of the rule in this regard, tends to obscure the sole purpose which justifies it.

It has been said that the theory supporting the rule that the expert must be familiar with the degree of care used in the particular locality where the defendant practices "is that a doctor in a small community or village, *not having the same opportunity and resources for keeping abreast of the advances in his profession,* should not be held to the same standard of care and skill as that employed by physicians and surgeons in large cities." Warnock v. Kraft, 30 Cal.App.2d 1, 3, 85 P.2d 505, 506. In earlier days, when there was little intercommunity travel, the courts required personal experience with the practice of physicians in the particular community where the plaintiff was treated as the basis of the expert's testimony concerning the degree of care which should have been used. But the law recognizes that: "The duty of a doctor to his patient is measured by conditions as they exist, and not by what they have been in the past or may be in the future. Today, with the rapid methods of transportation and easy means of communication, the horizons have been widened, and the duty of a doctor is not fulfilled merely by utilizing the means at hand in the particular village where he is practicing. So far as medical treatment is concerned, the borders of the locality and community have, in effect, been extended so as to include those centers readily accessible where appropriate treatment may be had which the local physician, because of limited facilities or training, is unable to give." Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183, 188, 132 A.L.R. 379, 386.

But Sinz seeks to advance this development beyond permissible bounds. He argues that "[i]t is a matter of both common knowledge and common sense that the standards of medical practice should be, and in fact are, the same in towns and cities within a large geographic area. For example, the San Joaquin Valley, wherein both Lodi and Oakdale are situated. This court may well take judicial notice of the fact * * *" However, the San Joaquin Valley is an area containing two cities of more than 50,000 population and communities ranging from that number to the smallest way stations. This merely emphasizes the fact that geographical generalizations or localizations do not provide a practical basis for measuring "similar circumstances." In any event, the question as to what constitutes similar circumstances is not one solely for judicial notice of an appellate court. It presents an issue which concerns the competency of a person called to testify as a witness, and must be decided upon a consideration of all relevant evidence.

With regard to the standard of care in Lodi, Dr. Sanderson, who was qualified from occupational experience to compare the standard of care in both places, as a witness for Dr. Owens stated: "I would say that [the] standard in Lodi * * * is just as good as [that of] the average doctor in Stockton." Dr. Morrison, testifying for Sinz, was not personally acquainted with conditions in Lodi but he said that although "usually the smaller the community the lower the plane of care," as to treatment of fractures of this particular nature, the same standard of care prevails throughout California.

[6, 7] Although this evidence is somewhat vague, the qualification of an expert witness is a question for the sound discretion of the trial court and its ruling will not be disturbed upon appeal unless a clear abuse of it is shown. Sowden v. Idaho Quartz

Min. Co., 55 Cal. 443, 451; Commonwealth v. Capalbo, 308 Mass. 376, 32 N.E. 225; Commonwealth v. Rouchie, 135 Pa.Super. 594, 7 A.2d 102, 107; II Wigmore on Evidence, § 561, p. 641. Considering the testimony of Dr. Morrison and other evidence before the court, it cannot be said that there was any abuse of discretion in the determination that, as to the medical treatment of fractures, the conditions in Oakdale, Lodi, and other adjoining areas were sufficiently alike to make him competent to testify with regard to the standard of medical practice ordinarily followed under similar circumstances.

This conclusion is not based exclusively upon geographical proximity, and necessarily there can be no hard and fast rule laid down as a test for experience requisite as a basis for testimony as to custom and practice. But where all of the towns in which a physician practices are tributary to a city, such as Stockton, and there is testimony that the degree of care at the place of treatment is equal to that in the city, the evidence is sufficient to support a finding of similar circumstances. The essential factor is knowledge of similarity of conditions; geographical proximity is only one factor to be considered.

Two cases upon which Dr. Owens relies heavily are McNamara v. Emmons, 36 Cal. App.2d 199, 97 P.2d 503, and Bickford v. Lawson, 27 Cal.App.2d 416, 81 P.2d 216. In the McNamara case, supra, "Plaintiffs produced two physicians as witnesses who had never practiced in Ontario and knew nothing of the standards of practice there. *Neither did they know that the communities of Ontario and San Bernardino, where they practiced, were similar or had similar standards of practice.*" 36 Cal.App.2d at page 207, 97 P.2d at page 508. Aside from this failure of the witnesses to testify to the conditions in the two communities, there was no independent evidence of similarity of conditions. The two physicians testified to the standard of care in San Bernardino, a city of some 50,000 population, for the purpose of establishing the liability of a physician practicing in Ontario, a town of less than 15,000. Although the decision was rested on other grounds and the discussion as to standard of care pertained only to the issue of prejudice resulting from other errors, the opinion shows that the minimum requirements of the rule as to similarity of conditions were not met. The distance between the two towns was stated as affecting the physician's duty to travel from one place to the other to continue treatment, but it was not considered as a factor in determining similarity of conditions.

In Bickford v. Lawson, supra, the witness testifying as to what he would have done under the same circumstances, "admitted he did not know what the practice of other physicians was in reducing and treating such fractures in that or any other locality." 27 Cal.App.2d at page 424, 81 P.2d at page 220. The trial court's ruling in striking such testimony from the record was properly sustained, the witness being clearly incompetent to establish the general degree of care under circumstances similar to those at the time of treatment.

Emphasizing occupational experience as the dominant qualification, that is, the witness must have a familiarity with the existing practice under the circumstances and not merely that he practice medicine or live in the area, are the cases of McGuire v. Baird, 9 Cal.2d 353, 70 P.2d 915; Taylor v. Fishbaugh, 26 Cal.App.2d 300, 79 P.2d 174; and Soady v. Washburn, 114 Cal.App. 82, 299 P. 560. In the McGuire and Taylor cases there was no question as to the practice of the witness in the vicinity, but the court pointed to a lack of knowledge of the manner in which other doctors treated the condition presented to the defendant. In Soady v. Washburn, supra, the witness was a retired naval officer living in San Francisco. An objection to his testimony as to the standard of care was properly sustained, for it appeared that he had never engaged in civil practice in California or elsewhere.

The more recent California cases upon the question of competency of a doctor in one community to testify as to the standard of care at another place, although phrasing the rule in terms of "same" or "similar" locality, have shown a clear tendency to depart from the earlier geographical limitations of the rule. Thus in Sales v. Bacigalupi, 47 Cal.App.2d 82, 117 P.2d 399, 401, the ruling admitting the testimony of a doctor practicing in Oakland as to medical treatment in San Francisco was upheld with comment upon "the close proximity of the two cities and the metropolitan character of the entire area." And in Pierce v. Paterson, 50 Cal.App.2d 486, 123 P.2d 544, a general statement that the witness was familiar with the degree of care throughout Alameda County was held sufficient although apparently, there was no testimony of familiarity with conditions in the town where the treatment was given.

The leading California case on this point is Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99, wherein the testimony of doctors practicing in Los Angeles was held admissible as to the standard of care in Long Beach. The court there stated the reason for the early rule requiring familiarity with the particular locality as "in order that the standards of widely separated localities with different practices may be excluded. But to make the exclusion rest arbitrarily upon a geographical line * * * would be a misuse of the rules of evidence and an unjustifiable emphasis on empty technicalities. Common knowledge, as well as the testimony of the doctors on both sides, tells us that the method used in treating this particular kind of fracture was one in use throughout the world." 12 Cal.2d at page 561, 86 P.2d 101.

The second contention of Dr. Owens is based on the italicized portion of the following instruction: "By undertaking professional service to a patient, a physician and surgeon impliedly represents that he possesses, and it is his duty to possess, that degree of learning and skill possessed by physicians and surgeons of good standing, practicing in the same locality. *If he undertakes such a service in a special branch of medical, surgical or other healing science, and if at that time and in the same locality there are members of his profession who specialize in, and limit their practice to, that particular branch of the healing profession, it is his duty to possess that degree of learning and skill ordinarily possessed by physicians and surgeons of good standing who engage in that special practice in the same locality.* It is argued that this amounts to imposing upon a general practitioner the duty of a specialist.

This instruction is No. 214 of California Jury Instructions, Civil (BAJI) and the editors of that work have made certain modifications in it. See Calif.Jury Instructions, Civil, 3rd Ed., 1948 Pocket Parts, pp. 169–73. An excellent brief by amicus curiæ points up the objection by noting that the instruction fails to include the element that the physician "discovered or should have discovered" that the injury required expert treatment before he is under any special duty. A sounder instruction is suggested by Benson v. Dean, 232 N.Y. 52, 133 N.E. 125, 127, in which the court said: "If under the circumstances a reasonably careful skillful general practitioner * * * would have suggested the calling into consultation of a * * * specialist, the defendant was negligent for failing to do so." Such an instruction would clearly avoid the far reaching implications of the instruction now under review, and would not impose an unreasonable degree of skill upon the ordinary practitioner. Further, the suggested instruction would allow the jury to find the defendant guilty of negligence if he failed to recommend a specialist when the particular facts justified such action. On the other hand, it would afford the practitioner reasonable discretion as to such elements as the patient's mental and emotional condition, his known financial situation, and the many other variants which a physician reasonably must consider in treating human ailments.

[8] For these reasons, the court should not have given the instruction in the quoted form, but the error was not prejudicial within the meaning of section 4½ of Article VI of the Constitution. Sinz offered no testimony to prove any standard of skill or care above that of the general practitioner. On cross-examination of Dr. Sanderson, the only orthopedic specialist to testify, he was asked several questions as to how he would have treated Sinz, but the inquiry was not directed to the general standard of skill of specialists. Further, Dr. Sanderson was an adverse witness and his answers in this regard were contrary to the position of Sinz.

The record shows a "very complicated fracture in the leg" and "one of the most difficult fractures that we can treat." Although there was testimony that, in the circumstances, the ordinary standard of care would have been either to apply skeletal traction or to call in a specialist to do so, the evidence must be considered in connection with the undisputed fact that, at the time of the accident and first x-ray photograph, the leg was in reasonably good alignment. But the successive pictures showed progressive increase in angulation and poor callus formation. According to Dr. Morrison, at the time the cast was taken off, traction still could have been applied and the angulation corrected. The failure of Dr. Owens to recognize the inadequacy of his treatment is strong evidence of a breach of the standard of care testified to by Dr. Morrison. Under these circumstances, no prejudice resulted from the challenged instruction.

[9] Apparently the complaint that the trial court allowed the jury to view x-rays taken of the injured leg at the time of the injury, without a qualifying instruction limiting consideration of them to the sole purpose of illustration, has been abandoned by Dr. Owens in the presentation of his appeal to this court. However, the record shows that they were properly introduced in evidence and he and the experts who testified for both of the parties interpreted them for the jury. There was no reason for any special cautionary instruction in regard to this evidence and neither Hollis v. Ahlquist, 142 Wash. 33, 251 P. 871, nor Vale v. Campbell, 123 Or. 632, 263 P. 400, support the position taken by Dr. Owens in his brief.

The question presented by the cross-appeal of Sinz is whether the trial court properly granted a new trial upon his refusal to accept a reduction in the judgment from $17,500, the amount of damages fixed by the jury, to $10,000. The trial judge, although including a reference to insufficiency of the evidence in a memorandum opinion, did not specify in the order that the motion was granted upon that ground. Under section 657 of the Code of Civil Procedure, Sinz contends, because of this omission, there is a conclusive presumption that the order was not based upon insufficiency of evidence and must have been made on the ground of "excessive damages, appearing to have been given under the influence of passion or prejudice." Code Civ.Proc. sec. 657(5). It is argued, in the language of Casaretto v. DeLucchi, 76 Cal.App.2d 800, 174 P.2d 328, 336, that: "If the evidence before the trial court is conflicting, and there is substantial evidence to sustain the award, no right to grant a new trial on the ground of excessiveness of the verdict exists where insufficiency of the evidence is not also specified as a ground of the order."

Dr. Owens relies upon a line of cases which, after analyzing the basis for allowing a new trial because of excessiveness of the verdict due to passion and prejudice, realistically conclude that such an order "necessarily is granted on the ground of the insufficiency of the evidence to sustain a verdict for the amount awarded by the jury." Griffey v. Pacific Electric Ry. Co., 58 Cal.App. 509, 513, 209 P. 45, 46; Meinberg v. Jordan, 29 Cal.App. 760, 762, 157 P. 1005, 1007. In view of the provision in section 657 of the Code of Civil Procedure that insufficiency of the evidence must be specified in writing in the order "otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground," there is perhaps a certain anomaly in the Legislature's failure to include excessiveness of damages in the proviso. This difficulty has been commented upon and criticized. See note, 12 So.Cal.L.Rev. 501, 503. But the point is not of controlling importance here, because the same rule governing appellate review applies to both grounds.

[10] The language quoted from Casaretto v. DeLucchi, supra, is not a correct statement of the law and is disapproved as directly in conflict with the rule laid down in Dreyer v. Cyriacks, 112 Cal.App. 279, 283, 297 P. 35, 37, approved in Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941, with regard to appellate review of an order granting new trial for excessive damages: "It may be conceded that the rule controlling in cases where the reviewing court is asked to reverse a judgment upon the ground of excessive verdict, after the trial court has refused to set aside the same, is that the verdict must stand unless it is so grossly disproportionate to any reasonable limit of compensation warranted

by the facts as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice, passion, or corruption, rather than sober judgment. * * * But where, as here, we are asked to review the act of the court, where, in the exercise of its discretionary power, it has seen fit to set aside the verdict on this ground, a very different rule prevails. Every intendment is to be indulged here in support of the action of the court below, and it will not be disturbed if the question of its propriety be open to debate."

[11] Applying that rule to the facts of the present case and considering the indefinite and conflicting evidence upon the degree of disability suffered by Sinz, the lack of a clear showing that the leg could have been completely cured in the exercise of due care, and his life expectancy, it cannot be said that the trial court abused its discretion in granting the new trial upon the ground of excessive damages.

The order granting new trial upon the issue of damages alone is affirmed.

SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I agree that the judgment against the defendant physician should be affirmed, but I think the order granting the new trial must be reversed for there is no showing of passion or prejudice in the damage award and the trial court cannot reweigh the evidence in passing on a motion for a new trial on the ground of excessive damages. Moreover, I believe any physician practicing in this state is qualified as an expert in a malpractice case in any part of the state.

Turning first to defendant's motion for a new trial, it appears that while the motion for a new trial was made upon all the grounds specified in the statute, the order granting the new trial was "on the question of damages alone." (The plaintiff was given an opportunity by the order to have the new trial denied by accepting a lesser sum for damages, but refused.) Nothing was said in the order about insufficiency of the evidence. Justice Edmond's opinion holds that under those circumstances, the appellate court may consider a conflict in the evidence, insufficiency of the evidence, as grounds justifying the action of the trial court in granting a new trial. It is my position that the only thing that may be considered is whether there was passion or prejudice, and in considering such, the trial court has not the power to weigh the evidence or resolve conflicts such as it has when passing upon a motion for a new trial on the ground of insufficiency of the evidence, and in reviewing such order on appeal this court is bound by the same rule.

The statutory law on the subject is clear. It is provided that a new trial may be granted on all or part of the issues for the thereafter mentioned causes, part of which are: "5. Excessive damages, appearing to have been given under the influence of passion or prejudice; 6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law. * * * When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall so specify this in writing and shall be filed with the clerk within ten days after the motion is granted; otherwise, on appeal from such order it will be concusively presumed that the order was not based upon that ground. The court may direct a party to prepare the order." Code of Civil Procedure, sec. 657. It should be obvious that insufficiency of the evidence and excessive damages *are two separate and distinct grounds for granting a new trial.* There is no justification for blending them together, that is, treating insufficiency of the evidence as part of the excessive damage ground. The latter ground is confined to passion or prejudice and that alone. The insufficiency of evidence ground is likewise separately treated. Indeed, it is treated in detail. When a new trial is granted on the latter ground "on all *or part* of the issues" the order *must* so specify. Plainly, if a new trial as to damages alone is granted it is on part of the issues, and if insufficiency of the evidence is the reason or cause for such partial new trial, the order must so state. On the other hand, where the new trial is granted as to damages alone, but insufficiency of evidence is not the ground, then the only ground is passion or prejudice, and such ground must be examined without weighing the evidence or resolving conflicts therein against the verdict. No other interpretation of section 657 is reasonable or even possible. Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941 (later discussed herein), relied upon by Justice Edmonds, is discussed at length in a well written article by Mr. John A. Weyl appearing in 12 So. Cal.Law Rev. 501-503, where it is aptly said: "With the establishment of procedural legislation, the grounds for new trial were prescribed by statute. Section 657 of the Code of Civil Procedure sets out the grounds upon which a motion for a new trial may be based; and this enumeration has been held to be exclusive. There have been many cases which follow the letter of the code and do not allow a new trial on the ground of excessive damages unless there is an indication of passion or prejudice upon the part of the jury. However, it is submitted that, upon at least two bases, the courts have not regarded this section as being an exclusive classification. First, the courts have consolidated the grounds in subsections 5 and 6, and thereby created a new ground. For example, in Doolin v. Omnibus Cable Company [125 Cal. 141, 57 P. 774], the court opined that: 'to say that a verdict for damages was enhanced by passion or prejudice is one mode of saying that the evidence did not justify it; and the only means of discovering therein the element of passion or prejudice, within the meaning of the statute, is by comparing the amount with the evidence which was before the court at the trial.'

"Second, the Legislature, in enacting Section 657(5), said a motion for new trial might be based upon excessive damages, appearing to have been given under the influence of passion or prejudice. Applying the well known doctrine of expressio unius est exclusio alterius, it may well be argued that excessive damages in such a case was the only basis for the motion upon this ground, and that this was the legislative intent. It would seem difficult to reconcile this construction with the statement in Meinberg v. Jordan [29 Cal.App. 760, 762, 157 P. 1005, 1007], to the effect that, because the court declared the damages were excessive, it need not mean that the trial court was of the opinion that the verdict was the result of passion or prejudice, but might be construed to mean that the trial court was not satisfied that the finding of the jury as to the extent of the damages suffered was supported by the evidence. But the declaration found in Swett v. Gray [141 Cal. 63, 74 P. 439], that the evidence is insufficient to justify the verdict or other decision, is a ground distinct from that of damages appearing to have been given under the influence of passion or prejudice, seems to uphold the literal wording of the code provision.

"There is an important practical aspect to the present problem, for the code says: 'when a new trial is granted on all or part of the issues, upon the ground of insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order it will be presumed that the order was not based upon that ground.' [Cal.Code Civ.Proc., sec. 657.] Hence, according to this limitation, while it would be possible to have the order show that the motion was based upon insufficiency of the evidence and have a determination of whether the verdict was excessive; on the other hand, it should not be possible to have a motion on the ground of excessive damages and have a review as to the insufficiency of the evidence without such being contained in the order by the trial court. Yet it seems that where the two grounds for a new trial are combined it might lead to an evasion of this limitation in the code." It is not necessary to consider or resolve the conflict in the authorities above mentioned. They were all *decided without giving any consideration to the amendment to section 657 which added the last paragraph thereto* requiring insufficiency of evidence to be stated in the order. For illustration, the cases of Dreyer v. Cyriacks, 112 Cal.App. 279, 297 P. 35, and Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941, supra, gave no consideration whatever to the effect of the amendment. For the same reason, the matter cannot be brushed aside as does Justice Edmonds by the statement: "But the point is not of controlling importance here, because the same rule governing appellate review applies to both grounds." The same rule of appellate review does not and cannot prevail in the light of the amendment and the cases cited, Dreyer and Koyer, do not so hold for the amendment was not considered. It should be manifest that if the rule announced by Justice Edmonds is to prevail, the amendment and its purpose are completely thwarted as far as new trials on the ground of excessive damages are concerned.

It should be noted that it is not possible for the trial court in passing on a motion for a new trial on any ground other than insufficiency of the evidence to consider the latter at all. Indeed, by basing the order granting a new trial on any other ground, the trial court holds that the *evidence is sufficient.* So this court said: "When the order [granting a new trial] is made upon a ground other than that of insufficiency of the evidence, the court impliedly holds that there is sufficient evidence to support the verdict, and 'on appeal from such order it will be concusively presumed that the order was not based upon that ground.' (Code Civ.Proc., § 657; Fennessey v. Pacific Gas & Elec. Co., supra, 10 Cal.2d [538] at page 544, 76 P.2d 104." Brignoli v. Seaboard Transportation Co., 29 Cal.2d 782, 791, 178 P.2d 445, 451.

The only case that has given consideration to the requirement that insufficiency of evidence be specified is Casaretto v. DeLucchi, 76 Cal.App.2d 800, 814, 174 P.2d 328, 336, where the court reaches the correct result, stating: "The motion for a new trial on the judgment based on the issues raised by the cross-complaint was made on the ground of excessive damages, insufficiency of evidence and errors in law occurring at the trial. The trial court, it will be remembered, granted this motion for a new trial unless the DeLucchis agreed to a reduction in damages from $6,500 to $500. *The trial judge did not specify insufficiency of the evidence as a basis of his order, so that that ground must be disregarded.* (Code Civ.Proc., § 657.) No ground at all was specified as the basis of the order. It is obvious, however, that the basis of the order granting the new trial must have been excessive damages in view of the provision of the order that if the DeLucchis would accept a reduction to $500 the motion would be denied. However, the trial court's power in this respect is much more limited than it is when the order is based on insufficiency. Section 657, sub. 5, of the Code of Civil Procedure, provides that a new trial may be granted on the ground of 'excessive damages, appearing to have been given under the influence of passion or prejudice.' A new trial may not be granted on this ground merely because the verdict seems large, but only when it appears to have been given under the influence of passion or prejudice. The trial court may interfere with the verdict on this ground only where the verdict is so disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice. Thus if the evidence before the trial court is conflicting, and there is substantial evidence to sustain the award, no right to grant a new trial on the ground of excessiveness of the verdict exists where insufficiency of the evidence is not also specified as a ground of the order. These principles are all well settled. (See cases collected 20 Cal.Jur., p. 99 et seq., § 64 et seq.)"

There is nothing in the record in this case to indicate that the jury was motivated by passion or prejudice and, therefore, the order granting the motion cannot be sustained on this ground.

I believe that in this modern day the standard of care of a physician should not be limited to that followed in any particular locality smaller, at least, than the state. The circumstances and conditions as to various localities no doubt vary, but the standard should not. Those circumstances and conditions are merely factors that should be given consideration by the expert witness and finder of fact.

The rule stated in the Restatement is that: "In those professions which can be safely practiced only by persons who have been trained thereto, one practicing his profession upon others whom he accepts as patients or clients is required to have the skill normal to the average member of the profession. If, however, he professes special skill in a particular branch of his profession, he is bound to exercise such special skill." Restatement of the Law of Torts, sec. 299, comment d. The following cases in California in stating the rule have not mentioned any qualifications as to "vicinity," "locality," or other geographical limitations. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Say v. Barber, 202 Cal. 679, 262 P. 312; Houghton v. Dickson, 29 Cal. App. 321, 155 P. 128; Foreman v. Hunter Lumber Co., 36 Cal.App., 763, 173 P. 408; Linn v. Piersol, 37 Cal.App. 171, 173 P. 763; McCollum v. Barr, 38 Cal.App. 411, 176 P. 463; Johns v. Pond, 38 Cal.App. 643, 177 P. 293; Mernin v. Cory, 145 Cal. 573, 79 P. 174; Ley v. Bishopp, 88 Cal.App. 313, 263 P. 369. It has been said: "The rule is not such skill as is possessed by medical men in the same locality, for there may be none other, or not a sufficient number of competent physicians to set a standard. All may be quacks, and the law can in no case countenance quackery. But what is required is that he shall possess such skill as capable members of the profession ordinarily possess under similar circumstances, having regard to similar localities and the opportunities they afford for keeping abreast with the advance in medical knowledge and science." Shearman and Redfield on Negligence, sec. 617, p. 1532. As long ago as 1916 the Supreme Court of Minnesota said: "We think it is plainly correct that the locality in which the physician or surgeon practices must be considered in determining whether he has the requisite skill and learning, but we do not think that he is bound to possess and exercise only that degree of skill and learning possessed by other practitioners in the same locality, if by that is meant the same village or city. If the same general locality is meant, as, for instance, the Northwest, or the state, no fault could be found with such a rule. But in these days the physician or surgeon in a village like Cloquet is not hampered by lack of opportunity for advancement. Frequent meetings of medical societies, articles in the medical journals, books by acknowledged authorities, and extensive experience in hospital work put the country doctor on more equal terms with his city brother. He would probably resent an imputation that he possessed less skill than the average physician or surgeon in the large cities, and we are unwilling to hold that he is to be judged only by the qualifications that others in the same village or similar villages possess." Viita v. Dolan, 132 Minn. 128, 155 N.W. 1077, 1081, L.R.A.1916D, 644, Ann.Cas. 1917E, 678.

The foregoing is quoted with approval in Flock v. J. C. Palumbo Fruit Co., 63 Idaho, 220, 118 P.2d 707, 716; Hodgson v. Bieglow, 335 Pa. 497, 7 A.2d 338, 344.

We can take judicial notice of the fact that there are but four medical schools in California which meet the requirements prescribed by the State Board of Medical Examiners for the education and training of medical students in this state and that no one is eligible for admission to practice medicine in California unless he is a graduate of a medical school which meets the requirements prescribed by said Board and passes an examination given by the Board of Medical Examiners of California or of some other state entitled to recognition in this state on the basis of reciprocity. Mann v. Board of Medical Examiners, 31 Cal.2d 30, 187 P.2d 1. It seems obvious, therefore, that the education and training of medical students who are eligible to practice medicine in California is a matter of some uniformity and that the qualifications of a physician and surgeon to practice in California does not depend upon the locality in which he is engaged in practice, but upon the education and training which he has received in institutions in which the method and scope of instruction and the technique in training are substantially uniform. It should follow, therefore, that the standard of practice of physicians and surgeons in California should be sufficiently uniform throughout the entire state to permit a physician and surgeon in one locality to qualify as an expert witness in any other locality, even though he is not engaged in practice in the locality in which he is called upon to testify. It is true, of course, that physicians and surgeons in some localities may not have the equipment or facilities for diagnosis and treatment of human ailments which are possessed by physicians and surgeons in other localities, but this is a factor which the trier of fact may take into consideration in determining whether, in the particular case, the conduct of the physician and surgeon was such that it amounted to negligence under the circumstances as disclosed by the evidence.

In view of the fact that there are cross-appeals in this case and the entire record is before us for review, I would reverse the order granting a new trial and affirm the judgment in favor of plaintiff.

33 Cal.2d 768

WALL v. M. & R. SHEEP CO. et al.

L. A. 20345.

Supreme Court of California, in Bank.
April 22, 1949.
Rehearing Denied May 19, 1949.

1. Constitutional law 🔑92

A "vested right", as expressed in constitutional guaranties, implies an interest which it is proper for the state to recognize and protect and of which the individual may not be deprived arbitrarily without injustice, and what constitutes such a right is for the courts to decide. U.S.C.A.Const.Amend. 14.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Vested Right".

2. Taxation 🔑688

Defects in notice of sale by state of lands sold to the state for delinquent taxes were not available to purchaser of interest in the land, where the defects were cured by Curative Act and defects occurred before the purchaser became an owner. St.1943, p. 1993.

3. Taxation 🔑305, 542, 734(1)

An excessive tax rate does not invalidate the entire levy, nor the delinquent tax proceedings nor the state's tax title, but taxpayer is relegated to the procedure for correction, or to a refund of the excess, after payment under protest.

4. Schools and school districts 🔑106.39

Where effect of irregularity in levy of school tax was to increase the total tax rate for the levy beyond that required by authorized budgeted items and to increase the taxes assessable against plaintiff's property by a small amount, such irregularities did not invalidate delinquent tax proceedings and the state's tax title based thereon, and plaintiff was relegated to procedure for correction or to refund of the excess, after payment under protest. Revenue and Taxation Code, § 3618 et seq.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Clifford S. Wall against M. & R. Sheep Company, a copartnership, and others, to quiet title. From a judgment based on an order sustaining a demurrer to complaint without leave to amend, plaintiff appeals.

Affirmed.

Prior opinion 192 P.2d 785.

Roy A. Linn, of Los Angeles, for appellant.

Borton, Petrini, Conron & Borton and Harry M. Conron, all of Bakersfield, for respondents.

SHENK, Justice.

This is an appeal by the plaintiff in a quiet title action from a judgment based on an order sustaining a demurrer to the complaint without leave to amend.

The allegations of the first amended complaint show the following: The plaintiff claims ownership of six non-contiguous sections and fractional sections of land in the Mojave School District in Kern County. The first installments of the 1931–32 taxes on the several separately assessed parcels were paid. On June 30, 1932, the second installments were delinquent and the properties were marked "sold to the State." On July 26, 1937, the tax collector executed a single deed to the State covering all of the parcels. On October 14, 1943, the tax collector sold the properties to the defendants who claim some right or interest therein adverse to the plaintiff.

To support his allegation of ownership and to defeat the alleged claims of the defendants the plaintiff set forth numerous irregularities in the tax budgets and levies for the several fiscal years commencing 1931–32, and defects in the tax rolls and delinquent tax sale proceedings whereby invalidity is said to follow. Included are claimed unauthorized appropriations for various veteran organizations which purported to increase the tax rates in excess of authorized budget requirements, and claimed excesses in school district tax rates. Also involved are asserted defects in the publication of the delinquent list in 1937 and in the tax deed to the state whereby the several non-contiguous parcels in one ownership were listed in the published notice in one group and included in the deed in like manner.

The first amended complaint was filed in June 1945. In December 1944 the plaintiff brought an action against the State of California pursuant to sections 3618 et seq. of the Revenue and Taxation Code whereby a person entitled to redeem tax-deeded property could contest the validity of the 1932 tax sale and the tax deed to the state and obtain corrections of claimed irregularities. The same irregularities and defects here involved were alleged in the complaint in that action. Judgment of dismissal entered on an order sustaining a demurrer to the complaint without leave to amend was affirmed on appeal. Wall v. State of California, 73 Cal.App.2d 838, 167 P.2d 740, decided April 5, 1946. It was held in that case that there was no illegality in the budget appropriations for veteran organizations because they were in conformity with the power granted by sections 1261 and 1262 of the Military and Veterans' Code previously held to be constitutional. The claimed irregularities otherwise in the budget procedures or in the tax sale and the deed to the state were determined not to be jurisdictional and were obviated by the curative acts of 1943 and 1945. Stats. 1943, p. 1993; Stats. 1945, p. 2176. The claimed irregularities in the school tax levies were held not to involve due process and likewise were nonjurisdictional matters which could properly be obviated by curative legislation, and that the same were cured by the 1945 act. The court also called attention to the fact that no objection had been made to the budget or the levies, citing City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397.

Following the affirmance of the judgment in that action, and in January 1947, the plaintiff filed an amendment to the first amended complaint herein alleging in addition that George W. Clemson "became the owner" of each of the non-contiguous parcels on January 26, 1932, which was after the 1931–32 taxes were levied and before the effective date of the 1943 curative act; that the plaintiff "became the owner" thereof on March 16th, 1944, which was after the levy of the 1931–32 taxes and before the effective date of the 1945 act; that the defendants claim the benefit of the curative acts, but that because of the alleged irregularities and the alleged ownership of Clemson and the plaintiff after the 1931–32 tax levy and prior to the effective dates of the respective acts, the effect of the legislative enactments was to take the property of the plaintiff without due process of law and to divest him of vested rights in violation of the Fourteenth Amendment to the Constitution of the United States.

[1] By the 1947 amendment to the first amended complaint it was sought to present the question of the effect of the curative acts upon the plaintiff's alleged rights as against the defendants' purchase of the title from the state and to invoke the doctrine of Miller v. McKenna, 1944, 23 Cal. 2d p. 774, 147 P.2d 531, to the effect that a curative act may not destroy or unlawfully infringe upon vested rights intervening between the date of the claimed irregularity and the effective date of the act. It was said in the Miller case, 23 Cal.2d at page 783, 147 P.2d at page 536, that "a vested right, as that term is used in relation to constitutional guaranties, implies an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice," and that the question of what constitutes such a right is confided to the courts where alone the questions of law and fact upon which they depend can be finally decided.

The plaintiff's predecessor in interest, Clemson, "became the owner" of the property on January 26, 1932. The second installments of the 1931–32 taxes were due in the following April. They were not paid and delinquency was chargeable to him. While he remained the owner the curative act of 1943 was passed. That enactment resulted in making ineffective all of his objections to the state's title based upon alleged irregularities in the tax proceedings cured by that act. By its terms, that act did not purport to correct defects in the levy of district school taxes. The object of the 1945 curative act was to correct defects in the levies for those purposes.

[2] The plaintiff is in no position to avail himself of tax irregularities which were cured by the 1943 curative act because he was not then the owner and the irregularities other than those in the tax levy for school purposes were cured by that act. As to the school tax levy the plaintiff alleges that the governing body of the Mojave School District fixed the budget item for the building fund of the district at $6400 for the fiscal year 1931–32; that the net assessed value of the real property in the district was $591,075; that a rate thereon of .011 was sufficient to raise the amount required, but that the board of supervisors fixed the rate at .02 per $100 assessed valuation which was .009 in excess of budget requirements; that thereby the taxes on the plaintiff's several properties in 1931–32 were increased by a total of $.51. It is also alleged that in 1931–32 the board of supervisors made a levy for the Mojave School District kindergarten fund of .15 per $100 assessed valuation, although there was no provision authorizing the levy because the statute providing for such fund had been repealed; and that the alleged unauthorized levy increased the tax on his six sections and partial sections of land by the sum of $9.17. These are the defects in the 1931–32 school tax levies upon which the plaintiff relies as not having been cured by the provision of a curative act until 1945, after the plaintiff "became the owner" of the property. The effect of both of these irregularities in fixing the tax rate was to increase the total tax rate for the Mojave district school tax levy beyond that required by the authorized budget items, and thereby to increase the 1931–32 taxes assessable against the plaintiff's properties by the sum of $9.68.

[3] The question of the effect of these alleged excessive levies, aside from the consideration of the 1945 curative act, was suggested as one of the grounds of the decision in the former Wall case with citation of City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397. In the latter case it was sought to set aside the tax proceedings relying in part on alleged invalidity because of an excessive tax levy. It was held, assuming the invalidity of the excessive portion of the tax, that the error did not invalidate the entire tax levy; that the taxpayer had the opportunity to have the levy corrected; that he should have invoked the procedure afforded to that end; that he also had the remedy by action for a refund of the excessive portion of the tax, Otis v. Los Angeles County, 9 Cal.2d 366, 70 P.2d 633; and that his failure to pursue either course amounted to a waiver of the objection. Those considerations are controlling here. It must be deemed as settled that an excessive tax rate invalidates neither the entire levy, nor the delinquent tax proceedings, nor the state's tax title. The taxpayer is relegated to the procedure for correction at an appropriate time or to a refund of the excess after payment under protest. He may not avail himself of error in the computation of the tax rate in an action to invalidate delinquent tax proceedings and the state's tax title based thereon.

[4] From the foregoing it follows that the plaintiff is not in position to invoke the doctrine of Miller v. McKenna, supra (see also Hall v. Chamberlain, 31 Cal.2d 673, 192 P.2d 759, April 1948), and the defendants' claims as purchasers of the state's tax title alleged by the plaintiff are immune from attack by him in the present action.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

33 Cal.2d 717

McCLURE, on Behalf of CARUTHERS v. DONOVAN.

L. A. 20340.

Supreme Court of California, in Bank.

April 19, 1949.

Rehearing Denied May 16, 1949.

1. Appeal and error 🔑110, 782

Order denying motion for new trial was nonappealable and attempted appeal from order would be dismissed. Code Civ. Proc. § 963.

2. Action 🔑59
Trial 🔑2

Ordinarily consolidated actions may be determined by a single set of findings, and a single judgment, the allegations of the various complaints may be taken together and treated as one pleading, and for purposes of further proceedings the cases will be treated as if the causes had been united originally; but, where pending actions are consolidated for purpose of trial of related issues, evidence presented in one case is to be deemed applicable to the other insofar as it is relevant thereto, but separate findings and judgments must be made in each case in disposition of particular issues as independently submitted. Code Civ.Proc. § 1048.

3. Trial 🔑2

Where degree of alleged mental incompetency was only controversy to be litigated in action brought to annul a marriage of an alleged incompetent and in proceeding for appointment of a guardian of alleged incompetent, trial court properly ordered their consolidation for limited purpose of trial and properly made separate dispositions of the two matters. Code Civ. Proc. § 1048; Civ.Code, §§ 82, subd. 3, 83, subd. 3.

4. Pleading 🔑211

Only objections to jurisdiction of the court and objection that complaint does not state facts sufficient to constitute a cause of action may be taken orally. Code Civ.Proc. §§ 434, 465.

5. Pleading 🔑211

An oral demurrer to complaint to annul a marriage because of want of legal capacity of plaintiff to sue is not recognized. Code Civ.Proc. § 465.

6. Parties 🔑18, 29

A "necessary party" is one so interested in the controversy that he should normally be joined in the litigation in order to enable the court to do complete justice, and, when his presence in suit can be obtained, it is improper for court to attempt to adjudicate his rights without effecting his joinder therein.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Necessary Party".

7. Marriage 🔑2

The Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated as well as the effect of an attempted creation of that status.

8. Marriage 🔑60(5)

Statute authorizing relative of party of unsound mind to commence action to annul marriage on ground of unsound mind of party to marriage does not authorize a relative to prosecute action for annulment without joining the person of unsound mind as a party to the action through a guardian. Civ.Code, §§ 82, subd. 3, 83, subd. 3; Code Civ.Proc. §§ 367, 369, 372, 373, 389.

9. Appeal and error 🔑193(9)

Where defendant at trial offered no objection to introduction of evidence on ground that complaint did not state facts sufficient to constitute a cause of action, and no demurrer to complaint was filed, particulars alleged as deficiencies of complaint on appeal by defendant could be deemed to have been waived.

10. Appeal and error 🔑187(1)

Error could not be predicated on fact that defendant in action to annul marriage was sued in her former name rather than in her married name, where defendant had not suggested to trial court that she was improperly named in the litigation so as to permit trial court to order a correction. Code Civ.Proc. § 473.

11. Marriage 🔑60(6)

In action to annul a marriage, allegation referring to defendant as the "alleged wife" of plaintiff's brother and referring to the "alleged marriage" reflected only plaintiff's premise of actionable redress and was not objectionable. Civ.Code, §§ 82, 83.

12. Pleading ⇨237(5)

Where action to annul a marriage was tried without objection on theory of unsoundness of mind of plaintiff's brother whose marriage plaintiff sought to annul, failure of complaint to recite in language of statute that plaintiff's brother at time of marriage was of unsound mind, rather than reciting that plaintiff's brother was incompetent, was cured and plaintiff was properly permitted to amend complaint to conform to proof. Civ.Code, §§ 82, subd. 3, 83, subd. 3.

13. Pleading ⇨427

Even though a complaint is defective in some particular, the unsuccessful party cannot later effectively contest sufficiency of the complaint if the case is tried on the theory that complaint is sufficient and evidence accordingly is received without objection.

14. Marriage ⇨60(7)

Evidence justified annulment of marriage contracted by plaintiff's brother on ground that at time of contracting marriage plaintiff's brother was of unsound mind and did not have mental capacity to understand the subject matter of the marriage contract and had not regained his soundness of mind since consummation of purported marriage. Civ.Code, §§ 82, subd. 3, 83, subd. 3.

15. Appeal and error ⇨1011(1)

Finding of fact of trial judge on conflicting evidence would not be disturbed on appeal.

16. Appeal and error ⇨1071(1)

Where it did not appear what amendments to proposed findings of fact and conclusions of law defendant desired to submit, or that any amendments would have been of any avail to defendant, and findings signed by trial judge were sustained by evidence, action of trial judge, taken upon his own motion and without notice to defendant's counsel, vacating order procured from presiding judge which extended time for filing of objections to proposed findings of fact and conclusions of law was not prejudicial to defendant.

17. Witnesses ⇨226

Considerable latitude is allowed a trial judge as to the length of time witnesses may be examined, especially in a non-jury case, consistent with duty of trial judge to ascertain the facts pertaining to the issues which he must determine.

18. Witnesses ⇨246(2)

In non-jury action to annul a marriage on ground of unsoundness of mind of one of the parties record established that interrogation of witnesses by trial judge, while extended at times, was directed to clarification of particular points that were not covered to his satisfaction by questions of counsel and which otherwise have remained obscure in the testimony, and that the lengthiness of the examination by trial judge was not an abuse of discretion. Civ. Code, §§ 82, subd. 3, 83, subd. 3.

19. Trial ⇨29(1)

In non-jury action to annul a marriage on ground of unsoundness of mind of plaintiff's brother when he contracted marriage, wherein defendant objected when trial judge expressed desire to have plaintiff's brother testify, remarks of trial judge that he would not force issue and would not call plaintiff's brother as witness for court, although testimony of plaintiff's brother would help judge, were not objectionable. Civ.Code, §§ 82, subd. 3, 83, subd. 3.

20. Stipulations ⇨13

Trial court could give proper consideration to motion that defendant's counsel be relieved of prior stipulation for consolidation of action to annul marriage on ground of unsoundness of mind of one of the contracting parties and proceeding for appointment of guardian, and court properly refused to rule upon motion immediately upon its presentation. Civ.Code, §§ 82, subd. 3, 83, subd. 3.

21. Parties ⇨97(1)

In action to annul a marriage on ground of unsoundness of mind of plaintiff's brother when he contracted marriage, plaintiff's counsel, by filing upon oral argument a stipulation and consent expressing election of plaintiff's brother by his guardian to be made a party and to be bound by the findings and judgment, cured prevailing defect existing because of absence of plaintiff's brother as a party to action. Civ.Code, §§ 82, subd. 3, 83, subd. 3.

22. Marriage ⚿60(3)

Where domicile of defendant was in California, superior court had jurisdiction to declare marriage of defendant to plaintiff's brother a nullity on ground of mental unsoundness of plaintiff's brother. Civ. Code, §§ 82, subd. 3, 83, subd. 3.

23. Courts ⚿24, 37(1)

Jurisdiction of subject matter cannot be conferred or waived by consent, agreement, or stipulation.

24. Insane persons ⚿93

Guardian of plaintiff's brother on oral argument had authority, subject to court approval, to execute a stipulation and consent on behalf of plaintiff's brother expressing election of brother to be made a party to plaintiff's action to annul marriage contracted by brother on ground of unsoundness of mind, and to be bound by the finding and judgment, and thereby cure the prevailing defect existing because of absence of brother as a party. Civ.Code, §§ 82, subd. 3, 83, subd. 3; Probate Code, § 1500.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Martha McClure, on behalf of Jefferson D. Caruthers, against Laura Alpha Donovan, also known as Laura Alpha Caruthers, to annul a marriage. From judgment annulling marriage and from order denying motion for a new trial, defendant appeals.

Judgment affirmed. Appeal from order denying motion for a new trial dismissed.

Prior opinion 195 P.2d 901.

Irving M. Walker, Lee J. Myers, and William Kay Crawford, all of Los Angeles, for appellant.

Martin, Hahn & Camusi, James G. Butler, and Horace L. Hahn, all of Los Angeles, for respondent.

SPENCE, Justice.

[1] As "sister of Jefferson D. Caruthers," Martha McClure brought an action to annul his marriage with defendant, Laura Alpha Donovan, upon the ground that "at the time" thereof he "was wholly incompetent and incapable by reason of incompetence, of contracting marriage," and he "continues to manifest that state of mind which renders him an incompetent person." It was further alleged that in the "purported marriage" defendant took "undue advantage of the mental condition and illness of" Mr. Caruthers and was seeking to "obtain [his] life savings and earnings." Coincidently with the commencement of the annulment action, a proceeding was instituted for the appointment of one Louis A. Ghiotto as guardian of the person and estate of Mr. Caruthers, upon the ground of his alleged incompetency. The two matters were later consolidated for the purpose of trial. At the conclusion thereof, plaintiff in the annulment action obtained leave to amend her complaint "to conform to proof" and accordingly there was added the allegation that "at the time of [his] said marriage" with defendant he "was of unsound mind." Thereafter the court disposed of the litigation before it as follows: (1) In the guardianship proceeding an order was made appointing the guardian as nominated, and the appeal therefrom was dismissed, McClure v. Donovan, 82 Cal.App.2d 664, 667, 186 P.2d 718; (2) in the annulment action, findings were made in conformity with plaintiff's claims, and from the judgment of annulment accordingly entered and the order denying a motion for a new trial, defendant has appealed. Since said last-mentioned order is nonappealable, the appeal therefrom should be dismissed, Code Civ.Proc., sec. 963; 2 Cal.Jur. sec. 34, p. 173; Nichols v. Mitchell, 32 Cal.2d 598, 600, 601, 197 P.2d 550; and there now remains for consideration only defendant's appeal from the judgment in the annulment action.

As grounds for reversal, defendant urges the following points: (1) The impropriety of the courts' order for the consolidation of the guardianship and annulment proceedings for trial; (2) the plaintiff's legal incapacity to maintain the annulment action;

(3) the insufficiency of the complaint in several particulars affecting the prosecution of the annulment action; (4) the insufficiency of the evidence to sustain the judgment declaring the marriage in question to be "null and void"; and (5) certain errors committed by the court "during the proceedings and trial" which "when taken together, and in addition to the other points discussed * * * show * * * that the defendant was deprived of a trial such as she was entitled to under the law of this state." In the light of the record and the stipulation filed in this court by the duly appointed guardian, defendant cannot prevail in her objections.

1. *Consolidation of the annulment and guardianship proceedings.*

[2, 3] Defendant argues that the court erred in consolidating the two matters for the purpose of trial and asserts that there was no stipulation to that effect. In so challenging the court's ruling, defendant claims that "a consolidation of cases" will be "approved" only "where the causes might have been united", Smith v. Smith, 80 Cal. 323, 21 P. 4, 22 P. 186, 549; Wolters v. Rossi, 126 Cal. 644, 59 P. 143; "where the subject matter is the same", Staub v. Muller, 7 Cal.2d 221, 60 P.2d 283; Manufacturers' Finance Corporation v. Pacific Wholesole Radio, Inc., 130 Cal.App. 239, 19 P.2d 1013; or "where the liability is based upon the same facts, with different claimants," Aufdemkamp v. Pierce, 4 Cal. App.2d 276, 40 P.2d 599; Thomsen v. Culver City Motor Co., Inc., 4 Cal.App.2d 639, 41 P.2d 597; People v. Ocean Shore Railroad, Inc., 22 Cal.App.2d 657, 72 P.2d 167. Ordinarily, consolidated actions may be determined by a single set of findings and a single judgment—"the allegations of the various complaints may be taken together and treated as one pleading," Simpson v. Bergmann (consolidation of actions to foreclose mechanics' liens, Code Civ.Proc., sec. 1184a), 125 Cal.App. 1, 6, 13 P.2d 531, 533, and "for the purposes of all further proceedings, the cases are to be treated as if the causes had been united originally." 1 Cal.Jur. sec. 51, p. 374. But a different situation exists where pending actions are consolidated only for the purpose of trial of related issues. In such event the evidence presented in one case is to be deemed applicable in the other insofar as it is relevant thereto, but separate findings and judgments must be made in each case in disposition of the particular issues as independently submitted. As declared by statute, actions "may be consolidated, in the discretion of the court, whenever it can be done without prejudice to a substantial right." Code Civ.Proc., sec. 1048.

An examination of the reporter's and clerk's transcripts herein unmistakably establishes that the court, recognizing that the claimed mental deterioration of the alleged incompetent, Mr. Caruthers, was the crux of both proceedings, ordered their consolidation for the limited purpose of trial consistent with the premise of the respective pleadings. Manifestly, such consolidation was done in the interest of saving the time of the court by avoiding a repetition of the evidence that would be offered in either proceeding which would be pertinent to the disposition of the other. Thus, at a preliminary hearing in the annulment action and after a colloquy in which all counsel and the court took part in considering the most expeditious procedure to be followed regarding the necessarily overlapping evidence—Mr. William Kay Crawford being sole counsel for defendant at that time—the court said: "Then that [the guardianship proceeding] will be consolidated with this [the annulment action], and we will try it all together. * * * Because, if the guardianship is for an incompetent, there will be the same doctors and the same witnesses and everything, and then if an annulment hearing is had we will take it in order, and stipulate the testimony as to one may apply to the testimony of the other. Is that agreeable, counsel?" Mr. Crawford replied: "Yes, provided the date is satisfactory." Counsel for plaintiff at all times expressed their willingness to accede to the court's suggestion. Further statements were made by the court and counsel at various stages in the presentation of the evidence, but the record does not disclose any objection to the trial of the two matters at the same time so as to avoid the reiteration of overlapping medical and lay testimony in the hearing of the second proceeding.

The order made at the conclusion of the preliminary hearing in the annulment action and appearing in the minutes of the court recites "that the guardianship proceedings filed on behalf of Jefferson D. Caruthers may be consolidated with this [annulment] matter for the purpose of hearing and hearing on guardianship, annulment and restraining order be had on September 10, 1946 at 9:30 A.M. * * * Notice is waived."

When the "hearing" proceeded on September 10 as scheduled, Mr. Lee J. Myers, who had become associated with Mr. Crawford as counsel for defendant, refused to stipulate to the trial of the two matters together. Thereupon the court referred to the proceedings had at the preliminary hearing, and Mr. Myers countered with a suggestion which in effect was the same as the court's order previously made and to "accomplish the same purpose"—that "after we hear the annulment, certain testimony of certain witnesses may be considered [as having been introduced] in the guardianship proceeding." The trial then proceeded. At the conclusion thereof, the court made and filed its findings and entered judgment in the annulment action, and made separate findings and an order appointing a guardian in the incompetency proceeding.

The court did not err in its action, and defendant was in nowise prejudiced by such procedure, for the degree of Mr. Caruthers' alleged mental deterioration constituted the real and only controversial point in litigation. Mr. Crawford expressly consented to the order of consolidation, and Mr. Myers' suggestion at the commencement of the trial amounted to an affirmance of that consent and a waiver of any further objection to the court's order insofar as it contemplated a saving of time for the court as well as for the parties in the presentation of overlapping "testimony of certain witnesses." Accordingly, the evidence adduced by both plaintiff and defendant as to the condition of Mr. Caruthers' mind was related to each proceeding for the determination of the respective issues, and the court, mindful of such independent considerations, properly made separate disposition of the two matters.

2. *Plaintiff's legal capacity to maintain the annulment action.*

[4, 5] Defendant disputes the right of plaintiff to prosecute the annulment action on her brother's behalf, and claims that "the entire proceedings and judgment are void." In considering this point, the timeliness of defendant's objection must first be noted. The want of "legal capacity" of a party "to sue" is one of the grounds for demurrer to a complaint, Code Civ.Proc., sec. 430, subd. 2, and since the record discloses that defendant did not raise the objection, "either by demurrer or answer," plaintiff urges that it "must be deemed to have [been] waived." Code Civ.Proc., sec. 434. Defendant, however, argues that the propriety of her objection may not be so dismissed because of a so-called "oral demurrer" made at the outset of the preliminary hearing in the annulment action and before the trial—the statement of her counsel that he "should like to appear in somewhat of a special appearance, to resist any further action of this order at this time, for the reason that there is absolutely no color of right for this plaintiff to be in court. * * * There is no capacity set forth." But no such pleading as an "oral demurrer" is recognized by our law and, as so classified, it need not be noticed. Code Civ. Proc., sec. 465; Redondo Improvement Company v. City of Redondo Beach, 3 Cal. App.2d 299, 302, 39 P.2d 438. Only (1) "objection to the jurisdiction of the court" and (2) "objection that the complaint does not state facts sufficient to constitute a cause of action" may be taken orally. Code Civ.Proc., sec. 434. However, correlating defendant's objection with the premise of a "general demurrer" in that the complaint does not state a cause of action which plaintiff is permitted to prosecute without joining the alleged incompetent as a party, the merits of defendant's position deserve consideration.

As sustaining her right to sue on her brother's behalf, plaintiff relies on the following provisions of the Civil Code. Section 82 declares that a "marriage may be annulled" if "at the time of the marriage * * * [subd. 3] either party was of unsound mind, unless such party, after coming to reason, freely cohabit with the other as husband or wife." Section 83 specifies that an "action to obtain a decree of nullity of marriage" on the ground of "unsound mind" of one of the parties "must be commenced * * * [subd. 3] by the party injured, or *relative* or guardian of the party of unsound mind, at any time before the death of either party." (Emphasis added.) Plaintiff claims that as the sister of the alleged mentally incompetent spouse, she comes precisely within the express wording of the statute as a "relative" authorized to prosecute such action in her own name, while defendant argues that such procedure would violate considerations of due process in protection of the marriage contract and accordingly the statutory language should not be construed as excusing the presence of the spouse of "unsound mind" as a necessary party to the action, sustaining the propriety of the court's undertaking to determine the annulment issue before it.

[6] A necessary party is one so interested in the controversy that he should normally be joined in the litigation in order to enable the court to do complete justice, and when his presence in the suit can be obtained, it is improper for the court to attempt to adjudicate his rights without effecting his joinder therein. Bank of California, Nat. Ass'n v. Superior Court, 16 Cal.2d 516, 521, 106 P.2d 879. Manifestly, the judgment in the annulment action, brought for the purpose of dissolving the marriage between Mr. Caruthers and defendant, would necessarily affect his rights and so would require his presence before the court in order that "a complete determination of the controversy" might be had "without prejudice to [his] rights." Code Civ.Proc., sec. 389. To annul such marriage on the ground of Mr. Caruthers' unsoundness of mind without giving him any "notice or an opportunity for a hearing" on that issue would clearly involve considerations of due process, Suckow v. Alderson, 182 Cal. 247, 249–250, 187 P. 965, and a judgment so rendered in avoidance of his marital status would be contrary to all recognized rules of fairness in procedure. Bank of California, Nat. Ass'n v. Superior Court, supra, 16 Cal.2d 516, at page 523, 106 P.2d 879.

It is true that during the prosecution of the annulment action Mr. Caruthers had no general guardian to appear for him and that none was appointed until after the "consolidated" trial of the guardianship and annulment proceedings, as above noted. But such circumstances would not give to plaintiff—as a "relative" of a person who is suffering from a legal disability—the right to act for her brother without naming him as a party to the action seeking the dissolution of his marriage. Rather such procedure upon plaintiff's part, premised upon bare allegations as to her brother's inability to act for himself in protection of his asserted rights, would assume a principal fact in issue in the matrimonial controversy before the court—whether Mr. Caruthers was unable to act for himself or was of "unsound mind." Mr. Caruthers was present throughout the trial—so no question of his availability can here arise.

Nor should it be concluded from section 83 of the Civil Code—because of its provision that a "relative * * * of the party of unsound mind" may commence an action for the annulment of his marriage—that the legislature thereby intended that a spouse *even admittedly* under such legal disability, as determined by previous adjudication, need not be made a party to the litigation. Such view would create an exception to the rules that "every action must be prosecuted in the name of the real party in interest", Code Civ.Proc., sec. 367, and that "an insane or incompetent person * * * must appear either by his general guardian or by a guardian ad litem." Code Civ.Proc., sec. 372. So pertinent is the case of Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L.R.A., N.S., 818, Ann.Cas.1913B, 1230, where it was held proper for an annulment action on the ground of "unsound mind" to be prosecuted in the name of the incompetent by a relative appointed "guardian ad litem" for that purpose in consequence of "application" by the latter therefor, "as provided by section 373 of the Code of Civil Procedure," and on "evidence tending to show that plaintiff was incompetent." 161 Cal. at page 389, 119 P. at page 516, 38 L.R.A.,N.S., 818, Ann.Cas.1913B, 1230. Such decision recognizes the vital interest of the incompetent in the matter of seeking the judicial redress of wrongs or the vindication of asserted rights as involved in the annulment proceeding, as well as the need for an appropriate officer appointed by the court in the prosecution of such litigation where the incompetent is not able personally to conduct it. Consistent with these considerations, section 83 of the Civil Code will not be construed as contemplating the maintenance of the cause of action without joinder of the incompetent as a "real party in interest" to the annulment action. By force of the statute, a "relative" as such may "commence" the action, but an effective appearance therein on behalf of the spouse allegedly of "unsound mind" must rest upon the same basis as any other proceeding involving the appearance of "an insane or incompetent person" through a "general guardian" or "guardian ad litem"—and the person so appointed by the court may be the "relative." In such manner the statutorily established safeguards provided for the protection of the spouse suffering the legal disability of incompetency would be operative in that the actions of the guardian would be to some extent controlled by the court, and the same procedural rules would apply in preservation of the rights of "an insane or incompetent person" incident to an annulment action as prevail in other litigation affecting his interests. There is no reason to assume that the legislature envisaged any other method of procedure in providing the remedy of annulment in favor of the party of "unsound mind." See Nelson on Divorce and Annulment, Second Edition, vol. 3, ch. 31, sec. 31.10, pp. 286–288; Notes, 70 A.L.R. 965, 149 A.L.R. 1288; Anderson v. Hicks, 150 App.Div. 289, 134 N.Y.S. 1018, 1021–1022; Kaplan v. Kaplan, 256 N.Y. 366, 176 N.E. 426, 427.

Plaintiff refers to the case of Jones v. Alameda, 85 Cal.App. 607, 259 P. 976, and the Estate of Karau, 26 Cal.App.2d 606, 80 P.2d 108, as upholding her right to prosecute her brother's annulment action in her own name. An examination of the cited opinions reveals them to have been directed to the consideration of factors distinguishable from the precise question here at hand. In Jones v. Alameda, supra, the alleged ground of annulment was the minority of one of the contesting parties. Civ.Code, sec. 82, subd. 1. The "original complaint" was filed by "the father of the minor" in his own name; a "demurrer" thereto "was sustained with leave to amend"; and thereafter "an amended complaint was filed, joining [the] minor, as party plaintiff, the minor appearing by her [father as] guardian ad litem." 85 Cal.App. at page 609, 259 P. at page 977. In the challenge of the judgment annulling the marriage, the matter of the propriety of "bringing in" the minor as a party to the action was raised upon the claim that two causes of action were thereby improperly joined. Upon sustaining the joinder, the court declared that the annulment suit presented only "one cause of action * * * in which both the minor and the parent are interested." 85 Cal.App. at pages 611-612, 259 P. at page 878. Accordingly, "both" were deemed "proper parties" for prosecution of the annulment action to judgment. But whether the parent might maintain such litigation without naming the minor as a party thereto was not a question at issue nor determined thereby.

Likewise different considerations prevailed in the case of Estate of Karau, supra, involving a contest between the decedent's surviving husband and her sister as to the right to apply for the appointment of an administrator of the estate. At the hearing of the matter, the sister attempted to introduce evidence to invalidate the marriage because of "the mental condition of the decedent" at that time. Objections to such line of inquiry in the probate proceeding were sustained on the premise that "after the death of a spouse the validity of the marriage cannot be made the subject of a collateral attack * * * upon the ground of the mental incapacity of the spouse at the time of the marriage ceremony." 26 Cal.App.2d at page 607, 80 P.2d at page 108. As the basis of such ruling was presented for review and approved, the court referred to the "provisions of sections 82 and 83" of the Civil Code as "controlling in the matter of annulment of marriage contracts upon the ground of unsoundness of mind," 26 Cal.App.2d at page 609, 80 P.2d at page 109, and thus limiting the period for the commencement of such action to "any time before the death of either party." In so discussing the legislative intent, the court was concerned wholly with the *time* prescribed for the avoidance of a marriage where the cause is "unsoundness of mind."

Nor does an action for annulment of a marriage under authority of sections 82 and 83 of the Civil Code present a situation analogous to that envisaged by section 196a of said code, providing that a "civil suit to enforce [the] obligations" of a father for support "may be maintained *in behalf of* a minor illegitimate child, by his mother or guardian." (Emphasis added.) The italicized language expressly declares the premise of such action to be in furtherance of the *interest* of the child whereas section 83, in designating the "relative" as a proper party to commence an annulment proceeding, does not similarly qualify its purpose as "in behalf of" or in the interest of the "party of unsound mind." Of course, if the spouse of "unsound mind" is desirous of having the marriage annulled, he would be interested in obtaining the judgment as originally demanded by his "relative"; but if, on the other hand, he is satisfied with his marital status and believes that it is to his advantage not to attack it, his interest would be adverse to that of his "relative" instituting the litigation. Under such circumstances, the propriety of having the spouse of "unsound mind" joined as a party litigant for the protection of his rights cannot be open to dispute.

[7, 8] Unquestionably, the legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated, as well as the effect of an attempted creation of that status. In re Estate of Gregorson, 160 Cal. 21, 24, 116 P. 60, L.R.A.1916C, 697, Ann.Cas.1912D, 1124. With the right of action for annulment of a marriage so statutory in nature, it is for the legislature to prescribe when and by whom such litigation may be commenced, and this it has done by section 83 of the Civil Code, supra. But as that section is construed in relation to other statutory provisions regulating the procedure to be followed in actions of this character and with due regard for the fundamental principles of due process as lying at the very foundation of the administration of justice, it does not appear that the legislature thereby intended to authorize a "relative" of a person of "unsound mind" to prosecute such litigation without joining him as a party in the proceeding, cf. Salmon v. Rathjens, 152 Cal. 290, 294, 92 P. 733; Black Rock Placer Mining District v. Summit Water and Irrigation Company, 56 Cal.App.2d 513, 516–517, 133 P.2d 58—pursuant to considerations establishing him as the "real party in interest." Code Civ. Proc., sec. 367. It is true that "a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted," Code Civ.Proc., sec. 369, but such declaration cannot be assumed to envisage the prosecution of an annulment action by the "relative" of the spouse of "unsound mind," Civ.Code, sec. 83, without making him a party to the action consistent with considerations of due process in effecting "a complete determination of the controversy" pursuant to the dictates of justice. Code Civ.Proc., sec. 389; Bank of California, Nat. Ass'n v. Superior Court, supra, 16 Cal.2d 516, 521, 106 P.2d 879. Accordingly, the matrimonial controversy ought not to be adjudicated until the spouse suffering the legal disability in question is brought into the case.

However, upon the oral argument in this case plaintiff's counsel presented and, by permission of this court, filed a stipulation signed "Jefferson D. Caruthers, by Louis A. Ghiotto, guardian of his person and estate," and providing that "under appropriate order" of court, "he be made and brought in as a party to the action" and "be bound by the findings of fact and conclusions of law as already made" herein and the "judgment * * * entered in accordance" therewith "without further trial of any issue in [the] case." The force of this stipulation in curing the defect as to the necessary party litigant for the determination of this action will be considered later, after disposing of the other points raised on this appeal.

3. *The sufficiency of the complaint in the annulment action.*

[9] Preliminarily it should be said with regard to the effectiveness of defendant's grounds of challenge in the stated particulars, that defendant at the trial offered no objection to the introduction of evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action and, as above stated, no demurrer to the complaint was filed. While, accordingly, the first two "particulars" listed as "alleged deficiencies" may be deemed to have been waived by reason of defendant's failure to make timely objection, they will be briefly noted. The last point listed goes to the sufficiency of facts and would be ground for general demurrer.

[10] (a) The objection that defendant "was sued in her former name, Laura Alpha Donovan," and not in her married name of Caruthers, is of no consequence. She was identified in the complaint as "Laura Alpha Donovan, also known as Laura Alpha Caruthers," and she filed her answer without remonstrance. No mention of such discrepancy having been registered with the trial court, it cannot be raised on appeal. Had she suggested to the trial court that she was improperly named in the litigation, a correction in that particular could have been ordered. Code Civ.Proc., sec. 473.

[11] (b) The objection to the allegations referring to defendant as the "alleged wife" of Mr. Caruthers and to the "alleged marriage" is likewise without force. Plaintiff was seeking a decree voiding the marriage, and she couched her pleading in such language as would indicate that she did not recognize the marriage as valid or defendant as the lawful wife of Mr. Caruthers. Accordingly, such wording reflected only her premise of actionable redress.

[12] (c) The last objection is significant in that it challenges the sufficiency of the complaint because of its failure to plead the ground of annulment in the language of section 82 of the Civil Code, that Mr. Caruthers at the time of the marriage was of "unsound mind"—the recital being simply that he "was [then] wholly incompetent" and "continue[d]" to be "incompetent" at the time of the commencement of the action. But such defect in allegation was cured by evidence that was received without pertinent objection from defendant. 2 Cal.Jur. sec. 85, p. 269.

The record establishes that the cause was tried on the theory that the "unsoundness of Mr. Caruthers' mind" was the principal contested issue between the parties. True, there was testimony as to his incompetency, but there was also ample positive evidence that he was, at the time of the marriage, and continued to be at the time of the trial, "of unsound mind." Thus, one of the examining doctors was asked whether Mr. Caruthers' mind was "either sound or unsound." He answered: "It is unsound." He was also asked: "Would you say he was of unsound mind * * * on or about August 1st [1946]," the date of the marriage; and he answered: "I think so." Mr. Ghiotto, who was subsequently appointed the guardian for Mr. Caruthers, testified that he "first" noticed "this condition of unsound mind" in "1942 or 1943"; that the "condition" had "not improved" but had "grown worse." Another witness—a relative by marriage—after stating that he had known Mr. Caruthers "between 35 and 40 years" and during such time had visited him "once a month or maybe oftener," was asked to give "an opinion * * * as to the condition of [Mr. Caruthers'] mental sanity, with respect to whether he was sound or unsound," and he answered: "He was unsound." There was other testimony that Mr. Caruthers was "irrational" and that he was "completely unbalanced"; and another one of the examining doctors for plaintiff stated that in his opinion Mr. Caruthers was "of unsound mind" on "the date of August 1, 1946" and would not have "a thorough understanding or any sufficient amount of understanding of as serious a contract as a marriage contract" on that date. His condition was described by witnesses as "senile dementia," a "state of senile deterioration," an "advanced degree of mental deterioration," "medically incompetent," and "mental enfeeblement."

[13] All the foregoing testimony relating to Mr. Caruthers' state of mind was presented without objection as to any de-

ficiency in the scope of the issues raised by the pleadings. The only objections interposed were that "no proper foundation [for the evidence] ha[d] been laid" or that the opinion requested "call[ed] for a conclusion," but no other challenge was made to any of the questions. Such state of the record demonstrates that the parties were not in disagreement during the trial as to the issue to be adjudicated by the court. In fact, one of defendant's counsel, in cross-examining the medical witnesses produced by plaintiff, expressly referred to Mr. Caruthers' "unsound mind" and questioned on that point. Under all these circumstances, the objection now to the sufficiency of plaintiff's pleading comes too late. It is the settled rule that even though a complaint is defective in some particular, if the case is tried on the theory that it is sufficient and evidence accordingly is received without objection, the unsuccessful party cannot later effectively contest the sufficiency of the pleading. Slaughter v. Goldberg, Bowen & Co., 26 Cal.App. 318, 325–326, 147 P. 90; Hirsch v. James S. Remick Company, 38 Cal.App. 764, 767, 177 P. 876; Guidera v. Lapiana, 52 Cal.App. 460, 463, 199 P. 557; Meer v. Cerati, 53 Cal.App. 497, 505, 200 P. 501; City of Redding v. Dozier, 56 Cal.App. 590, 592–593, 206 P. 465; Asnon v. Foley, 105 Cal.App. 624, 628, 288 P. 792; Grimes v. Richfield Oil Co., 106 Cal.App. 416, 422, 289 P. 245.

So here any formal defect in the pleading of the issues was cured by the evidence. The court accordingly permitted plaintiff to amend her complaint "to conform to [the] proof" on her claim as to Mr. Caruthers' "unsoundness of mind," and it made a finding of fact that he "was of unsound mind," and that by reason thereof he "was incapable of * * * contracting said marriage." As so analyzed, the record distinguishes this case from those cited by defendant for the proposition that "amendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and *upon which the adverse party had no opportunity to defend*." Weinberg v. Dayton Storage Co., 50 Cal.App.2d 750, 759, 124 P.2d 155, 160, emphasis added; see, also, Lavely v. Nonemaker, 212 Cal. 380, 385, 298 P. 976; Richter v. Adams, 19 Cal.App.2d 572, 576, 66 P.2d 226.

4. *The sufficiency of the evidence to sustain the judgment.*

[14] Defendant refers to testimony given by medical and lay witnesses regarding Mr. Caruthers' "incompetency," "mental enfeeblement," and "senile dementia," and contends that it is insufficient to sustain the finding and judgment that at the time of the marriage in question he was of "unsound mind." But the trial court's decision is sustained by other testimony—the above noted as well as by that which will be hereinafter recited—all of which defendant ignores in her argument.

The evidence hereinabove recited and the testimony concerning the facts surrounding the marriage and the actions and statements of Mr. Caruthers, both before and after the ceremony, furnish ample support for the court's finding that he "was of unsound mind and did not have the mental capacity and understanding to understand the subject matter of the marriage contract, its nature and probable consequences and was incapable by reason of such unsoundness of mind of contracting said marriage and at the present time is and continues to manifest a state of mind which renders him and he is a person of unsound mind. That it is true and the court is of the firm conviction from the evidence and the preponderance thereof that Jefferson D. Caruthers was and is incapable of comprehending and understanding the contract of marriage, its nature and probable consequences, and that the said Jefferson D. Caruthers, subsequent to the said marriage, was incapable of freely cohabiting with the said Laura Alpha Donovan, also known as Laura Alpha Caruthers, in that during said period the said Jefferson D. Caruthers was of unsound mind. That at no time since the consummation of the said purported marriage has the said Jefferson D. Caruthers regained his soundness of mind nor will he do so."

On the day of the marriage Mr. and Mrs. Gill in their automobile drove Mr. Caruthers and the defendant from Mr. Caruthers' home near El Monte to the branch office of the county clerk in Pasadena to obtain a marriage license. Prior to leaving and during their ride no mention was made of the forthcoming wedding. The entire conversation related to scenes along the highway and "general topics of the day." After securing the license, the "wedding party" proceeded to a garage in El Monte owned by a justice of the peace, a particular friend of Mr. Gill and to whom Mr. Gill explained that "he was playing Cupid [as] he had some people who were to be married." They all then continued to the home of the justice of the peace for the ceremony, he and his wife being the only others present in addition to the "wedding party." It was necessary at times to prompt Mr. Caruthers regarding his responses in the proceeding. Apparently he was unaware of the fact that he was being married and he interjected remarks concerning matters foreign to such a solemn occasion. In fact, once defendant told him to "quit your clowning."

There was no wedding ring nor any of the usual accompaniments of a wedding. After the ceremony was concluded, there was no conversation concerning the event. The justice of the peace testified that the "wedding party" remained in his home for "possibly 10 minutes," and that during that time the conversation related principally to Mr. Caruthers' activity in "years gone by when he raised apples" and to other experiences of his early life.

About two days after the wedding, relatives of Mr. Caruthers went to visit him—as had been their custom each week-end—at which time defendant was absent from the premises. Mr. Caruthers made no mention of his having just been married. Although he had sold 16½ acres of his 17-acre farm less than two months previously to Mr. and Mrs. Gill, he said to his relatives during their visit: "I have had this place now for 40 years and I think I will keep it until I die, I am not going to sell it." His visitors did not know at that time that he had married again or that he had sold his property. (His first wife, to whom he had been married more than 50 years, had died only the year before.) One of the relatives testified that during their visit Mr. Caruthers "commenced to laugh and he said, 'I had a funny thing happen to me.' I said, 'Let's hear it, Uncle Jeff, I have heard a lot of funny things on you so far.' Well, he said, 'Somebody came in here and wanted me to go up and stand up with them to get married.' He said, 'I don't know what the hell they wanted with me; I didn't know them, so anyway they came and helped me put on my clothes and hustled [me] off to Long Beach and I stood up with them; she was a hell of a pretty girl. I didn't know what she was, what they wanted me to stand up for I don't know, but they came back and dumped me out and away they went and I haven't seen them since.'" His lack of understanding of the events that had occurred is indicated not only by his statement about the marriage but by his declaration that he had been taken to Long Beach, which was several miles farther from his home than Pasadena and in a different direction. Since he had resided on his farm for 40 years, it is reasonable to presume that he should have been acquainted with his surroundings, and that if he had been in his right mind he would have known whether he had been taken to Long Beach or Pasadena.

A week later, during another visit of the relatives, mention was made of the fact that Mr. Caruthers had only a few of the livestock which he had previously kept on his farm. He was asked whether or not he had sold his horses and mules, as they were not "in the pasture." He answered: "No, someone came up and carted them down below here." Then defendant, who was present on that occasion, said: "You sold them for $300 [a few days previously to Mr. Gill] and you gave the man a bill of sale for them." Mr. Caruthers replied: "Wait a minute * * * you are all wrong about that; * * * I didn't sell any mules or stock." Defendant, after repeating that he had sold the animals and trying to explain it to him, said: "Well, it doesn't make any difference, it is none of your business anyhow. * * * Jeff and I are married. * * * I own this place." This was the first notice of the marriage given to the relatives. After such announcement and when defendant left the room, one of the relatives—Mr. Caruthers' niece—asked if he were married and he answered: "No, Honey, now don't worry, I am not married." When then told that "Laura [the defendant] says you married her," he replied: "Who is Laura, you mean that woman that drinks and smokes so much? * * * Oh, no, * * * I wouldn't marry her."

The sale of Mr. Caruthers' farm to Mr. and Mrs. Gill was made in June, some seven weeks prior to the marriage. Defendant accompanied Mr. Caruthers to the bank for the purpose of reading over the escrow instructions and signing the necessary documents to complete the conveyance. During a visist of his relatives about a week later, they inquired whether he had sold his property and he said "absolutely no," that he would not do so. When one of them then stated, "Well, it is rumored that you have," he replied: "Well, boy, if anybody would know about my selling surely I should know. * * * When I tell you it has not been sold, it has not been sold." Further indication of his lack of knowledge of the sale is the fact that after the conveyance had been made, he dug "post holes" for fencing the property and continued to work on the land in the same manner as before.

[15] There was considerable additional evidence sustaining the allegation and finding that Mr. Caruthers was of "unsound mind" at the date of the marriage and at the time of the trial, but its recital is unnecessary since the foregoing references to the record are amply sufficient. True, there was also evidence from defendant's witnesses that he knew that he had been married to her. But this only produced a conflict in the record as would normally be expected in every case in which the issues are controverted, and since the trial court by its finding of fact has indicated which witnesses were accredited in resolving the various contradictions, 27 Cal.Jur. secs. 156–157, pp. 182–186, its determination will not be disturbed. 10 Cal.Jur. sec. 383, pp. 1172–1173.

5. *Other alleged errors.*

Defendant complains of four "other" matters, "any one of [which], standing alone," she admits would not be ground for reversal, but "when taken together" and cumulative to her main objections, show that she did not have a fair trial. Her position in this regard is devoid of merit.

[16] (a) Defendant's counsel, without notice to plaintiff or her counsel, procured from the presiding judge an order extending the time for the filing of objections to the proposed findings of fact and conclusions of law. Two days later, the trial judge, upon his own motion and without notice to defendant's counsel, vacated and set aside the order. The facts of the case and the condition of Mr. Caruthers—both mental and physical, he being over 80 years of age—were not known to the presiding judge but were within the knowledge of the trial judge. The order of the trial judge recites that he had given "previous instructions to the respective counsel that he desired the findings of fact and conclusions of law and any exceptions or objections * * * or any amendments to the same, to be filed in accordance with the statutory requirement and without any extension of time," and that he had "advised respective counsel that he would be in Los Angeles" at a certain time "for the purpose of disposing of [the] cause." There was no error in vacating the order under the circumstances. Defendant suffered no prejudice for (1) it does not appear what amendments she desired to submit nor that any amendments to the proposed findings would have been of any avail to her; and (2) the findings signed by the trial judge are sustained by ample evidence.

[17, 18] (b) Defendant alleges "abuse of discretion by the court in his lengthy examination of witnesses." She necessarily concedes it to be the rule that "considerable latitude is allowed a trial court" in regard to this phase of the proceedings, "especially in a non-jury case," consistent with his duty to ascertain the facts pertaining to the issues which he must determine. 27 Cal. Jur. sec. 49, pp. 65–66. Here an inspection of the record demonstrates that the court's interrogation of various witnesses, while extended at times, was directed to the clarification of particular points that were not covered to his satisfaction by the questions of counsel and which would otherwise have

remained obscure in the testimony—all pertinent in reflecting the condition of Mr. Caruthers' mind as the premise for determining what disposition should be made of both the annulment and guardianship cases. Such proceedings involved important and serious considerations, for a finding that a person is "incompetent" or "of unsound mind" should not be made lightly, or at all, unless the court is convinced that such conclusion is warranted by the facts. In the light of these observations, the court's examination of the respective witnesses was reasonable and proper.

[19] (c) Defendant complains that the court criticized her because her counsel did not call Mr. Caruthers as a witness. Mr. Caruthers was in court during the entire trial. When the court expressed a desire to have him testify—"to hear his answers to certain questions, certainly concerning whether he knows what the proceedings here are all about"—defendant's counsel objected while plaintiff's counsel not only did not object but expressly agreed to his testifying. The remarks of the court to which defendant takes exception were made during an argument as to whether either party should call Mr. Caruthers as a witness, with plaintiff's counsel maintaining that she was precluded from such step by reason of her position—contrary to defendant's—that he was "of unsound mind." Code Civ.Proc., sec. 1880, subd. 1. With the matter so in dispute and the added challenge of defendant's counsel on the right of the court to call Mr. Caruthers as its witness, but see 27 Cal.Jur. sec. 49, p. 65, the court concluded as follows: "I merely expressed the wish that counsel would call him; I am not going to place myself in the position of being an advocate one way or the other. I am here to decide the issues presented. I merely expressed the desire * * * but I am certainly not going to force the issue. I do feel that the court could be helped if he was called, with respect to at least observing him as a witness, observing just how he might react to, and his understanding of the present situation. I am not going to call him as a witness for the court." There appears to be nothing objectionable in such remarks.

[20] (d) Defendant claims that the court committed error in failing to rule promptly upon her motion "to be relieved" of the "stipulation for consolidation" of the two proceedings and "to sever the cases for trial." But as hereinabove discussed, the consolidation of the cases for the purpose of trial was within the discretion of the court, was deemed "agreeable" by defendant's counsel as the matter was originally discussed at the preliminary hearing as well as later, and was made in the interest of expeditious procedure—saving the time of the court by avoiding two trials of closely related issues. The court had a right to give proper consideration to the motion and to take it under submission for that purpose. There was no error in failing to rule upon the motion immediately upon its presentation, nor was there error in denying it at a subsequent point in the trial. Defendant suffered no prejudice by the ruling, for her counsel well knew the controverted issues to be tried and appreciated the fact that the same witnesses would testify, and that substantially the same evidence would be given in both the guardianship and annulment proceedings.

[21-23] Returning now to a consideration of the "stipulation and consent" filed by plaintiff at the oral argument in this case, expressing the election of "Jefferson D. Caruthers, by Louis A. Ghiotto, guardian of his person and estate" to be made a party to the annulment action and to be bound by the findings and judgment entered therein, it would appear to cure the prevailing defect as to the absence of a necessary party. Mitau v. Roddan, 149 Cal. 1, 17, 84 P. 145, 6 L.R.A., N.S., 275, Nau v. Santa Ana Sugar Company, 79 Cal. App. 685, 695-696, 250 P. 705. As above indicated, the annulment action was fully tried on all the material issues, particularly that concerning the "unsoundness of mind" of Mr Caruthers; he was present during the entire trial; and the prejudicial errors urged by defendant as grounds for reversal of the judgment are all without merit except her claim that he should have been joined in the litigation as a "real party in interest." The court had jurisdiction to declare the marriage a nullity in view of the domicile in the state of at

least one of the parties thereto—the defendant. Brill v. Brill, 38 Cal.App.2d 741, 748, 102 P.2d 534; see, also, Delanoy v. Delanoy, 216 Cal. 27, 39, 13 P.2d 719, 86 A.L.R. 1321; Comfort v. Comfort, 17 Cal. 2d 736, 742, 112 P.2d 259; People v. Harlow, 9 Cal.App.2d 643, 646, 50 P.2d 1052; Kegley v. Kegley, 16 Cal.App.2d 216, 220-221, 60 P.2d 482; In re Estate of McNutt, 36 Cal.App.2d 542, 546-547, 98 P.2d 253. Moreover, it appears that the other party to the marriage, Mr. Caruthers, was likewise a bona fide resident of the state as was plaintiff herein, his sister, who had authority to commence the annulment action. Civ.Code, sec. 83, subd. 3. Accordingly, the cases cited by defendant for the "universal rule" that jurisdiction of the subject matter cannot be conferred or waived by consent, agreement or stipulation, Van Horn v. Justice's Court, 216 Cal. 235, 242, 13 P.2d 704; Standard Oil Company of California v. State Board of Equalization, 6 Cal.2d 557, 559, 59 P.2d 119; Fuller v. Nelle, 12 Cal.App.2d 576, 580-581, 55 P.2d 1248; Vaughan v. Roberts, 45 Cal.App.2d 246, 253, 113 P.2d 884, have no application here.

[24] Nor can defendant successfully challenge the authority of the guardian to execute this stipulation on behalf of his ward, Mr. Caruthers. The trial consumed several days, with the transcript of the testimony running through 840 pages, and at the conclusion thereof the court found, upon sufficient evidence, that Mr. Caruthers was at the time of his marriage, and continued to be, "of unsound mind." It would appear that no justifiable purpose would be served by a retrial of this principal issue, and that such procedure, as the stipulation recites, "would be costly to the estate." Since the "guardian" of a person "of unsound mind" has authority to institute in the name of his ward an action for the annulment of the latter's marriage by reason of his said mental condition at that time, Civ.Code, sec. 83, subd. 3, and also has authority "with the approval of the court * * * to agree to the order or judgment to be entered therein for or against his ward," Code Civ.Proc., sec. 372, it would reasonably follow that such guardian should be held to have authority, subject to the approval of the court, to enter into a stipulation which would give judgment to his ward on the same cause of action which theretofore had been fully tried and determined. Here the guardian, consistent with such considerations and his duty in assuming "the care and custody of the person of his ward or the management of his estate," Prob.Code, sec. 1500, properly elected to take advantage of the favorable judgment rendered in the annulment action in relation to his ward, and "in the interest of justice to all parties, this should be permitted." Mitau v. Roddan, supra, 149 Cal. 1, 17, 84 P. 145, 151, 6 L.R.A., N.S., 275; see, also, Nau v. Santa Ana Sugar Company, supra, 79 Cal. App. 685, 696, 250 P. 705. Upon the making of an appropriate order by this court, based upon and in approval of said stipulation, there will remain no sound reason for reversing the judgment.

It is therefore ordered that the stipulation, filed herein on behalf of Jefferson D. Caruthers, by Louis A. Ghiotto, guardian of his person and estate, be approved; that pursuant to said stipulation said Jefferson D. Caruthers be made and brought in as a party to the above-entitled action, and that he be bound by the judgment heretofore entered in the same manner as though he had been named as a party at the commencement of the action and had appeared throughout the proceedings in the trial court by a general guardian or a guardian ad litem. The appeal from the order denying defendant's motion for a new trial is dismissed. The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

91 Cal.App.2d 526

BOOTE'S HATCHERIES & PACKING CO., Inc. v. SUPERIOR COURT IN AND FOR MERCED COUNTY.

Civ. 7624.

District Court of Appeal, Third District, California.

April 28, 1949.

1. Corporations ⚷642(4½)

Minnesota corporation, which did not own any property nor operate any office in California, but which purchased in California through a resident agent 59,600 turkey eggs between December 24 and March 6, for a total price of $17,714, was "doing business" in California and amenable to process in action in California arising out of activities of such agent. Code Civ. Proc. § 411, subd. 2; Civ.Code, § 406(a).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Doing Business".

2. Corporations ⚷642(1), 665(1)

Each case involving a corporation allegedly "doing business" within state, so as to be amenable to process, must be determined on its own facts; but, if it can be said that corporation is carrying on business in such a manner and to such an extent as to warrant inference that it is within the state, it is amenable to process. Code Civ.Proc. § 411, subd. 2; Civ.Code, § 406(a).

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Prohibition proceeding by Boote's Hatcheries & Packing Company, Inc., a corporation, petitioner, against the Superior Court in the State of California in and for the County of Merced, respondent, to restrain the respondent from proceeding in an action against petitioner.

Alternative writ discharged.

Adams, Griswold, Winton & Mayes, of Merced, for appellant.

L. A. Macnicol and Lester J. Penry, both of Merced, for respondent.

PEEK, Justice.

Boote's Hatcheries and Packing Co., Inc., a foreign corporation, petitioned this court for a writ of prohibition restraining the Superior Court in and for the County of Merced from proceeding in an action instituted by one Henry Giebeler. An alternative writ issued.

A summary of the pertinent allegations of the petition shows that the petitioner is a corporation duly organized under the laws of the State of Minnesota; that service of summons was first made personally upon petitioner's president in the state of Minnesota, which service was quashed by the respondent Superior Court on petitioner's motion; that thereafter service was made upon the Secretary of State of California pursuant to section 411, subdivision 2 of the Code of Civil Procedure as provided for by section 406(a) of the Civil Code, and that petitioner's motion to quash said service was denied by respondent court after hearing testimony in opposition to said motion. Petitioner further alleged that at said hearing no evidence was introduced to show whether it owned any property in California or operated any office or performed any other activity in California except to negotiate for and purchase turkey eggs which were immediately shipped in interstate commerce, and in connection therewith advise growers how to produce the kind of eggs desired; that such acts are insufficient to constitute doing business in the State of California and that the petitioner is therefore not amenable to process in California.

[1] The answer of Henry Giebeler, the interested party herein, denied generally the allegations of the petition. He further alleged that between December 24, 1945, and March 6, 1946, a total of 59,600 eggs were shipped to petitioner by him and his assignors at a total price of $17,714. The answer also referred to specific evidence introduced at the hearing in the Superior Court, which Giebeler alleges was amply sufficient to support the conclusion of said court that the petitioner was doing business in California and thus amenable to its process. We are in accord with such conclusion.

From the evidence so introduced it appears without contradiction that for some time petitioner had solicited the egg business of various turkey raisers in this state; that such solicitation was carried on through an agent who was a resident of this state; that the specific activities of said agent in the vicinity of Merced county included the entering into of written contracts for the purchase of turkey eggs on behalf of the petitioner with fifteen to twenty turkey raisers; that said agent assisted in the examination, supervision and culling of the turkey flocks; that she gave instructions and information to the raisers as to the packaging and shipment of the eggs, and that she gave advice generally to the raisers, including information as to the proper medicines, if any, that were needed. Such activities of said agent were summed up by one witness who stated that the agent "was just looking out after everything." The present litigation arose out of these very activities and is predicated upon a contract so entered into in this state.

[2] Inasmuch as there is no precise test for what amounts to "doing business" within the jurisdiction of this state, each case must be determined on its own facts. However, if it can be said, as it can in the present case, that the corporation is carrying on business in such a manner and to such an extent as to warrant the inference that it is here, it is within the jurisdiction of the courts of this state and hence amenable to process of said courts. West Publishing Co. v. Superior Court, 20 Cal.2d 720, 727, 128 P.2d 777, and cases therein cited.

Applying this standard to the facts herein it appears that the activities of petitioner were systematic and continuous in its solicitation of business from various turkey raisers in the vicinity of Merced county as well as other areas in the state. It participated in the overall activities of the growers including the giving of expert advice by petitioner's agent in all phases of the production, packaging and shipment of turkey eggs.

The substantial business which was so developed in this state gave rise to obligations and liabilities such as in the present case. Likewise it gave to petitioner the benefits of the laws of this state including the right to enforce such rights in the courts of this state. Paraphrasing the opinion of the court in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057: It is quite evident that the enumerated activities of petitioner established sufficient contacts and ties in this state to make it reasonable and just according to our conception of fair play and substantial justice that the plaintiff Giebeler should be permitted to enforce the obligations which petitioner has incurred in this state, and which constitute the basis for his action.

The writ is discharged.

ADAMS, P. J., and THOMPSON, J., concur.

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91 Cal.App.2d 411

VAN FLEET-DURKEE, Inc. v. OYSTER.

Civ. 13868.

District Court of Appeal, First District, Division 2, California.

April 25, 1949.

1. Pleading ⇨192(6)

Insufficiency of partnership assets to discharge liabilities of partnership, which did not appear on face of complaint, could not be raised by demurrer to complaint in action by limited partner on notes evidencing loans to general partner. Civ.Code, § 2489.

2. Partnership ⇨375

Complaint, which did not show on its face that partnership assets were insufficient to discharge liabilities of partnership, stated a cause of action against general partner who had guaranteed payment of partnership debts on notes payable to limited partner evidencing loans to general partner, without alleging that an accounting had been had. Civ.Code, § 2489.

3. Bills and notes ⇨499

Possession by payee of a note duly executed and delivered for a valuable consideration, in absence of evidence of payment, raises a presumption of nonpayment.

4. Evidence ⚷423(6)

Parol evidence was inadmissible to show that limited partner was to look to profits of mining venture only for payment of notes evidencing loans to general partner duly executed and delivered for a valuable consideration and payable to limited partner without restrictions. Code Civ. Proc. § 1856.

5. Bills and notes ⚷527(1)

Evidence was insufficient to support a finding of payment of notes sued on.

6. Evidence ⚷384

The "parol evidence rule" is a rule of substantive law under which the act of embodying the complete terms of an agreement in a writing becomes the contract of the parties superseding prior or contemporaneous oral or written negotiations. Code Civ.Proc. § 1856.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Parol Evidence Rule".

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action on promissory notes by Van Fleet-Durkee, Incorporated, against A. J. Oyster. Judgment for defendant, and plaintiff appeals.

Judgment reversed.

Chickering & Gregory and Frederick M. Fisk, all of San Francisco, for appellant.

Alden Ames, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued on five promissory notes, four of which were executed in the name of "Poverty Hill Mine, by A. J. Oyster," one signed by "A. J. Oyster." All notes were made payable to plaintiff without restrictions. The trial was had without a jury and judgment went for defendant.

In 1938 a limited partnership called Poverty Hill Mine was formed by plaintiff, defendant and one C. C. Trowbridge, Jr. The defendant was the only general partner. In 1941 a partnership named Poverty Hill Properties was formed. The defendant became a general partner, plaintiff became a limited partner taking 27.18 per cent interest as such. Prior to the formation of the new partnership, plaintiff loaned the general partner $32,500 on five promissory notes. Six thousand one hundred and twenty five dollars was paid and this suit was brought to recover the balance.

While plaintiff was making his opening statement at the inception of the trial defendant presented a general demurrer addressed to the ground that the complaint was insufficient because it failed to allege that an accounting had first been had. The demurrer was taken under advisement and was sustained when the findings of fact and conclusions of law were signed.

Passing appellant's criticism as to the time of presenting and the method of ruling on the demurrer, it is sufficient to say that the order sustaining it was error. Section 2489 of the Civil Code provides: "(1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall in respect to any such claim,

"(a) Receive or hold as collateral security any partnership property, or

"(b) Receive from a general partner of the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners. * * *"

[1] Now if the partnership assets "were not sufficient to discharge partnership liabilities" that fact did not appear on the face of the complaint and could not have been raised by demurrer. The error in the ruling is illustrated by the undisputed fact that when the new partnership was formed in 1941 the articles provided that "the said A. J. Oyster, one of the partners herein named, and the general partner of said Poverty Hill Mine, hereby guarantees the payment of said debts, liabilities and obligations of said Poverty Hill Mine."

[2] Appropriate allegations of the written guaranty appear in the complaint. But respondent says that this guaranty does not mean what it says. That, of course, would be a matter of proof. The complaint stated a good cause of action against the general demurrer.

[3] The more substantial error lies in the admission of parol evidence to vary the terms of the notes and in the finding based on this evidence that the notes were paid. Due execution, delivery, and a valuable consideration were all admitted. Possession of the payee with no evidence of payment raises a presumption of non-payment. Levey v. Henderson, 177 Cal. 21, 23, 169 P. 673; Bank of Italy etc. Ass'n v. Bettencourt, 214 Cal. 571–577, 7 P.2d 174.

Charging respondent with the burden of proving payment, let us examine the evidence upon which he relies. None was offered that the notes were actually paid in cash and it is conceded that this was not done. Evidence was received to prove two separate lines of defense—first, that there was never any intention to pay the notes, but appellant was to look to the profits of the mining venture only for payment; second, that it was "understood" that the notes were to be cancelled as a part of appellant's interest in the new partnership.

[4, 5] All the evidence taken under the first theory was clearly inadmissible under the parol evidence rule. Section 1856, Code Civil Procedure; McArthur v. Johnson, 216 Cal. 580, 582, 15 P.2d 151, where other cases are cited. The evidence directed to the second theory, such as was admissible, does not prove payment. Respondent states that evidence of payment appears in the articles of copartnership of the second partnership and in the schedule attached. There is no mention of these notes in either the articles or the schedule. The schedule is nothing but a list of assets with no reference to any outstanding debts. The only mention of debts in the articles is that portion where respondent guarantees the payment of all debts and obligations of the old partnership.

He also refers to the books of account, Exhibit "1." This exhibit is not in the record but we may assume that if it showed payment the respondent would have brought it up. After respondent made the first payment on the note and appellant notified him that a part had been alloted to interest, the parties orally agreed that the full amount should be credited to principal and that thereafter interest should be allowed to accumulate.

As further evidence of payment respondent refers to the fact that in April, 1941, before the organization of the new partnership, appellant sent respondent its check for $7000 to aid respondent in liquidating some of the debts of the old partnership. We cannot follow the argument. This was a contribution expressly based on appellant's proportionate share in the partnership made to pay an existing debt of $20,000. No note was given as was done in all the other cases.

These circumstances standing alone would be wholly insufficient to support the finding of payment of the notes. They tend to show only that the notes were not intended to be obligations of the payor, but were intended to be paid only out of future profits of the partnership. The respondent cannot seriously claim that the notes were paid as that term is commonly and universally used. The purport of his entire claim and defense is that he was under no legal obligation to pay and therefore was excused from payment. This is the core of his defense and if that theory falls his whole case falls. To prove this defense he offered evidence tending to show that the notes were payable only from future profits of the partnership and that, since the operations of the mine were unprofitable there was no obligation to pay.

As we have said this evidence was inadmissible and the authorities uniformly support this conclusion. In McArthur v. Johnson, 216 Cal. 580, 582, 15 P.2d 151, 152, the Supreme Court said:

"The note was an unconditional promise to pay money on demand. The parol evidence received was in direct contradiction of the express terms of said note. It tended to establish that said note was not payable on demand, but, on the contrary, was payable only out of a particular fund. Said evidence was not admissible. Section 1856, Code Civ.Proc., and section 1625, Civ.Code.

Said sections lay down rules of substantive law. Harding v. Robinson, 175 Cal. 534, 540, 166 P. 808. Under conditions similar to those existing here, the principles of law involved have been applied to prevent the reception of parol evidence to contradict the terms of written instruments in a great variety of cases. In support of our holding we shall cite only a few decisions dealing with commercial paper. Brown v. Spefford, 95 U.S. 474, 24 L.Ed. 508; San Jose Sav. Bank v. Stone, 59 Cal. 183; Cashman v. Harrison, 90 Cal. 297, 27 P. 283; Leonard v. Miner, 120 Cal. 403, 52 P. 655; Wright v. Shoenhair, 100 Cal.App. 163, 280 P. 174. Our case falls squarely within the rules announced and applied in said cases."

[6] Further explanation of the purpose and effect of the rule is found in Re Estate of Gaines, 15 Cal.2d 255, 264, 100 P.2d 1055, 1060, where the court said:

"The parol evidence rule, as is now universally recognized, is not a rule of evidence but is one of substantive law. It does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission. The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the 'integration'), *becomes the contract of the parties.* The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself. The rule comes into operation when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous negotiations, oral or written, are excluded; or, as it is sometimes said, the written memorial supersedes these prior or contemporaneous negotiations. See Civ. Code, sec. 1625; Code Civ.Proc., sec. 1856; Harding v. Robinson, 175 Cal. 534, 166 P. 808; Rottman v. Hevener, 54 Cal.App. 474, 202 P. 329; Estes v. Delpech, 73 Cal.App. 643, 238 P. 1085; Hanrahan-Wilcox Corp. v. Jenison Machinery Co., 23 Cal.App.2d 642, 73 P.2d 1241; 5 Wigmore, Evidence, sec. 2400, p. 236; 3 Williston, Contracts, sec. 631; Restatement, Contracts, secs. 237–244."

We see no purpose in continuing the discussion. The numerous errors were all substantial and it is not possible to say that any of them did not control the conclusions of law upon which the judgment is founded.

Judgment reversed.

GOODELL and DOOLING, JJ., concur.

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91 Cal.App.2d 359

PEOPLE v. PORTER.

Cr. 2417.

District Court of Appeal, First District, Division 2, California.
April 20, 1949.

Criminal law 🔑**1193**

Where state expert witness who gave damaging testimony against defendant, was produced on Thursday, defendant's attorney announced that he intended to ask for a continuance to procure an expert to examine articles which were basis of testimony of state's expert, court informed defendant's attorney that court would allow defense until Monday, and no longer, to procure an expert if desired, and on Monday defendant's attorney did not again refer to matter of a defense expert, defendant, after conviction had been affirmed, was not entitled to have motion to recall remittitur granted, because of denial of a continuance.

◆

On motion to recall remittitur.

Motion denied.

Prior opinion, 174 P.2d 873, 77 Cal.App. 2d 142.

Dillard E. Porter, in pro per.

Fred N. Howser, Atty. Gen., for respondent.

DOOLING, Justice.

The defendant was convicted of burglary and a violation of sec. 288a, Pen.Code. The judgments of conviction were affirmed by this court on December 4, 1946. People v. Porter, 77 Cal.App.2d 142, 174 P.2d 873. No petition for rehearing or for hearing in the Supreme Court was filed and the remittitur was issued to the Superior Court in due course. Defendant, after the lapse of nearly a year and a half, on May 3, 1948 filed a petition in this court to recall the remittitur. The petition was submitted to this court and the submission was afterwards set aside to allow defendant to furnish certified copies of additional records to this court which he advised the court he was attempting to procure. Thereafter the defendant informed the court that he did not desire to use these additional records in support of his pending petition to recall the remittitur. The petition has accordingly been resubmitted so that the matter may be decided.

The petition is grounded on the claim that defendant was not properly represented by his attorney on the appeal and that for that reason this court did not consider certain matters occurring at the trial which he now asserts to have been prejudicial and he also seeks to reopen the matter of the sufficiency of the evidence to support the judgments. This court fully considered the latter claim in our original opinion. The other asserted errors concern the expert testimony by which defendant alleges that he was taken by surprise and which he claims he was not afforded time to secure other expert evidence to rebut and certain other claims of prejudicial misconduct. These points were not urged on the original appeal and petitioner seeks to urge them now on the ground that his attorney improperly failed to present them. In this respect the following appears in the original opinion filed in this case, People v. Porter, supra, 77 Cal.App.2d 142-143, 174 P.2d 873, 874: "After the opening brief was filed appellant by letter discharged his attorney and on October 28, 1946, appellant filed a verified document with this court alleging various claimed acts of misconduct upon the part of his attorney by reason of which he alleged that he was prejudiced in the trial court and on his appeal. He was notified by letter mailed the same day that if he desired to file an additional opening brief he should forward a letter to the clerk asking for time to do so. No reply has been received to this letter, and for that reason we now feel justified in acting upon his appeal * * *."

Petitioner now asserts in an unsworn document, although he filed an affidavit in support of his petition, that he was unable to get another attorney to represent him or to get any further co-operation from his discharged attorney, but he furnishes no explanation why he made no reply to the clerk's letter or further request for time to the court and he does not attempt to explain his long delay in filing the present petition. The petition might well be denied on the ground of laches.

However because petitioner is now appearing in pro per we have reexamined the transcript in view of his new contentions and find no merit in them. The facts with regard to the expert evidence of the witness Kirk as shown by the transcript are: This witness was produced on a Thursday. On that day defendant's attorney announced that he intended to ask for a continuance to procure an expert to examine the articles which were the basis of Kirk's testimony. On Friday the transcript shows a colloquy between the trial judge and defendant's attorney in which the court reminded defense counsel that on the previous day he had stated that he would allow the defense until Monday, and no longer, to procure an expert if desired. On Monday the trial resumed and the entire day was spent in examining defense witnesses. Counsel did not again refer to the matter of a defense expert, make any statement whether one had been secured or whether any effort had been made to secure one, nor ask for any additional time for that purpose. On Monday night the defense rested and on Tuesday morning the court commenced to instruct the jury. Again nothing was said of a defense expert nor was any showing attempted to be made as a basis for continuing the cause further for that purpose. Under the circumstances no abuse of the discretion of the trial court is shown and we need not consider what the rights of a defendant may be as to a continuance to meet testimony which takes him by surprise, because in the absence of any further motion or showing on the subject than was made herein no error can be claimed to have occurred.

The other new points are equally without substance, which may well be the reason for discharged counsel's failure or refusal to urge them.

Motion to recall remittitur denied.

NOURSE, P. J., and GOODELL, J., concur.

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91 Cal.App.2d 478

SHELDON v. RIVER LINES et al.

Civ. 13825.

District Court of Appeal, First District, Division 2, California.

April 27, 1949.

Rehearing Denied May 27, 1949.

1. Appeal and error ⇨688(2)

Where transcript failed to show what was said by plaintiff's counsel in closing statement to jury, claimed misconduct would not be reviewed on appeal.

2. Appeal and error ⇨1060(1)

A reversal may be ordered if it appears that fact of insurance was deliberately injected into case with intent of prejudicing verdict and evidence is so evenly balanced as to render it probable that jury was influenced or if evidence preponderates in favor of unsuccessful party.

3. Appeal and error ⇨1026

A conflict in evidence does not mean that a case is close so that errors which ordinarily might be prejudicial would become prejudicial.

4. Appeal and error ⇨933(4)

Where trial court denies a motion for a new trial based upon ground of misconduct of plaintiff's attorney, it must be deemed to have concluded that questions were asked in good faith and that no prejudice resulted therefrom.

5. Appeal and error ⇨978(2)

A denial of a motion for a new trial made upon ground of misconduct of counsel although not binding on District Court of Appeal is entitled to great weight on appeal in which complaint is made of misconduct.

6. New trial ⇨32

In action against a corporation, where evidence was not so evenly balanced as to indicate probability of a different result if utterance of first two syllables of the word "insurance" had not been made by plaintiff's counsel in argument to jury, and trial court felt this was due to a slip of tongue, trial court did not abuse discretion by refusing to grant a new trial for alleged misconduct of counsel in improperly injecting insurance into case.

7. Trial ⇨296(8)

In personal injury action, instruction that jury was not to give greater weight to side producing greater number of witnesses but to find for side producing that witness or witnesses who is or are believed and testimony of one witness if believed is sufficient to prove any fact in dispute, was not error as instructing jury that degree of proof required in a civil case was not preponderance of evidence but proof of a fact to mere belief of jury, where other instructions negatived such criticism.

Appeal from Superior Court, City and County of San Francisco; Preston Devine, Judge.

Action by Albert William Sheldon against the River Lines, and another, for personal injuries. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Hoge, Pelton & Gunther, John H. Black, Edward R. Kay and Leo V. Killion, all of San Francisco, for appellants.

Melvin M. Belli and Lou Ashe, both of San Francisco, for respondent.

GOODELL, Justice.

This appeal was taken from a judgment on the verdict for $20,000 in a Jones Act case.

The S. S. San Joaquin, one of appellant's river boats, was tied to the dock in San Francisco and respondent, one of her crew, was engaged in getting the shore-end of her gangplank onto the dock. From the plank's end he had carried a rope line to a motor jitney, to which he had tied it. The jitney on the dock then backed, thereby exerting a pull on the plank which made the line taut. Respondent had hold of one end of the line, which he was guiding, in such a way as to make him responsive to the pulling operation and, according to his testimony, a jerk of the jitney twisted him to his left. He dropped the rope, limped away, and could not straighten up. He was taken to the Marine Hospital. After spending a few days thereafter in his hotel room he returned to the hospital, where he underwent an operation for a ruptured intervertebral disc. He was in the hospital for four and a half months, during seven weeks of which time he was in a cast from his neck to his pelvis. He had not worked from the time of injury to the time of trial.

Appellant does not question the sufficiency of the evidence to support the verdict, but argues that respondent's case was a weak one. It makes no claim of excessive damages, but argues that the verdict was high for such a case.

The two points presented on this appeal are claimed misconduct of respondent's counsel and prejudicial error in an instruction.

The alleged misconduct occurred during plaintiff's argument to the jury. There had been a conference in chambers respecting an earlier episode and immediately on returning to the courtroom and resuming the argument plaintiff's counsel said: "* * * and compare that with the opening statement of the insur—of the steamship company." Court and counsel again went into chambers where the following transpired:

"Mr. Hoge: * * * we are assigning counsel's reference to insurance here as misconduct, and we are going to ask the Court to declare this case a mistrial. It hasn't been ten minutes since we were in here making a motion for a mistrial on the ground that he made reference to an insurance company; and here, within fifteen minutes after, we are going through the same thing. He said before that that was called a slip of the tongue and makes reference to an insurance company. We are going to ask the Court to declare a mistrial.

"Mr. Belli: There is no purpose on my part in mentioning the insurance company. If it is a slip of the tongue—

"The Court: Let's assume now—and I think it was a slip of the tongue— * * *

"Mr. Belli: I saw the representative of the insurance company sitting there and I am intent on him sitting there, and I have no purpose to mention the word 'insurance'.

"The Court: I am thinking of the effect.

"Mr. Belli: It has no effect when it is a steamship company involved and not an insurance company. If it were an individual, there might be something to hope for. I don't think this is enough—if it is a steamship company I would rather have them as a defendant than an insurance company * * *

"The Court: Well, I am going to deny the motion for a mistrial the second time * * *"

[1] Appellant moved for a new trial and filed affidavits, but in requesting the transcript it did not ask for the affidavits. Accordingly the transcript fails to show what was said during the first episode of claimed misconduct; it shows only the discussion in chambers. In the absence from the record of the alleged objectionable language we cannot review the first episode. See Mudrick v. Market St. Ry. Co., 11 Cal. 2d 724, 737, 81 P.2d 950, 118 A.L.R. 533.

The only misconduct problem presented is that which arises from the statement: "* * * and compare that with the opening state of the insur—of the steamship company."

[2] Appellant contends that this was a close case that where the evidence is equally balanced the injection of insurance into the case is particularly prejudicial. 10 Cal. Jur. 10-year, supp. pp. 664–5; Citti v. Bava, 204 Cal. 136, 266 P. 954. At 10 Cal.Jur.

10-year supp. p. 672 it is said: "As to whether the injection into a case of information as to liability insurance constitutes prejudicial error depends upon the circumstances of the particular case. In determining this question the good or bad faith of counsel in eliciting the fact that a party is insured is important; in fact, in one case it is said to be the 'test generally applied.' In any event, it is established that a reversal may be ordered if it appears that the fact of insurance was deliberately injected into the case with the intent of influencing or prejudicing the verdict, and the evidence is so evenly balanced as to render it probable or possible that the jury were influenced, or if the evidence preponderates in favor of the unsuccessful party."

On the question of good or bad faith the trial judge in chambers characterized the remark as "a slip of the tongue".

The next inquiry is whether the evidence is so evenly balanced as to render it probable that the jurors were influenced.

Respondent testified that he made the line fast to the jitney by tying it around the front of the motor. He said "I didn't put a knot in; I took a couple of round turns; that is the reason you have to hold the line, so there is no knot in there." Witness Thompson, who was operating the jitney, testified that he saw respondent pass the line around and carry it to the jitney and secure it with a knot. The superintendent of the dock also testified that he saw respondent tie the knot.

With respect to the jerk, respondent when asked to "Tell us what the jitney did and what you did", answered "Well, I was holding onto one end of the line there, and she gave a jerk and so it just twisted me a little bit." Witness Thompson was not asked whether there was *any* jerk *at any time,* but was asked: "Was there any jerk *when you started to pull the plank off?* Did you jerk the jitney?" (emphasis added) and answered "No, I did not." When asked "Did anything unusual happen in pulling it off, as far as you know?" he answered "Nothing at all."

[3] Treating this testimony, however, as a clear-cut denial that there was any jerk at all, it raises a conflict. There is a conflict, also, as to whether the line was made fast to the jitney with a knot or merely by a couple of turns around the motor. These were the only conflicts in the case so far as concerns the accident itself. But a conflict does not necessarily make the case a close one. Hatfield v. Levy Bros., 18 Cal. 2d 798, 815, 117 P.2d 841.

Moreover, respondent's testimony that there was a jerk finds support in the fact that he did unquestionably sustain a ruptured disc, and ruptured discs admittedly are caused by jerks. The jury presumably treated this as corroborative of respondent's version and thus resolved that conflict in his favor. The conflict as to whether the line was tied with a knot appears to be inconsequential.

The medical evidence was free from substantial conflict. As to the main inquiry, whether the injury was a ruptured intervertebral disc of traumatic origin there was no dispute. Moreover, appellant's medical witness testified on cross examination that it does not take much of a twist or sprain to cause such a rupture.

For these reasons we are not convinced that the evidence was so evenly balanced as to indicate the probability of a different result had the challenged statement not been made. Mize v. Davy, 72 Cal.App.2d 607, 613, 165 P.2d 26; Baker v. Rodriguez, 41 Cal.App.2d 58, 62, 63, 105 P.2d 1018.

[4, 5] The trial judge heard the utterance of the two syllables, "insur—" and could determine from the tone and general character of the utterance whether it was likely to have impressed the jury in a way prejudicial to the defense, and whether it was intentional and calculated or a mere slip. He first had occasion in chambers to consider its effect when the issue was fresh, and was in a much better position than is an appellate court to weigh it in all its aspects. Lafargue v. United Railroads, 183 Cal. 720, 724–725, 192 P. 538. The record shows that he then considered it a mere slip. He had occasion to consider it again on the motion for new trial, the denial of which indicates that he adhered to his first conclusion. In Levens v. Stocco, 5 Cal.App. 2d 693, 695, 43 P.2d 357, 358, the court

said: "where the trial court denies a motion for a new trial, based upon the ground of misconduct of plaintiff's attorney, it must be deemed to have concluded that the questions were asked in good faith * * * and that no prejudice resulted therefrom [citations]." In Hatfield v. Levy Bros., supra, the Supreme Court, 18 Cal.2d at page 814, 117 P.2d at page 849 cites and follows the Levens case and says: "A denial of a motion for a new trial made upon the ground of misconduct of counsel, although not binding on this court, is entitled to great weight upon an appeal in which complaint is made of the misconduct [citations]."

The court sua sponte instructed the jury "that no insurance company is a party to this action."

[6] We are satisfied that there was no abuse of discretion in the denial of a new trial on the misconduct ground.

Appellant's only other point is that the following instruction was erroneous:

"XIV. You are not necessarily to give greater weight to the side producing the greater number of witnesses, but you are to find for the side producing that witness, or those witnesses, who is, or are, believed by you. In this regard, I instruct you that the testimony of any one witness, if believed by you, is sufficient to prove any fact or facts in dispute."

Appellant's criticism is that "it instructs the jury that the degree of proof required in a civil case is not the *preponderance of the evidence* but proof of a fact or facts to the *mere* belief of the jury." (Emphasis appellant's).

Shortly before XIV was given the following instruction was read: "IV * * * You are not bound to decide in accordance with the testimony of any number of witnesses against a less number or against a presumption or other evidence satisfying your minds. The direct evidence of one witness, who is entitled to full credit, is sufficient for proof of any fact in a civil case."

After the latter (IV) but before the former (XIV) was read, the jury was instructed as follows:

"VIII * * * The burden of proof in this case is upon the plaintiff to sustain the allegations of his complaint by a preponderance of the evidence * * *

"IX * * * by a 'preponderance of evidence' is meant such evidence as, when weighed with that opposed to it, has more convincing force * * *

"XI. When the evidence in your judgment is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your verdict should be against the party upon whom rests the burden of proof * * *"

The jury was told at the beginning and again at the end of the charge that the instructions were to be considered as a whole and that no part was to be singled out.

[7] When the instructions are read as a whole, Megee v. Fasulis, 65 Cal.App.2d 94, 99, 150 P.2d 281, no foundation is found for appellant's criticism. Instruction XIV was nothing but an elaboration and extension of instruction IV, and could not conceivably have given the jury any erroneous or unorthodox idea of the meaning of preponderance of the evidence. It did no harm to the appellant. See Radisch v. Franco-Italian Packing Co., 68 Cal.App.2d 825, 843, 158 P.2d 435.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

On Petition for Rehearing.

PER CURIAM.

After decision appellant noticed a motion to augment the record to show an earlier reference to insurance similar to that discussed in the opinion. At the time noticed there was no appearance and we denied the motion. However, the parties have stipulated that appellant's request for augmentation may be now considered.

The deficiency in the record was called to appellant's attention at oral argument but no correction was attempted, hence there is good reason to refuse such belated augmentation.

Notwithstanding this and treating the first episode as before us, a different result should not be reached since the trial court did not consider either episode (or both of them) of sufficient consequence to call for a new trial.

The petition for rehearing is denied.

PETROVICH et al. v. CITY OF ARCADIA et al.

Civ. 16714.

District Court of Appeal, Second District, Division 1, California.

April 21, 1949.

Rehearing Denied May 7, 1949.

Hearing Granted June 20, 1949. *

1. Municipal corporations 🔑375

Where contractor in making bid to construct city sewer system struck out words in printed form of bid relating to cashier's check and forfeiture and accompanied bid with a bond in excess of ten per cent of amount of bid, and contractor wilfully refused to perform after city accepted his bid, evidence sustained finding that there was no forfeiture, that amount of bond did not represent reasonable liquidated damages, and that city was not entitled to recover amount of bond from contractor and his surety. Civ.Code, §§ 1670, 1671, 3275.

2. Municipal corporations 🔑368

Provisions in bond given to city in connection with bid of contractor for construction of sewer system, providing that liability of surety on the bond to the city would be established in case of nonperformance of the work, and that performance by contractor was guaranteed, did not show agreement that contractor's failure and refusal to perform would result in forfeiture to city of amount of bond. Civ.Code, §§ 1442, 1670, 1671.

3. Municipal corporations 🔑375

If city expected to recover from contractor whose bid had been accepted for construction of sewer system, or from his surety, when he refused to do the work, either on theory of forfeiture or on that of liquidated damages, city was required to bring the case clearly within the law relating thereto. Civ.Code, §§ 1442, 1670, 1671.

4. Contracts 🔑318

Forfeitures are not favored by the law.

5. Appeal and error 🔑1010(1)

Where record disclosed substantial evidence in support of trial court's findings, appellate interference was unwarranted.

Appeal from Superior Court, Los Angeles County; Frederick F. Houser, Judge.

Action by Martin Petrovich, etc., against the City of Arcadia and others for rescission and cancellation of a bid to construct a sewer system for the City of Arcadia, and for release of principal and surety on a bid bond posted with the plaintiff's bid, wherein the City of Arcadia filed a cross-complaint against the plaintiff and the Great American Indemnity Company, as surety, seeking to recover full amount named in bid bond. From an adverse judgment, the defendants appeal.

Judgment affirmed.

T. Guy Cornyn, of Arcadia, and Burke, Marshall & Burke, of Los Angeles, for appellants.

Stephen Monteleone, of Los Angeles, for respondents.

DORAN, Justice.

The action herein was instituted by Martin Petrovich, a contractor, for rescission and cancellation of a bid to construct a sewer system for the City of Arcadia. The complaint also prayed for the release of principal and surety on a bid bond which had been posted with the contractor's bid. The City of Arcadia filed a cross-complaint against the contractor and the surety Great American Indemnity Co., seeking to recover the full amount named in the bid bond, $37,500.

The trial court decreed, in the language of appellant's brief, that the plaintiff contractor "take nothing by his complaint in which he asked for a cancellation of the bid, that he and his surety on the bid bond be discharged of all obligations thereunder, and that the city clerk return the bid bond to him, and also decreed that the city take nothing by its cross-complaint in which it prayed judgment against the contractor and the surety".

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* Subsequent opinion 222 P.2d 231.

The record discloses that, after voting a bond issue of $350,000 for sewer construction, the city council approved plans and specifications for the sewer system, and on August 6, 1946, instructed the city clerk to advertise for bids for the construction thereof, which bids were to be opened on August 20, 1946. On the latter date bids were opened and read at a meeting of the council and referred to the city engineer for tabulation, inspection, and report. In addition to the Petrovich bid, there were bids by five other contractors which were duly opened. On August 22, 1946, the city engineer and the consulting engineer recommended that the city council award the contract to respondent Petrovich; on August 26, 1946 all bids save that of respondent were rejected, respondent's bid of $347,129.40 was accepted and a contract covering the work was tendered to Petrovich.

Respondent Petrovich contends that "after these bids were opened, but before the alleged acceptance of his bid by the City of Arcadia, he discovered that his office man, who computed the bid, made an error in his computation and unintentionally failed to include in the bid the cost of certain material of a substantial amount, and accordingly, on August 22, 1946, he filed * * * a written notice indicating the above error * * * and requested that he be permitted to withdraw his bid". However, as hereinbefore stated, on August 26, 1946, the City accepted respondent's bid and presented a proposed contract which Petrovich refused to execute. As mentioned in respondent's brief, "The improvement project was never readvertised or awarded to the next highest bidder".

The City's invitation for bids provided that "Each bid must be accompanied by either a cashier's check or bid bond for the sum of Ten Percent (10%) of the total amount of the bid and made payable to the City of Arcadia as a guarantee that the bidder, if his bid is accepted, will enter into a satisfactory contract and furnish a good and sufficient bond for the faithful performance thereof and for the payment of labor and material costs in accordance with the requirements of the contract documents".

The printed form of bid furnished to prospective bidders by the city contained the provision that "A *cashier's check properly made payable to the City of Arcadia* a Bid Bond in favor of the City of Arcadia for ——— Dollars ($———), which amount is not less than ten per cent (10%) of the total amount of this proposal, is attached hereto and is given as a guarantee that the undersigned will execute the Agreement and furnish the required bond if awarded the contract and in case of failure to do so within the time provided *said check shall be forfeited to the City.* Surety's liability to the City will be established."

In this connection it may be further noted that the bid stated that the bidder had investigated the site of the work and conditions affecting the cost thereof, and that "The undersigned fully understands the scope of the work and has checked carefully all words and figures inserted in this bid and * * * that the City will in no way be responsible for any errors or omissions in the preparation of this bid".

As stated in respondent's brief, "Before submitting his bid * * * Martin Petrovich eliminated from said bid form the following words: 'Cashier's check properly made payable to the City of Arcadia' and 'said check shall be forfeited to the City' ". Accompanying said bid was a bid bond providing that the Mike Miller Company (under which name Petrovich transacted business), as principal, and Great American Indemnity Co., as surety, are held and firmly bound unto the City of Arcadia in the sum of $37,500. As stated therein, "The condition of this bond is such that if any awards made by said obligee to the above bounden principal under public invitation for proposals for (sewer) construction * * * shall be accepted by said principal and said principal shall enter into the contract for the completion of said work and give bond * * * for the faithful performance thereof, then this obligation shall be null and void; otherwise to remain in full force and effect".

The trial court found that no "error or mistake was committed by any employee of said plaintiff * * * in preparing * * * said bid, and it is not true that said bid contained any error or mistake". It was likewise found that the city, as cross-complainant, had failed to establish "that it was or is impracticable or extremely difficult to fix the amount of any damage or loss" by reason of the contractor's failure to enter into the bid contract with the City; that the $27,500 specified in the bid bond "was not liquidated nor was the same correlated to an estimate of what the actual damage might be in order to establish that it was a reasonable sum as liquidated damages;" and that "the evidence does not establish a forfeiture nor does said invitation for bid of said City of Arcadia, said bid of cross-defendant (Petrovich) or said bid bond provide for a forfeiture of the amount specified in said bid bond or any other amount for the failure of cross-defendant to enter into said contract".

The trial court in making the ruling, said: "And the Court is of the opinion that there was a willful failure to perform a duty here; and under Section 3275 of the Civil Code, there could have been a provision in the bid and in the bond providing for forfeiture in case of willful breach of duty, gross neglect, or fraudulent breach of duty. * * * But the Court does not believe that the bid itself, the form of the bid or the form of the bond, called for a forfeiture. At least, so far as the forfeiture is concerned, the language has to be very explicit that it is a forfeiture".

The City of Arcadia, as appellant, contends that the bond provides for a forfeiture and for "a statutory penalty"; that Sections 1670 and 1671 of the Civil Code, making void contracts fixing damages to be paid, except that parties may agree "upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage", do not here apply "since the case is not one for breach of any obligation"; that such sections do not apply because "the obligee of the bond is a political subdivision". It is further argued that "the bond is within the exception of Section 1671 since the actual damage is impracticable, extremely difficult and even impossible to fix in anticipation of a breach".

Respondent Petrovich takes the position that "As the records now stand, it is devoid of any evidence from which the court can state, with reasonable certainty, the parties intended the bid bond to be subject to forfeiture rather than security for actual damages sustained". In the respondent's brief it is also averred that, "Without taking any further action towards the construction of the project involved, which, from the evidence, cannot be attributed to respondents, and without showing any actual loss, appellant (city) now seeks to unjustly enrich itself at the expense of respondents".

[1] The record herein discloses substantial evidence in support of the findings of the trial court and the resulting judgment in favor of the plaintiff. These findings were to the effect that although the plaintiff "committed a wilful breach of duty in refusing to enter into the contract" after having been declared the successful bidder, nevertheless, since the bid bond did not expressly provide for a forfeiture, and since it was not established that the $37,500.00 amount specified therein represented reasonable liquidated damages "correlated to an estimate of what the actual damage might be", the City was not entitled to recover on its cross-complaint.

As stated in respondent's brief, "There appears to be no reasonable basis, either in law or in fact, justifying a reversal of the judgment on any of the contentions submitted by appellant in its brief". The cases cited by appellant, in which recovery has been approved on various theories of forfeiture or liquidated damages, are not, because of factual differences, particularly helpful in the present controversy. Nor do any of such cases require a reversal of the trial court's judgment. Appellant's contention that "It is the conduct of the contractor which made this litigation", does not solve the problem nor does it furnish a ground for reversal.

Appellant's position is, in part, predicated upon the fact that the bid bond originally contained a provision for deposit of a cashier's check and expressly stipulated that "said check shall be forfeited to the City", from which fact appellant reasons that a like situation should prevail in respect to the bid bond furnished by the contractor. However, as pointed out by respondent, the above mentioned check provision was not made use of since a bond was furnished, and the quoted provision had accordingly been deleted. It therefore formed no part of the executed arrangement, and hence can have no weight in arriving at a decision. With this provision eliminated, there is no specific, direct or indirect reference to any forfeiture.

[2] Appellant's further contention that the bond provision "Surety's liability to the City will be established", should be deemed equivalent to the term "forfeiture", is clearly untenable. It may likewise be noted that the word "guarantee" which was employed is not synonymous with the word "forfeiture".

Section 1442 of the Civil Code states that "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." And, as hereinbefore mentioned, under Section 1670 of the Civil Code, "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void," except as provided in Section 1671 that "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be inpracticable or extremely difficult to fix the actual damage."

[3, 4] Under these sections and the case law on the subject, it was the duty of the City, if it expected to recover either on the theory of a forfeiture or on that of liquidated damages, to bring the case clearly within the law relating thereto. This cannot be done by means of the broad interpretation here contended for. That forfeitures and the like are no special favorites of the law, needs no citation of authority.

[5] "On the issue of liquidated damages", quoting from respondent's brief, "whether it would be impracticable or extremely difficult to fix the actual damages was a question of fact decided adverse to appellant". Since the record discloses substantial evidence in support of the trial court's finding in this as in other particulars, under the well established rule appellate interference is unwarranted.

The judgment is affirmed.

WHITE, P. J., concurs.

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91 Cal.App.2d 357

READ v. READ.

Civ. 14014.

District Court of Appeal, First District,
Division 2, California.
April 20, 1949.

Rehearing Denied May 20, 1949.
Hearing Denied June 16, 1949.

1. Divorce 🔑263, 311

Where husband, after divorce decree, had remarried twice and acquired other family obligations, execution covering accruals for support of wife and minor children required by divorce decree prior to the five-year period was addressed to the discretion of the trial court though wife was entitled to execution as a matter of right for accruals accruing within the five-year period. Code Civ.Proc. § 685.

2. Divorce 🔑263, 311

Where both parties had remarried after divorce decree and acquired family obligations and both lived in the same city, and wife delayed fifteen years before attempting to enforce by execution husband's obligations to make payments under the divorce decree, refusal to allow execution for arrearages accruing more than five years prior thereto was not an abuse of discretion. Code Civ.Proc. § 685.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Marian Y. Read against Alfred C. Read, Jr., wherein plaintiff was granted a divorce, awarded custody of minor children, and a monthly sum of money for support of plaintiff and the children. From order denying plaintiff's motion for execution in so far as it sought execution for arrearages in support payments accruing more than five years prior to order, plaintiff appeals.

Order affirmed.

C. Ray Robinson, Willard B. Treadwell and Margaret A. Flynn, all of Merced, for appellant.

Stanley R. Sterne, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff, who had been the successful litigant in an action for divorce, moved for execution after five years under the provisions of section 685 of the Code of Civil Procedure. A decree of divorce had been entered in October, 1933, awarding plaintiff custody of the two minor children, fifty dollars a month for the support of plaintiff, and fifty dollars a month to be paid to plaintiff for the support of each minor child. The defendant having been in arrears on these payments the plaintiff filed her motion for execution on February 16, 1948. Following a hearing the order which is the subject of this appeal was made on April 22, 1948, denying the motion in so far as it sought execution for sums accruing five years prior to the order, but reserving to plaintiff the right to a writ for sums due within said five year period. On April 23, 1948, a writ of execution was directed to issue in the sum of $3600, that being the amount which had accrued during the five period.

[1] The appeal is taken from the order of April 22, 1948, and presents the single question of the right of appellant to a writ covering the sums accruing more than five years prior to the date of the order. The respondent has not filed a brief and his counsel has declined to make an appearance. On the hearing it appeared that after the divorce of these parties respondent had married another and produced two children. A divorce from the second marriage followed and respondent married another and produced one child. The third marriage ended in a divorce. These matters being before the trial court when the request for execution covering accruals prior to the five year period was presented, the issue was one addressed to the discretion of the trial court. Butcher v. Brouwer, 21 Cal.2d 354, 358, 132 P.2d 205; Lohman v. Lohman, 29 Cal.2d 144, 148, 173 P.2d 657; Di Corpo v. Di Corpo, 33 Cal.2d 195, 200 P.2d 529.

In so far as the order reserves the right to execution for the sums accruing during the immediate five year period [this reservation was covered by a subsequent order that such a writ should issue] the trial court followed the accepted rule that a writ will issue for such instalments "as a matter of right." Di Corpo v. Di Corpo, supra; Lohman v. Lohman, supra; Wolfe v. Wolfe, 30 Cal.2d 1, 4, 180 P.2d 345.

[2] As to the portion of the order of April 22, 1948, denying the application for a writ covering the antecedent instalments the appeal is controlled by the Butcher case and those cited above and the only debatable question is whether the reviewing court should say that there was an abuse of discretion. We have nothing more before us than the affidavits which were before the trial court. These show a delay of 15 years from the date of the judgment to the date of the hearing. During most of that time the parties were living in the same city of Oakland. The appellant had remarried and seems to have made only sporadic efforts to collect the payments. But it does not appear that she made any consistent effort to ascertain whether respondent had any property subject to execution.

The discretion of the trial court is just as good as ours and a better showing than that made here is necessary to justify a holding that such discretion has been abused. We need only follow the former opinion of this court in Cochrane v. Cochrane, 57 Cal.App.2d 937, 135 P.2d 714.

The order is affirmed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; CARTER J., dissenting.

91 Cal.App.2d 315

DRAPER et al. v. CITY OF LOS ANGELES et al.

Civ. 16629.

District Court of Appeal, Second District, Division 3, California.

April 18, 1949.

Rehearing Denied May 6, 1949.

As Modified May 9, 1949.

Hearing Denied June 16, 1949.

1. Automobiles ⚿175(1, 4)

To be entitled to exemption from duties imposed by Vehicle Code relative to speed laws, driving on right side of the roadway, starting, etc., driver of emergency vehicle equipped with siren must sound siren when reasonably necessary as warning to pedestrians and others of approach of vehicle. Vehicle Code, §§ 454, 671.

2. Automobiles ⚿201(1)

Where police automobile was not equipped with siren but pursued stolen automobile at high speed and stopped at intersection, but fugitive ignored stop signal and collided with another automobile crossing intersection, negligence of fugitive was sole cause of accident for which city as owner of police automobile could not be held liable in absence of evidence that police were attempting to force fugitive to the curb. Vehicle Code, §§ 454, 671.

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Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Dorothea V. Draper and Emery Lattanner against the City of Los Angeles, a municipal corporation, Howard J. Pratt, and his mother and father, for injuries sustained when an automobile driven by plaintiff Draper was struck by one driven by defendant Pratt. From the judgment, plaintiffs appeal.

Judgment affirmed.

Frank H. Love and Newmark & Hamblin, all of Los Angeles, for appellants.

Ray L. Chesbro, City Atty., Bourke Jones, Asst. City Atty., and Edwin Shinn, Deputy City Atty., all of Los Angeles, for respondent.

SHINN, Presiding Justice.

Dorothea V. Draper and Emery Lattanner sued the City of Los Angeles, Howard J. Pratt, and his mother and father for damages arising out of injuries sustained when an automobile driven by plaintiff Draper was struck by a car driven by Howard J. Pratt, plaintiff Lattanner being at the time a guest in the Draper car. The default of Howard J. Pratt was entered. The action was tried to a jury upon the complaint and answer of the city. Motion for nonsuit was denied as well as a motion for a directed verdict; the jury returned verdicts in favor of both plaintiffs and upon motion of the city judgment notwithstanding the verdicts was entered in its favor. The plaintiffs appeal. Each plaintiff sued by a separate cause of action containing identical charges of negligence. The accident happened about 2:30 p. m. Mrs. Draper was driving west on Oxnard Street across the intersection of Colfax Avenue, a north-south street, when the right rear of her car was struck by a car driven by Pratt, who approached from the north on Colfax. The cars were wrecked and came to rest southwesterly from the intersection. Pratt, who was driving a stolen car, was being pursued by Los Angeles Police Officers John E. Welker and William C. Boutelle in a city car. There were boulevard stop signs in all directions. At the intersection Pratt, approaching at some 60 miles an hour, failed to make a boulevard stop. The police car stopped at the intersection. The facts relied upon to establish negligence of the city as a proximate cause of the accident are the following: (1) The police car was not equipped with a siren; (2) the police car was not driven with due regard for the safety of persons using the highway; (3) the actions of the driver constituted an arbitrary exercise of the privilege granted to drivers of emergency cars; (4) the driver of the police car was endeavoring to force Pratt to and into the curb. The answer of the city admitted the car was not equipped with a siren but otherwise denied the acts upon which the charge of negligence was predicated. The evidence disclosed the following: The police car was parked on Tujunga immediately north of Victory Boulevard; Pratt drove westerly across that intersection on Victory Boulevard at about 50 miles an hour, disregarding a boulevard stop sign on the east side of Tujunga; he continued west at about the same speed followed by the police car traveling from 50 to 60 miles per hour. The cars entered the intersection of Victory and Lankershim Boulevard and Colfax Avenue. Lankershim comes in at an angle from the southeast, Colfax runs directly north and south. Both cars turned south on Colfax and travelled three or four blocks to Oxnard Street where the accident took place. There was testimony that after they entered Colfax, Pratt was seen to look back and increase his speed from 35 to 40 miles an hour to 60 or 70. The speed of the police car was likewise increased. There was testimony by a boy who witnessed the accident that he "dimly" noticed the police car near the Oxnard intersection 100 or 150 feet north of the intersection and that it was traveling slower than the Pratt car, the speed of which he estimated at 60 miles per hour. The driver of the police car testified that as the intersection was approached his car was not closer than 275 feet to the Pratt car and was slowing down for the intersection. There was testimony that there was a southbound car stopped at the intersection and that the Pratt car went to the right of it; also that the police car drew up to the curb and stopped at the intersection and was later parked around the corner on Oxnard. The contention of plaintiffs is that the failure of driver Boutelle to sound a siren constituted negligence and that it was a proximate cause of the collision. It is argued that the failure to have the car equipped with a siren was a violation of the Vehicle Code and that the question whether the failure to sound a siren was a proximate cause of the accident should have been submitted to the jury. Neither contention is sustainable.

Section 454 of the Vehicle Code exempts drivers of authorized emergency vehicles from the provisions of chapter 3 and chapters 6 to 13 inclusive of Division IX of the code "whenever any said vehicle is being driven in response to an emergency call or when used in the immediate pursuit of an actual or suspected violator of the law * * *. Said exemptions shall apply only when the driver of said vehicle sounds a siren as may be reasonably necessary as a warning to others," etc. The exemptions do not relieve the driver of the duty to drive with due regard for the safety of all persons using the highway nor excuse him from the consequences of an arbitrary exercise of the privilege. Section 671 requires that every motor vehicle when operated upon a highway shall be equipped with a horn which shall be blown when reasonably necessary to insure safe operation and provides: "Any authorized emergency vehicle *may* be equipped with a siren of a type approved by the department but such siren shall not be used except when such vehicle is operated in response to an emergency call or when responding to a fire alarm or in the immediate pursuit of an actual or suspected violator of the law in which said latter events the driver of such vehicle shall sound said siren when necessary to warn pedestrians and other drivers of the approach thereof."

[1] The effect of the privilege extended by section 454 is to exempt drivers of authorized emergency vehicles from the duties imposed by chapters 6 to 13 inclusive of division IX of the code which relate respectively to speed laws, driving on the right side of the roadway, starting, stopping and turning vehicles, rules of right of way of vehicles and pedestrians, passing streetcars, making special stops, and stopping, standing or parking. To be entitled to the exemption the driver must sound a siren when the same is reasonably necessary as a warning to pedestrians and others of the approach of the emergency vehicle. Sections 454 and 671 merely authorize the use of sirens on emergency vehicles. It is not required equipment. If there is a siren on the car it must be sounded in some circumstances in order to excuse the failure to observe certain statutory rules that apply to the operation of other vehicles. If the vehicle has no siren, or if it has one and the drivers fails to use it when it is reasonably necessary to do so in order to warn pedestrians and other drivers of his approach, he he is required to obey the above mentioned traffic laws that apply to the operation of all other vehicles. He can then claim no exemption. The conduct of Officers Wel-

ker and Boutelle was to be judged according to their duties as drivers of a nonexempt car. That the police car was traveling as fast as 60 miles an hour is not disputed but it is, of course, immaterial what its speed may have been, inasmuch as it came to a stop at the intersection of Oxnard. If somewhere on the road it was not driven with due regard to the safety of others who were using the highway, plaintiffs were not among those whose safety was endangered thereby.

[2] After stating their contention that section 671 should be so construed as to require every authorized emergency vehicle to have a siren plaintiffs say: "The sole remaining question is whether or not the sounding of a siren was necessary to warn other drivers of the approach of the police vehicle." One answer, as we have seen, is that it was not necessary that the car be equipped with a siren. Another complete answer is that it was not reasonably or at all necessary for the officers to give warning of their approach to the intersection. There was undisputed evidence that they intended to and did stop when they reached the intersection, and that they parked their car on the north side of Oxnard west of Colfax.

The officers, of course, were not required to warn pedestrians or other drivers to keep out of the way of the Pratt car. Pratt's actions were distinct from theirs and placed no responsibility upon them. It is true that he was endeavoring to escape from them and for that reason, perhaps, was driving recklessly but that was his affair, not theirs. Although the pursuit no doubt contributed somewhat to his reckless driving, the officers were under no duty to allow him to make a leisurely escape. There was no evidence whatever that they were endeavoring at the time to force his car to the curb. They owed no duty to plaintiffs except to operate their own car with due care and they fulfilled this duty. The failure to have a siren on the car or to use one under the circumstances was not a violation of law. There was no evidence of negligence on the part of the officers. The court properly held as a matter of law that the negligence of Pratt was the sole cause of the accident. Judgment notwithstanding the verdicts was proper.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

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91 Cal.App.2d 336

STRONG v. OWENS et ux.

Civ. 16796.

District Court of Appeal, Second District, Division 2, California.
April 19, 1949.

1. Judgment 🔑948(1), 952

A party, in order to avail himself of plea of res judicata, must allege affirmatively the prior judgment in his pleading if there be an opportunity to do so, and, if there be no such opportunity, the judgment itself may be used as evidence. Code Civ.Proc. § 1962, subd. 6.

2. Judgment 🔑948(1)

The defense of res judicata is waived unless pleaded.

3. Habeas corpus 🔑119

In proceeding by natural mother against natural father and his wife for custody of illegitimate child which had been placed in home of father and his wife with consent of mother, father and wife would be deemed to have waived defense that decision adverse to mother in her prior habeas corpus proceeding for delivery of child was res judicata, where father and wife did not plead such defense, and file in habeas corpus proceedings was introduced by defendants with understanding that defendants would ask later to amend their pleadings to show such defense and no such amendment was ever offered. Code Civ. Proc. § 1962, subd. 6.

4. Bastards ⚷15

In proceeding by natural mother against natural father and his wife for custody of illegitimate child which had been placed in home of father and his wife with consent of mother, admission of letter from mother's husband disclosing husband's willingness to receive child in husband's home and to support child, if error, was not prejudicial, since consent of mother's husband was unnecessary. Civ.Code, § 200.

5. Bastards ⚷15

Under statutes, mother of illegitimate child either has absolute right to custody of child or equal right with the father if the child has been legitimated by adoption. Civ.Code, §§ 200, 230.

6. Infants ⚷19

The trial court has a large measure of power in fixing custody of children and, in absence of showing of manifest abuse of discretion, its decree will not be interfered with on appeal.

7. Bastards ⚷15

The court's determination that best interest of illegitimate child would be subserved by giving custody to mother instead of to father and his wife would be conclusive on reviewing court in absence of evidence of abuse of discretion. Civ.Code, §§ 200, 230.

8. Bastards ⚷15

Awarding custody of illegitimate child to mother instead of to father and his wife without restricting right of mother to remove child from jurisdiction of court was not abuse of discretion. Civ.Code, §§ 200, 230.

9. Bastards ⚷15

The father of illegitimate child whose custody was awarded to mother would be granted right of visitation if he desired such right. Civ.Code, §§ 200, 230.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Child custody proceeding by Elizabeth Yeldell Strong against Stacey Elliott Owens and Fay Owens, his wife. From a judgment, the defendants appeal.

Affirmed.

Simon, Fox & Fraider, Stanley E. Fox, and A. David Kagon, all of Beverly Hills, for appellants.

E. Marshall Bitgood, of Los Angeles, for respondent.

WILSON, Justice.

From a judgment granting plaintiff the exclusive custody and control of her minor child, defendants appeal.

Plaintiff is the natural mother of the infant in question who was born July 13, 1945, and for whose custody she has petitioned. The child is the issue of a clandestine love affair between plaintiff and defendant Stacey Elliott Owens. At the time of his birth and at the time of trial plaintiff was married to Henry Strong, Jr., and defendant Owens, the acknowledged father of the child, was married to defendant Fay Owens. Plaintiff's husband is a sergeant in the United States Army, stationed outside California. When the child was born, neither the spouse of plaintiff nor of Owens had knowledge of it. Defendant Fay Owens first learned about the situation when plaintiff called her on the telephone about seven months later.

At the time plaintiff and the child were discharged from the hospital, plaintiff went to the home of a friend and the infant was immediately placed, with the aid of the Children's Bureau of the City of Los Angeles, in the home of a Mrs. Johnson in Monrovia. During the first year of his life the child was transferred to two other homes and in August, 1946, with the consent of plaintiff, he was taken by defendants into their home. About seven months later plaintiff asked Owens for custody of the child, which he refused and she thereupon brought this action on May 12, 1947. On August 5, 1947, plaintiff filed a petition for a writ of habeas corpus, praying that the child be delivered to her. The matter was heard on August 8, 1947, and the writ was denied.

Defendants contend that (1) the denial of the petition for a writ of habeas corpus was an adjudication upon the question of the right to custody and is res judicata as to this proceeding; (2) it was error for the trial court to permit the introduction into evidence of a "certificate" in the form of a letter from plaintiff's husband for the purpose of proving her allegation that her husband desired to receive the child into his home and to assume responsibility for his support, and (3) it was an abuse of discretion for the court to award exclusive care and custody of the child to plaintiff without restricting her right to remove him from the jurisdiction of the court and without providing safeguards whereby she would be required to cooperate in making reasonable arrangements for Owens to visit the child and to keep him advised as to the child's whereabouts.

Defendants' contention that the habeas corpus proceeding is res judicata of the issues in the instant proceeding is untenable. The record discloses the following colloquy when the file in the habeas corpus proceeding was offered in evidence:

"Mr. Fox: It occurred to me as we recessed yesterday that I should like to offer an additional defense and discuss it later at the proper time. However, I wanted counsel to have the opportunity of being aware of my intention as soon as possible, and with that in mind I asked the clerk to procure for me the file of the Superior Court of the State of California No. 23191. It was a habeas corpus matter, in the Matter of Stacey Elliott Owens, in which the heading is 'Elizabeth Yeldell Strong, Plaintiff, vs. Stacey Elliott Owens and Faye Owens, his wife, Defendants,' and *I shall ask later that we may have the additional defense by way of answer, of res judicata,* at which time I shall argue further about the petition herein being denied, *and for that purpose I ask that this file be received in evidence* and referred to. [Emphasis added.] * * *

"Mr. Taintor: No objection. Of course, we will have an opportunity to make a few comments about that ourselves.

"The Court: Oh, yes.

"Mr. Fox: I merely make it at this time, as I say, for your benefit.

"The Court: So that he won't be surprised.

"Mr. Fox: That is right, your Honor."

[1, 2] The record is devoid of any motion to amend the pleadings and no amendment has been filed. A party in order to avail himself of the plea of res judicata must allege affirmatively such judgment in his pleading if there be an opportunity to do so and if there be no such opportunity the judgment itself may be used as evidence. Sec. 1962, subd. 6, Code Civ.Proc.; Madruga v. Borden Co., 63 Cal.App.2d 116, 123, 146 P.2d 273; Rideaux v. Torgrimson, 12 Cal.2d 633, 638, 86 P.2d 826. The defense of res judicata is waived unless it is pleaded. Reeh v. Reeh, 69 Cal.App.2d 200, 206, 158 P.2d 751.

[3] Defendants urge that despite the fact the defense was not pleaded, it was presented without objection and it is too late for plaintiff to object to the defense on appeal. The file in the habeas corpus proceedings was introduced with the understanding that defendants would ask later to amend their pleadings to show the additional defense and the file was offered in evidence solely so that plaintiff's counsel would not be surprised. Defendants not having availed themselves of the defense by affirmatively pleading it have waived it.

[4] The certificate which defendants contend was erroneously received in evidence consists of a letter from plaintiff's husband in which he declared his willingness to receive the child in his home and support him. The letter in question was introduced for the sole purpose of rebutting letters previously introduced into evidence by defendants whereby they attempted to show that plaintiff's husband was not in favor of taking the child. The trial court admitted it for that limited purpose, stating that it could go in for what it was worth. Moreover, if it were error for the court to have admitted the so-called "certificate," it was not prejudicial since the consent of plaintiff's husband is not necessary.

[5] Under section 200 of the Civil Code the mother of an illegitimate child is en-

titled to its custody. If the father complies with the requirements of section 230 of the Civil Code for the adoption of an illegitimate child its status becomes that of the legitimate child of both of its natural parents and, as stated in In re Navarro, 77 Cal.App.2d 500, 505, 175 P.2d 896, 899, "the rights of the child and of the parents thenceforth are the same as they would be had the child been born of the marriage of its natural parents. To this extent, then, the rights of the natural mother as set forth in section 200 of the Civil Code are modified for the benefit of the child, and neither of such parents has a superior right to its custody, services or earnings." Thus, plaintiff as the mother of the illegitimate child either has an absolute right to its custody or an equal right with that of its father if the child be considered as having been legitimated by adoption.

[6, 7] The trial court in considering the interest and welfare of the child found that it was for the best interest of the minor to place him in the custody of his mother. Neither of the parties has contended that the other is unfit and there is no evidence that either is not a fit and proper person to have custody. There is evidence that both are able to care for and support the child. The trial court has a large measure of power in fixing the custody of children and in the absence of a showing of manifest abuse of discretion its decree will not be interfered with on appeal. Runsvold v. Runsvold, 61 Cal.App.2d 731, 733, 143 P.2d 746. The trial court having determined that the best interest of the child will be subserved by giving the mother custody and there being no evidence of an abuse of discretion, its decision is conclusive upon this court. In re Navarro, supra, at page 77 Cal.App.2d 509, 175 P.2d 896; Munson v. Munson, 27 Cal.2d 659, 666, 166 P.2d 268.

[8] Defendants' final contention that it was an abuse of discretion for the trial court to award custody of the minor child to plaintiff without restricting her right to remove him from the jurisdiction of the court is likewise untenable. In the case of White v. White, 68 Cal.App.2d 650, 651, 157 P.2d 415, it was held that the trial court did not abuse its discretion in permitting a divorced mother, following her remarriage, to take her child of whom she had custody from the state. We see no reason, therefore, why it should be an abuse of discretion for the trial court in the instant case not to enjoin the mother from taking the child from the state. See also Engasser v. Engasser, 75 Cal.App.2d 80, 82, 170 P.2d 116.

[9] No reason has been advanced for the denial to the father of his right to visit his child and if he desires to do so he has a right to be admitted to see the infant at all convenient times. Wand v. Wand, 14 Cal. 512, 518.

The judgment is affirmed without prejudice to the right of defendant Stacey Elliott Owens to petition the court for an order requiring plaintiff to make reasonable arrangements for him to visit the child and to keep him advised at all times of the address where the child is domiciled.

MOORE, P. J., and McCOMB, J., concur.

90 Cal.App.2d 783

PEOPLE v. RUSH.

Cr. 600.

District Court of Appeal
Fourth District, California.
March 22, 1949.

Robbery 🔑24(1)

Evidence sustained conviction of robbery while armed with a gun following two previous convictions of felonies. Gen.Laws, Act 1970, § 2.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Melvin Rush was convicted of robbery while armed with a gun following two previous convictions of felonies and from the judgment and an order denying his motion for a new trial he appeals.

Judgment and order affirmed.

Raymond A. Ferrario, of Oakland, for appellant.

Fred N. Howser, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with robbery while armed with a gun and, in a second count, with a violation of section 2, Act 1970 of 1 Deering's General Laws, Stats. 1923, p. 695, as amended. He was further charged with two previous convictions of felonies, both being burglaries. A jury found him guilty on both counts, and found against him with respect to both prior convictions. He has appealed from the judgment and from an order denying his motion for a new trial.

Appellant's main contention is that the evidence is insufficient to support the judgment. About 10 p. m. on April 8, 1948, the appellant came to a service station in Fresno and purchased a cigar. Just before 12 that night he returned and asked for some fuses. When the attendant opened the cash register to make change the appellant threatened him with a large service-type revolver and took the contents of the cash register, amounting to about $480, including $325 in cash and some checks. He then demanded that he be given a green bag with other money, which was in a safe. While this was going on a Fresno attorney drove into the station for gas and, getting no service, walked to the door. He then saw the appellant waving a gun at the attendant near the safe. The attorney ran across the street and the police were called. When they arrived the appellant had left.

On the morning of April 9, the appellant went to a cafe in Fresno and although the proprietors had known him for some years they refused to cash some checks which he had. He then tore four checks into small pieces and left them there rolled up in a paper napkin. These checks were turned over to the police, pasted together, and introduced in evidence. They were checks which had been taken from this service station in the robbery in question. The next day, April 10, the appellant was arrested in Mendota. A service revolver exactly similar to the one used in this robbery was found in his car.

In addition to the other evidence, the appellant was positively identified by the service station attendant and by the attorney. He attempted to establish an alibi, claiming that he was in Firebaugh at or about the time the robbery occurred. A woman testified that she owned a restaurant in Firebaugh; that the appellant came in and ate between 11 and 12 on the night of April 8; that he asked her and her husband if they would be witnesses for him "in a robbery"; and that this occurred about April 8, "in there somewhere." Her husband testified that the appellant came in about 11:30 or midnight on that night, and told them that he had been "cornered" on a robbery charge. Evidence was introduced that at another time, prior to the trial, this witness had told the officers that he did not know exactly what date it was when the appellant had come into the restaurant. Another witness testified that he was a janitor at this restaurant in Firebaugh, and that the appellant came in there on the night of April 8 at about 10 or 10:15. He then testified that he did not know the date when this occurred until the appellant, later on, told him what date it was.

The appellant, on the stand, told a confused story which varied materially from the story he told the officers immediately after his arrest. The prior convictions were proved beyond question. The evidence on the other issues speaks for itself, and the contention here made is entirely without merit.

It is further suggested that the district attorney committed prejudicial error during the course of the trial. No references to the transcript are made in support of this charge and it is difficult to determine what error, if any, the writer of the brief had in mind. A reading of the record discloses no such error, prejudicial or otherwise.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concurred.

90 Cal.App.2d 879

OIL WORKERS INTERNATIONAL UNION C.I.O. v. SUPERIOR COURT OF CONTRA COSTA COUNTY et al.

Civ. 14088.

District Court of Appeal, First District, Division 1, California.

March 2, 1949.

Rehearing Denied April 1, 1949.

Hearing Denied April 28, 1949.

1. Certiorari ⚿44, 45

The District Court of Appeals has power to permit an amendment of its writ of certiorari or to issue a supplemental writ in order to permit a hearing on the merits and in aid of the proper administration of justice.

2. Certiorari ⚿42(9), 44, 60

Where neither original petition for certiorari nor the court's writ thereon, called for the full record, motion to quash the proceedings would be denied, motion to file an amended petition would be granted and a supplemental writ directing the return of the complete record less the documents already filed would be directed to issue.

◆

Certiorari by Oil Workers International Union, C. I. O. to review a decision by the Superior Court of Contra Costa County. On motion to quash proceedings, and motion to amend petition so as to call for a full record.

Orders in accordance with opinion.

Edises, Treuhaft & Condon and Bertram Edises, all of Oakland, and Lindsay P. Walden, of Denver, Colo., for petitioner.

Tinning & DeLap, of Martinez, for respondents.

PETERS, Presiding Justice.

In order to permit counsel for respondents to preserve their rights by filing a writ of prohibition with the Supreme Court, if they so desire, the following oral opinion is filed and the reporter is directed to prepare copies of this oral opinion and to present them to Mr. Tinning and Mr. Condon and one is to be filed as the order of this court.

The original petition and the writ heretofore issued did not call for the full record. The petitioner has filed a notice of motion to amend the petition, which as amended in open court pursuant to the order of the court, calls for a full record. Respondents have made a motion to quash the entire proceedings on the ground that the writ heretofore issued is void inasmuch as it does not call for a full record. Counsel for respondents concedes that this court has jurisdiction of the parties and the subject matter and that if they filed a demurrer or a stipulation or failed to object, the court could proceed with an incomplete record and concedes that a new petition could be filed right now calling for a full record, but urge that this court is without power to amend its writ already issued and must quash the proceedings.

[1] None of the cases cited go to such an extreme. No such arbitrary limitations on our power exist. This court possesses the power to permit an amendment of its writ or to issue a supplemental writ in order to permit a hearing on the merits and in aid of the proper administration of justice.

[2] The motion to quash now before us is denied. The petition to file an amended petition is granted and it is hereby ordered that a supplemental writ of certiorari issue which will provide for the return of the complete record less the documents already filed. The return date for such supplemental writ is fixed as May 1, 1949.

Petitioner is granted until 30 days after the return date to file its opening brief. The respondent 30 days thereafter to file its brief. Petitioner 20 days to file their reply. The cause is then to be placed upon the calendar for oral argument.

The motion of petitioner made in open court to amend the amended petition in two respects is denied. The request of various amici curiae to file briefs on behalf of the petitioner is granted. They are granted until the date fixed for the filing of the petitioner's opening brief to file such briefs. Amici curiae will have no right without further order of the court to file further briefs. The court will not now limit the extent of such amicus curiae briefs, but states that only issues properly raised by the parties will be considered by the court.

The record should indicate that the views here expressed are unanimous.

WARD, and BRAY, JJ. concurred.

91 Cal.App.2d 524

PEOPLE v. SIMCICH.

Cr. 4300.

District Court of Appeal, Second District, Division 3, California.

April 28, 1949.

1. Infants 🔑20

Evidence sustained conviction of defendant for violation of section 288 by offenses committed on three young girls. Pen.Code, § 288.

2. Criminal Law 🔑823(4)

Instruction that whether children consented to conduct of defendant was immaterial except as tending to show a circumstance in the whole set of circumstances to be considered in determining innocence or guilt of defendant of a violation of section 288 was not error on ground that want of consent was highly material in determining specific intent of defendant, where instruction was given which defined offense in language of the statute. Pen.Code, § 288.

3. Infants 🔑20

In prosecution for violation of section 288 by offenses committed against children, instruction defining the words "lewd and lascivious" was not necessary in view of the evidence. Pen.Code, § 288.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Matt Simcich was convicted of a violation of Pen.Code, § 288, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Appellant was convicted in a jury trial of three charges of violation of section 288 of the Penal Code. He appeals from the judgments urging insufficiency of the evidence to establish his guilt and error in the instruction of the jury.

[1] The victims were three girls, one nine years of age and the other two aged eleven. The scene of the offenses was a public park in the Arroyo Seco in the city of South Pasadena and the time was early on a Sunday afternoon. Defendant, over sixty years of age, was acquainted with one of the girls and with the members of her family, who had been his business customers. He met the three girls early in the afternoon in the park; there were a few other children playing there and one couple, a man and woman, who were lying on the grass. According to the testimony of the girls, defendant, after conversing with them for awhile, suggested that he would go down the bank to the bed of a stream that ran through the park and that they should follow him; that he preceded them, motioned for them to come and that they joined him at a point near the bed of the stream. Each of the girls testified that defendant then engaged in conduct with her and with the other two which would constitute the offenses charged. The contention that the testimony given by the girls was inherently improbable and without evidentiary value cannot be sustained. Their accounts of the occurrence were stated intelligently, clearly and with a minimum of contradiction of the testimony which they had given at the preliminary examination. Moreover, although defendant denied having committed

the acts of which he was accused, his testimony went far to corroborate that given by the prosecuting witnesses.

[2, 3] The jury was instructed to the effect that whether the children consented to the conduct was immaterial except as it might tend to show a circumstance in a whole set of circumstances to be considered in determining the innocence or guilt of the defendant. It is contended that evidence of consent or want of consent was highly material in determining the question as to the specific intent of the defendant. The claim is without merit. An instruction was given which defined the offense in the language of the statute. It is contended that the court should have given an instruction defining the words "lewd and lascivious." In view of the evidence there was no necessity for such an instruction.

There is no merit in the appeal and the judgments are affirmed.

WOOD and VALLÉE, JJ., concur.

91 Cal.App.2d 203

DENNIS v. GONZALES et al.

Civ. 16570.

District Court of Appeal, Second District,
Division 2, California.
April 12, 1949.

Rehearing Denied April 22, 1949.
Hearing Denied June 9, 1949.

1. **Municipal corporations** 🔑703(3)

City ordinance forbidding any person to stand on any roadway or park his vehicle on a roadway other than parallel to, and within 18 inches of, the curb, was designed to prohibit the use of a road by idlers, or any aimlessly there.

2. **Automobiles** 🔑245(72)

Motorist who stood behind his stalled automobile at night waving a flashlight to procure assistance from oncoming motorists, and who was struck by truck, was not rendered guilty of contributory negligence as a matter of law so as to preclude recovery for injuries, by city ordinance forbidding a person to stand on any roadway.

3. **Municipal corporations** 🔑594(1)

Regulatory ordinances of a city must be so interpreted as to give them a rational meaning.

4. **Automobiles** 🔑245(72)

In action against owner and driver of truck, for injuries sustained by motorist when struck by truck while motorist was standing behind his stalled automobile at night waving a flashlight to procure assistance, whether motorist was negligent was for jury.

5. **Negligence** 🔑136(9, 26)

Contributory negligence is ordinarily a question for jury and becomes a question of law only when court determines that but one inference can reasonably be drawn from the evidence.

6. **Negligence** 🔑65

Whether established facts constitute contributory negligence, as a matter of law, depends on the existing circumstances.

7. **Negligence** 🔑82

To be a defense, negligence of the plaintiff must be a proximate cause of plaintiff's injury.

8. **Negligence** 🔑122(1)

Burden of proving plaintiff's negligence to be the proximate cause of plaintiff's injury rests on defendant.

9. **Negligence** 🔑136(25)

Even though an act constitutes negligence per se, it is ordinarily a question for the jury whether such negligence proximately contributed to accident.

10. **Negligence** 🔑136(25)

Question whether negligence was proximate cause of injury is a fact question for jury.

11. **Negligence** 🔑136(26)

Only when facts are clearly settled, and course which common prudence dictated can be readily discerned, should court decide issue of contributory negligence as a matter of law.

12. Negligence ⚷136(9)

Issue of contributory negligence is one of fact for jury unless court can say that reasonable minds can draw but one inference which points unerringly to the negligence of the plaintiff, and that it has proximately contributed to his injuries.

13. Trial ⚷295(1)

One may not extract from entire charge a single instruction and successfully contend that such instruction must contain all elements necessary to substantiate a verdict.

14. Death ⚷103(3)

Where conclusion is warranted that decedent was contributorily negligent as a matter of law, court should take case from jury unless statutory presumption that decedent was using due care was sufficient to create a conflict in the evidence and sustain a verdict for the plaintiff.

15. Automobiles ⚷242(8)

Where motorist whose automobile stalled in street at night stood behind automobile waving flashlight to procure assistance from oncoming motorist, and, at trial of action for injuries sustained when struck by truck, he testified that he remembered three automobiles passing him, but that his next consciousness came 14 days later in hospital, jury was properly instructed that motorist was presumably exercising due care.

McCOMB, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by William Charles Dennis against Pedro Gonzales, also known as Pedro Gonzalez, and Arthur Flores Cordero, to recover for injuries sustained by the plaintiff when struck by a truck. From a judgment for the plaintiff, the defendants appeal.

Judgment affirmed.

Syril S. Tipton, of Los Angeles (Patrick H. Ford, of Los Angeles, of counsel), for appellants.

Harrold A. Binnard and Samuel L. Kurland, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

While driving westerly on Highway 66, battery trouble developed in respondent's automobile. After his fourth attempt to make repairs, he drove about four blocks further when the motor sputtered and died. His attempts to restart his engine were of no avail. The car had come to rest in the very center of the three west-bound lanes. Respondent attempted by waiving a flashlight to procure assistance from oncoming motorists. At the trial he remembered three cars' having passed him on the left, but his next consciousness came fourteen days later in the county hospital. He had stood in the path of a truck operated by appellant Cordero and owned by appellant Gonzales who was asleep in the vehicle at the time of the impact. The trial of the action resulted in a verdict and judgment for plaintiff, from which comes this appeal.

[1-4] Appellants' principal contention is that respondent was guilty of contributory negligence as a matter of law in that he was at the time violating a city ordinance[1] and a statute.[2] The two sections of the ordinance forbid (1) a person to stand on any roadway and (2) a person to stand or park his vehicle on a roadway other than parallel to, and within 18 inches of the curb. The ordinance was clearly designed to prohibit the use of a road by idlers or by anyone aimlessly there. A denial of the use of a road by the operator of any vehicle to retrieve his merchandise, his dog or his child could not reasonably

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[1] Pomona City Ordinance, No. 907, section 74. "It shall be unlawful for any person to stand, or sit, in any roadway."

Pomona City Ordinance, No. 907, section 96. "It shall be unlawful for any person to stop, stand, or park, any vehicle in a roadway other than parallel with the curb and with the two right hand wheels of such vehicle within eighteen (18) inches of the regularly established curb line, except in those streets which have been marked for angle parking."

[2] Vehicle Code, section 562(a). "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway."

have been in the contemplation of the legislature. Nor could it have been intended that a driver should not stand upon a highway behind his stalled automobile to protect it from destruction by a careless motorist or to save the latter from his own destruction by colliding with the standing car. To construe the ordinance as an arbitrary command for every operator of a motor car that suddenly halts on a roadway to hasten for safety to the adjoining fields or to mount an adjacent cliff would render such a law ridiculous. Regulatory ordinances must be so interpreted as to give them a rational meaning. The act of respondent in standing behind his car for the purpose of signaling the oncoming traffic was done in the normal course of a motorist who had suffered an accident. Whether he was negligent in view of the ordinance and of the conditions was a question of fact for the jury.

As to section 96, it cannot be said that respondent wilfully parked or stood his automobile on the highway. It was stalled and his testimony was that he was in quest of aid to enable him to remove it to a position of safety. The jury impliedly found that his testimony was true. Statutory standards of behavior are intended to govern conduct in situations where there are no reasons for acting to the contrary. To walk upon the highway and aimlessly discharge a machine gun into passing traffic would be murder; but to shoot down a bandit in his attempt to rob travelers would be a virtue entitling the actor to generous rewards. Having heard respondent's explanation for standing on the roadway and for the presence of his car more than 18 inches from the curb line, it was for the jury to determine whether he was negligent and if so whether such negligence contributed to his injuries. Section 562(a), Vehicle Code, is not pertinent to the issue. Respondent did not attempt to cross the highway.

[5] Motorists pushing or standing near their own stalled automobiles are not thereby necessarily guilty of contributory negligence as a matter of law, but the question is one for the triers of fact. Graves v. Kern County Transp. Corp., 112 Cal.App. 261, 268, 296 P. 902; Wright v. Ponitz, 44 Cal.App.2d 215, 220, 112 P.2d 25; Shannon v. Thomas, 57 Cal.App.2d 187, 194, 134 P.2d 522; Rath v. Bankston, 101 Cal.App. 274, 279, 281 P. 1081; Giorgetti v. Wollaston, 83 Cal.App. 358, 363, 257 P. 109. Therefore appellants' contention is groundless unless the rule enunciated in the cited authorities is inapplicable to the facts at bar. The cases cited by appellants in support of their proposition that the respondent's acts in leaving his car in the second lane and in standing behind it were negligence per se hold to the contrary. Shimoda v. Bundy, 24 Cal.App 675, 683, 142 P. 109; George v. McManus, 27 Cal.App. 414, 416, 150 P. 73. Conceding that the violation of a statute or ordinance is negligence as a matter of law, it does not follow that under all circumstances a violation constitutes contributory negligence. Just as the negligence of a defendant is not tantamount to liability unless the negligence proximately causes injury to plaintiff so the negligence of a plaintiff will not bar his recovery unless his own negligence has proximately caused his injury. His conduct may be negligent but it is not contributory negligence unless it proximately contributes to his injury. Contributory negligence, like negligence, is ordinarily a question for the jury and becomes a question of law only when the court determines that but one inference can reasonably be drawn from the evidence. Flores v. Fitzgerald, 204 Cal. 374, 376, 268 P. 369; White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086; Ross v. Pacific Electric R. Co., 39 Cal.App. 658, 660, 179 P. 538.

[6-10] Whether the established facts constitute contributory negligence as a matter of law may not be easily determined. Their solution depends upon "the existing circumstances in each particular case." White v. Davis, supra. To be a defense the negligence of the plaintiff must be a proximate cause of the injury. The same rules of causation apply and the burden of proof rests upon the defendant. Rush v. Lagomarsino, 196 Cal. 308, 310, 237 P. 1066; Gaster v. Hinkley, 85 Cal.App. 55, 61, 258 P. 988; Hartford v. Pacific Motor Trucking Co., 16 Cal.App.2d 378, 380, 60 P.2d

476; Rest., Torts, 465. Even though the act constitutes negligence per se it is ordinarily a question for the jury whether such negligence proximately contributed to the accident. Sharick v. Galloway, 19 Cal.App. 2d 693, 696, 66 P.2d 185; Cadwell v. Anschutz, 4 Cal.2d 709, 710, 52 P.2d 916. Just as in the case of negligence the question of proximate cause is one of fact for the jury. Fennessey v. Pacific Gas & Electric Co., 20 Cal.2d 141, 145, 124 P.2d 51; Jackson v. Utica Light & Power Co., 64 Cal.App.2d 885, 891, 894, 149 P.2d 748; Stockwell v. Board of Trustees, 64 Cal.App.2d 197, 148 P.2d 405. In Mathers v. County of Riverside, 22 Cal.2d 781, 141 P.2d 419, the trial court had instructed the jury that if the plaintiff violated section 525 of the Vehicle Code which requires driving as close as practicable to the right edge of the road she was guilty of contributory negligence. The order granting a new trial was affirmed on the ground that "it should have been left to the jury whether or not the position of her car with reference to the white line constituted contributory negligence." In Satterlee v. Orange Glenn School District, 29 Cal.2d 581, 588, 589, 590, 177 P.2d 279, 284, the rule was declared to be: "Ordinarily, the excuse relied upon by the violator presents a question of fact for the jury's determination. * * * under unusual conditions, it is generally held that circumstances may be shown to excuse the violation"; that the presumption of negligence arising from a violation "may be rebutted by showing that the act was justifiable or excusable under the circumstances." An exhaustive research discloses no holding contrary to the foregoing although some decisions appear at first glance to differ from them in material respects. For instance, in Reeves v. Lapinta, 25 Cal.App.2d 680, 78 P.2d 465, the *trial court determined* that the evidence showed contributory negligence per se and it was affirmed. But that decision was questioned by Connard v. Pacific Electric R. Co., 14 Cal.2d 375, 379, 94 P.2d 567, 569, where it is said, "That decision contains a correct statement of the general rule as to the effect of negligence per se, but it gives only a meager statement of the facts which gave rise to application of the rule. * * * It is quite likely that the factual situation in that case was distinguishable from that of the present one." Plaintiff Connard had suffered a directed verdict because at the time of receiving his injuries he was violating an ordinance which forbade a person to alight from a street car in motion or to ride upon the steps of a street car. The court suggested that it was doubtful whether the plaintiff was riding on the steps within the meaning of the ordinance and that such was a question for the jury. In Kibler v. Stone, 20 Cal.App.2d 377, 67 P.2d 106, the trial court determined that the plaintiff was not guilty of contributory negligence although she had seen the traffic signal change to "caution," and the judgment was affirmed. In Lorry v. Englander Drayage and Warehouse Company, 108 Cal.App. 116, 291 P. 467, the trial court determined from the evidence that plaintiff's violation of a San Francisco ordinance proximately contributed to the plaintiffs' injuries and its judgment was affirmed. Satterlee v. Orange Glenn School District, supra, was reversed by reason of the failure of the trial court to read to the jury section 550 of the Vehicle Code after the defendant's evidence showed that its bus had not only approached from the right but had actually entered the intersection before the plaintiff's automobile had arrived. In Leek v. Western Union Telegraph Co., 20 Cal.App.2d 374, 66 P.2d 1232, judgment for plaintiff was reversed because plaintiff stepped from her position of safety on the curb into a traffic-congested street before the semaphone indicated that it would be safe for her to proceed and while the flow of traffic continued along the street she attempted to cross. No circumstance was shown as an excuse for her conduct but the facts disclose that defendant's bicycle was hurled against her by the act of a third party.

[11, 12] It is only when the facts are clearly settled and the course which common prudence dictated can be readily discerned that the court should decide the issue as a matter of law. In Zibbell v. Southern Pacific Company, 1911, 160 Cal. 237, 241, 116 P. 513, 515, Justice Henshaw adopted the language of a prior decision, to wit: "It is only where no fact is left in doubt, and no deduction or inference other

than negligence can be drawn by the jury from the evidence, that the court can say as a matter of law that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." In divers phrases the rule has been repeated in innumerable decisions including Shannon v. Thomas, 57 Cal.App.2d 187, 194, 134 P.2d 522, where it was held that the issue of contributory negligence is one of fact for the jury unless the court can say that reasonable minds can draw but one inference from the evidence, namely, an inference, pointing unerringly to the negligence of the plaintiff in violating the statute and that it has proximately contributed to his injuries. After such facts have been affirmatively determined the jury must then find whether or not the violation proximately contributed to the accident; also, whether the violation was excusable or justifiable. Sharick v. Galloway, 19 Cal. App.2d 693, 696, 66 P.2d 185; Rivera v. Hasenjaeger, 29 Cal.App.2d 431, 433, 85 P.2d 167. See also Hilbert v. Olney, 17 Cal.App.2d 135, 138, 61 P.2d 941; Skaggs v. Wiley, 108 Cal.App. 429, 433, 292 P. 132; Smith v. Occidental & Oriental Steamship Co., 99 Cal. 462, 34 P. 84.

Appellants further contend that respondent's predicament was not such an emergency as to justify a violation of the statute and ordinance. It is unnecessary to discuss the authorities cited by appellant in view of Satterlee v. Orange Glenn School District, 29 Cal.2d 581, 588, 177 P.2d 279, where the court held that while an act done in violation of an ordinance or statute is presumptively negligence, yet the presumption is not conclusive and may be rebutted by proof that the act was justifiable or excusable under the circumstances. Thus, in the light of the evidence, the issue of contributory negligence was properly left to the jury.

Instructions Not Prejudicial.

[13] Appellants also contend that certain instructions were erroneous in that (1) they did not "list substantially all important factors or elements involved" and (2) they were contradictory. In asserting the deficiencies of specific instructions appellants overlook the many other instructions pertinent to the issue of contributory negligence some of which were requested by themselves. One may not extract from the entire charge a single instruction and successfully contend that it must contain all the elements necessary to substantiate a verdict. Stroud v. Hansen, 48 Cal.App.2d 556, 562, 120 P.2d 102; Callet v. Alioto, 210 Cal. 65, 70, 290 P. 438; Barlow v. Crome, 44 Cal.App.2d 356, 361, 112 P.2d 303. If each instruction had to be all-encompassing the court would be limited to but one instruction. Nor does Beyerle v. Clift, 59 Cal.App. 7, 209 P. 1015, support appellants' contention. The court there held that an instruction which purports to set forth the elements necessary to a verdict must contain all such elements. Those complained of here did not purport to give all the elements necessary for a verdict, but were of necessity to be considered with the other instructions given. Nor were those criticized conflicting. Whereas one referred to the stopping of a vehicle, the other treated of its removal from the highway after it had stopped.

[14] Appellants' final contention is that the instructions on burden of proof on contributory negligence were conflicting and that the jury was thereby confused. This argument is predicated upon the assumption that respondent was guilty of contributory negligence as a matter of law. Inasmuch as the court correctly ruled that contributory negligence had not been established as a matter of law, the case cited by appellant is inapplicable. Mundy v. Marshall, 8 Cal.2d 294, 296, 65 P.2d 65, 66, held that upon the facts established, the trial court was justified in concluding that the decedent was contributorily negligent as a matter of law. Where such a conclusion is warranted, the court should take the case from the jury "unless the statutory presumption that the decedent was using due care was sufficient to create a conflict in the evidence and sustain a verdict for the plaintiff."

[15] Thus the doctrine that the presumption of due care constitutes a species of evidence in death cases, Westberg v.

Wilde, 14 Cal.2d 360, 365, 94 P.2d 590, and in those involving brain injuries, Scott v. Sheedy, 39 Cal.App.2d 96, 99, 102 P.2d 575, is applicable to the facts at bar and any conflict in the instructions pertaining thereto arose from the application of conflicting presumptions. The jury was correctly instructed on the presumption of due care, the presumption arising from the breach of a statute or ordinance, and the reasonableness of behavior when faced with an emergency.

The judgment is affirmed.

WILSON, J., concurs.

McCOMB, Justice (dissenting).

I dissent.

Defendants appeal from a judgment in favor of plaintiff after trial before a jury in an action to recover damages for personal injuries.

Viewing the evidence most favorable to plaintiff, the facts in the instant case are:

On June 2, 1946, at about 10 P.M., plaintiff was operating his automobile in a westerly direction on Highway No. 66 when the car stopped. At this point the highway consisted of two marked lanes for traffic in each direction and a parking lane on each side thereof. Plaintiff immediately got out of his automobile with his flashlight and walked to the rear of his car, looking for oncoming traffic and holding the flashlight in his hand. His headlights and tail light were burning. He stood near the left rear fender of his car signaling to traffic until a truck driven by defendant Cordero, and owned by defendant Gonzales, traveling from 20 to 25 miles per hour in a westerly direction on Highway 66, struck and seriously injured plaintiff. At the time of the accident, section 74 of a Pomona City Ordinance read thus:

"It shall be unlawful for any person to stand, or sit, in any roadway."

This is the sole question presented for our determination:

Was plaintiff guilty of contributory negligence as a matter of law in standing in the roadway in violation of the prohibition in section 74 of the Pomona City Ordinance, supra?

This question must be answered in the affirmative. It is the general rule that (1) the violation of a statute or ordinance constitutes negligence *per se*, and (2) it constitutes contributory negligence if the failure to comply with the statute or ordinance contributes directly to the injury. (Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145-147, 52 P.2d 922; Leek v. Western Union Tel. Co., 20 Cal.App.2d 374, at page 376, 66 P.2d 1232; Reeves v. Lapinta, 25 Cal. App.2d 680, at page 681, 78 P.2d 465; Satterlee v. Orange Glenn School District, 29 Cal.2d 581, at page 588, 177 P.2d 279.)

To the foregoing general rule there is an exception that if the violation of a statute or ordinance under the particular circumstances was justifiable or excusable, such violation may be excused and not constitute negligence *per se*. (Satterlee v. Orange Glenn School District, supra, 29 Cal.2d 581, 588, 177 P.2d 279; Morris v. Purity Sausage Co., 2 Cal.App.2d 536, at page 539, et seq., 38 P.2d 193.) However, the exception is only applicable when the violation of the ordinance or statute results from a cause or thing beyond the control of the person charged with the violation. (Satterlee v. Orange Glenn School District, supra, 29 Cal.2d 581, 589, 177 P.2d 279; Gallichotte v. California Mutual Bldg. & Loan Ass'n, 4 Cal.App.2d 503, at page 506, 41 P.2d 349; Morris v. Purity Sausage Co., supra.) In the instant case, at the time of the accident, section 74 of the Pomona City Ordinance read:

"It shall be unlawful for any person to stand, or sit, in any roadway."

As plaintiff violated a provision of the foregoing ordinance in standing in the highway, he was guilty of negligence *per se*, and since the accident would not have occurred had he complied with the ordinance, his negligence was one of the proximate causes of the accident and therefore he was guilty of contributory negligence and cannot recover for his injury. The exception to the general rule mentioned above, to wit, that the violation of an ordinance may be justifiable or excusable under the circumstances of a particular case when the act is done prudently for the purpose of safety of life or limb, it not here applicable for the reason that, as stated in the rule, such exception applies only where the violation of the ordinance results from a cause or thing beyond the control of the person charged therewith. In the present case, plaintiff voluntarily stood in the highway and he was not placed there because of any cause or thing beyond his control.

As previously pointed out in Leek v. Western Union Tel. Co., supra, 20 Cal. App.2d 374, 376, 66 P.2d 1232, the alarming increase in deaths and injuries resulting daily from violation of traffic ordinances and provisions of the Vehicle Code has become a matter of public concern, demanding the conscientious effort of every individual to prevent accidents by complying with such ordinances and provisions. One of the motivating causes inducing the adoption of the ordinance here in question was to prevent just such an accident as has occurred due to the violation of the ordinance and which accident would not have occurred had plaintiff complied with it. The facts in Reeves v. Lapinta, supra [25 Cal.App.2d 680, 78 P.2d 466], are analogous to those in the present case. In the cited case, a Municipal Code provision of the city of Los Angeles read:

> "No person shall ride upon the fender, steps, or running board of any street car or vehicle."

Plaintiff, in violation of the ordinance, rode upon the step of an automobile bus and was injured as a result thereof. It was held that she was guilty of contributory negligence and could not recover for her injuries. The principle of law in such case and in Leek v. Western Union Tel. Co., supra, are identical and are controlling in the present case.

Graves v. Kern County Transp. Corp., 112 Cal.App. 261, 296 P. 902; Wright v. Ponitz, 44 Cal.App.2d 215, 112 P.2d 25; Shannon v. Thomas, 57 Cal.App.2d 187, 134 P.2d 522; Rath v. Bankston, 101 Cal.App. 274, 281 P. 1081; Giorgetti v. Wollaston, 83 Cal.App. 358, 257 P. 109, are not here applicable for the reason that in such cases there was not a violation of an ordinance the same or similar to the one here involved. Connard v. Pacific Electric Railway Company, 14 Cal.2d 375, 94 P.2d 567, is likewise readily distinguishable from the facts in the present case. In such case, there was a conflict in the testimony as to whether the plaintiff was riding on the step of the car or merely using the step for the purpose of alighting from the car. This conflict in evidence clearly raised a question of fact, which was properly submitted to the jury. In the instant case, there is no conflict in evidence that the plaintiff was standing in the highway.

The judgment should be reversed.

Rehearing denied; McCOMB, J., dissenting.

Hearing denied; TRAYNOR, J., dissenting.

91 Cal.App.2d 351

BURR v. GOSS et al.

GOSS et al. v. BURR et al.

Civ. 13950.

District Court of Appeal, First District,
Division 2, California.
April 20, 1949.

1. Appeal and error 🔑1060(1)

Efforts of plaintiff's counsel to bring in a statement which driver of motorcycle, on which plaintiff was riding, made to a police officer after collision with defendants' automobile, that the defendant who was driving automobile "was coming as fast as he could come" was not such misconduct as required a reversal, since no sensible jury could have been deceived by such testimony.

2. Appeal and error 🔑1060(1)

Act of counsel for respondent during argument to jury in writing with crayon over a map which was an exhibit of scene of accident was not misconduct requiring a reversal, where it did not appear that portions of map thus obliterated were material or that jury was confused by the change.

3. Appeal and error ⚿1064(1)

In action arising out of intersectional collision between automobile and motorcycle, where visibility of motorcycle was a disputed fact, giving of the usual "to look is to see and to listen is to hear" instruction was not prejudicial, although it would have been a more accurate statement of law if it had included admonition "if you find that motorcycle was clearly visible".

4. Appeal and error ⚿1064(1)
Negligence ⚿141(12)

Instruction designed to cover separate suit for damage by defendants in main action arising out of intersectional collision between automobile and motorcycle and to relate to question of their contributory negligence, and reciting that slight negligence would require a verdict for defendants in such separate suit for damages, was not confusing or prejudicial.

5. Appeal and error ⚿1067

Where particular testimony had no evidentiary value, proposed instruction that such testimony was admissible only to show conversation and was not evidence of speed of vehicle was merely a commonplace statement of what any reasonable juror knew, hence refusal thereof was not prejudicial.

6. Trial ⚿295(6)

Where defendants in main action were cross-complainants under cross-complaint and plaintiffs under a separate action consolidated with main action for trial, instruction which, taken as a whole, identified respective parties clearly, was not so confusing as to require a reversal because a portion of instruction told jury that, unless it found a particular party was negligent, their verdict should be in favor of "defendants and cross-defendants".

7. Damages ⚿216(8)

Where there was some evidence that plaintiff's future earning power was impaired, instruction which plainly left to jury duty to determine whether such impairment was reasonably certain was proper.

8. Automobiles ⚿242(8)

In action by passenger on motorcycle against motorist for injuries sustained in a collision between motorcycle and automobile at an intersection, before defense of assumption of risk could become applicable on theory that motorcycle's brakes were defective, some evidence of knowledge of defective condition by passenger before the accident had to be established.

9. Damages ⚿216(7)
Trial ⚿260(10)

Refusal to give proposed instruction on speculative damages, which instruction stated that verdict could compensate plaintiff for prospective detriment, was not error since jury must necessarily engage in some speculation in awarding damages for prospective detriment and, in any event, instructions given told jury that award must be based on a finding of damage reasonably certain.

10. Damages ⚿132(2)

Award of $15,000 for critical injuries to a boy, in view of finding that boy was reasonably certain to suffer some damage in future, was not excessive.

11. Appeal and error ⚿1004(1)

Amount of verdict is a matter for consideration of trial judge on motion for new trial, and is a question scarcely debatable in reviewing court unless appellant shows that verdict is result of passion or prejudice or that it is so highly excessive that it shocks the conscience of reviewing court.

◆

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by Robert Burr, a minor, against William Henry Goss and others to recover for injuries sustained in a collision between motorcycle on which plaintiff was riding as a passenger and defendants' automobile. Defendants cross-complained and also commenced a separate action against Robert Burr, Le Roy C. Burr, the operator of the motorcycle, and Mrs. F. H. Burr, the owner thereof. Actions were consolidated for trial. From a judgment on a verdict for minor plaintiff against defendants and that the defendants take nothing under their cross-complaint and independent action, defendants appeal.

Affirmed.

Campbell, Hayes & Custer, of San Jose, and Edward J. Niland, of Santa Clara, for appellants.

Callaghan & Giannini, Peter Anello, Charles R. Wayland, and David S. Lull, all of San Jose, for respondents.

NOURSE, Presiding Justice.

Robert Burr was injured while riding on a motorcycle operated by his brother, Le Roy Burr. Mrs. F. H. Burr, the mother of these two, was the owner of the machine, and it was being operated at the time of the accident by Le Roy with the owner's permission. W. H. Goss, accompanied by his wife, was operating an automobile at the time and the two vehicles came into collision at a street intersection. Robert Burr was thrown from the motorcycle and suffered serious injuries. The Goss car was turned over and Mrs. Goss suffered injuries. Robert Burr first sued the Goss's for damages. Mr. and Mrs. Goss filed a cross-complaint against the Burr brothers and against the mother as owner of the motorcycle. Mr. and Mrs. Goss commenced a separate action against the same three Burrs and these actions were consolidated for trial before a jury. A verdict against Mr. and Mrs. Goss in favor of Robert Burr for $15,000 was entered as well as one that Mr. and Mrs. Goss take nothing from the Burrs.

The appeal of Mr. and Mrs. Goss specifies nine separate grounds urged for a reversal, which we will take in order. A detailed statement of the facts is not necessary. The evidence presents the everyday occurrence of two motor vehicles colliding in a street intersection with the witnesses on both sides solemnly swearing to fantastic estimates of speed, light and air conditions and attending circumstances. Counsel for all parties argue on this evidence in all seriousness, but the conflicts do not appear to have any great bearing on the result.

[1, 2] (1) Two grounds of misconduct are raised. The first relates to the efforts of respondent's counsel to bring in a statement which Le Roy Burr made to a police officer that Goss "was coming as fast as he could come." We cannot perceive how any sensible jury could have been deceived by such testimony or how it could have had any prejudicial effect on the verdict. The second relates to the act of counsel for respondent during his argument to the jury in writing with crayon over a map which was an exhibit of the scene of the accident. It does not appear that the portions of the map thus obliterated were material or that the jury was in any manner confused by the change.

[3] (2) At the request of the respondent the usual "to look is to see and to listen is to hear" instruction was given. Appellants complain that it was inapplicable here because of the evidence that the light of the motorcycle was not burning until a fraction of a second before the collision. Thus they say the words "object clearly visible" and "in plain sight" assumed facts which were in dispute. Whether the motorcycle was visible was a disputed question of fact, and the instruction would have been a more accurate statement of the law if it had included the injunction to the jury "if you find that the motorcycle was clearly visible." Instructions similar to that given have been passed as nonprejudicial, though in Bischell v. State of California, 68 Cal.App.2d 557, 563, 157 P.2d 41, it is said to be not "happily worded." But, since the respondent who was the one seriously injured was riding as a guest, the jury apparently did not hold him to blame for the act of his brother, assuming that the jury believed the testimony that the motor vehicle was not visible when appellants entered the intersection, and hence it does not appear to have been prejudicial.

[4] (3) At the request of respondents the jury was instructed that if Goss "was negligent, no matter how slight" the verdict must be in favor of defendants. The instruction was designed to cover appellants' separate suit for damages, and to relate to the question of their contributory negligence, but appellants complain that it was not limited to that action and that it might have given the jury the impression that "slight" negligence on the part of Goss justified a verdict against him in the main case where he appeared as a de-

fendant. Possibly the instruction was objectionable because it tended to set up a standard of slight negligence on the part of Goss as compared with a standard of ordinary care on the part of his adversaries, Polk v. City of Los Angeles, 26 Cal.2d 519, 532-535, 159 P.2d 931, but it is difficult to see how the jury was confused in this instance or that there was any prejudicial error.

[5] (4) A police officer was permitted to testify that he asked Mr. Goss if he had not been going around forty miles an hour and that Mr. Goss said, "no" that he was going between twenty and twenty-five. Why the question was asked does not appear. The answer had no evidentiary value and was not objected to. Appellants now complain because the trial court refused their proposed instruction telling the jury that this testimony was admissible only to show the conversation and was not evidence of the speed of the vehicle. The instruction might well have been given, but it was merely a commonplace statement of what any reasonable juror knew and we can find no prejudice in the refusal to give it.

[6] (5) Complaint is made of the instruction telling the jury that unless it found Le Roy Burr negligent their verdict should be in favor of "defendants and cross-defendants." This instruction taken as a whole identified the respective parties with sufficient clearness so that the jury could not have been confused as to which "defendants and cross-defendants" were referred to.

[7] (6) Complaint is made of the instructions on general damages to Robert Burr which told the jury it could consider loss of earning power "which he is reasonably certain to suffer in the future." The argument is that there is no evidence establishing "with any degree of certainty" that his future earning power would be impaired. There was some evidence, such as that of the plaintiff Burr that he was unable to do heavy work at the time of the trial, and that of a physician who said there was still a restriction of movements and a weakness of the back, which would support an inference that future earning power was impaired. The instruction plainly left to the jury the duty to determine whether such impairment was "reasonably certain."

[8] (7) Appellants requested three instructions covering their defense of assumption of risk and complain that none was given. Their argument relating to the distinction between the defenses of contributory negligence and assumption of risk is academically sound but does not show error here. The argument is based on the premise that plaintiff Robert Burr knew that the brakes on the motorcycle were in poor condition and hence assumed the risk of injury when he accepted the ride. But the only evidence bearing on the condition of the brakes was that of the two brothers, both of whom said the brakes were in "good" or "excellent" condition. Before the defense of assumption of risk could become applicable to Robert Burr some evidence of knowledge of a defective condition of the brakes before the accident had to be given. Since there was no evidence to support the defense there was no error in refusing the instructions.

[9] (8) Appellants complain of the refusal to give their proposed instruction on "speculative damages." The same instruction stated that the verdict could compensate the plaintiff "for prospective detriment." The argument is interesting but purely academic. As we said above there was some evidence that plaintiff Burr's back had not fully healed and that it would cause him pain and trouble in the future. Although a great deal has been written about speculative verdicts the truth is that when a jury seeks to award damages "for prospective detriment" it necessarily engages in some speculation. The instructions given told the jury plainly that its award must be based on a finding of damage "reasonably certain", and was free from error.

[10, 11] (9) Finally it is argued that the verdict of $15,000 was excessive. The amount of the verdict was a matter for consideration of the trial judge on the motion for a new trial. The question is scarcely debatable in the reviewing court

unless the appellant shows more than is shown here—that the verdict was the result of passion or prejudice, or that it is so highly excessive that it shocks the conscience of the reviewing court. We know of no case in recent years where this has occurred.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

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91 Cal.App.2d 376

JEWISH PUBLICATIONS, Inc. v. GORDON et al.

Civ. 16775.

District Court of Appeal, Second District, Division 1, California.

April 21, 1949.

Rehearing Denied May 16, 1949.

See 206 P.2d 61.

1. Associations 🔑4
Corporations 🔑49(1)

Where defendant fraternal organization had not authorized exclusive use by plaintiff of defendant's name as a trademark, defendant was entitled to use its own name in connection with official publication defendant planned, although plaintiff corporation had for many years published a newspaper using the name of defendant as part of the title of plaintiff's newspaper. Gen.Laws Act 692.

2. Trade-marks and trade-names and unfair competition 🔑93(3)

To support a judgment enjoining the use of one's own name there must be evidence that defendant authorized the exclusive use of its name by plaintiff as a trade-mark. Gen.Laws Act 692.

3. Associations 🔑4
Corporations 🔑49(1)

The fact that plaintiff corporation for many years had used name of defendant fraternal organization as part of the title of plaintiff's newspaper, would not support finding that defendant had consented to exclusive use of defendant's name by plaintiff so as to justify judgment enjoining defendant from using its own name in connection with official publication defendant planned. Gen.Laws Act 692.

4. Associations 🔑4
Corporations 🔑49(1)

Where defendant fraternal organization had for many years permitted plaintiff to use name of defendant as part of title of newspaper published by plaintiff, plaintiff had vested right to use of the name, and defendant could not enjoin corporation from continued use of the name as part of title of newspaper published by plaintiff. Gen.Laws Act 692.

5. Associations 🔑4
Corporations 🔑49(1)

Where plaintiff which had used name of fraternal organization for many years as part of title of newspaper published by plaintiff, and so was entitled to continue use of name of organization as part of title of newspaper although organization planned to publish an official publication of organization, organization was properly required to publish on its masthead specified words showing publication to be official publication, and to use a size of sheet and type of masthead which would not resemble present general appearance of plaintiff's newspaper. Gen.Laws Act 692.

◆

Appeals from Superior Court, Los Angeles County; Frederick F. Houser, Judge.

Action by Jewish Publications Inc., against Eli Gordon, Moe Kudler and others, to enjoin the use by defendants of the name "B'nai B'rith Record" from a newspaper defendants planned to publish. From judgment denying injunction and imposing restrictions upon defendants in connection with publication of defendants' newspaper, plaintiff appeals and defendants cross appeal.

Judgment affirmed.

Cummins, Goodstein & Paltun and David H. Paltun, all of Los Angeles, for appellant.

Fred Horowitz and Joseph Friedman, both of Los Angeles, for respondents.

DRAPEAU, Justice.

Jewish Publications, Inc., is a California corporation engaged in publishing a Jewish newspaper named B'nai B'rith Messenger. This paper has been published by plaintiff and its predecessors since April, 1898. It is a weekly of general circulation, principally read by people of the Jewish race.

The defendants are members of a Jewish fraternal organization named B'nai B'rith. As such members of the order, and in consequence of authority from the Grand Lodge of the order, they were about to commence the publication of a monthly newspaper to be named B'nai B'rith Record, to be circulated among members of the order locally in the Los Angeles area, when the plaintiff brought the action now under review to enjoin the use by the defendants of the name proposed.

The trial court adjudged that the Record had the right to use the name B'nai B'rith Record, but limited its subscription lists to members of the order and auxiliary organizations thereof, and to advertisers, present and prospective. The judgment also required the Record to publish at its masthead the words "Official Publication of the Southern California Council of the Independent Order of B'nai B'rith Lodges", and to use a size of sheet and type of masthead which will not resemble the present general appearance of the Messenger.

The judgment also restrained the plaintiff from asserting in the Messenger that that paper has any connection with B'nai B'rith or its auxiliaries.

Both plaintiff and defendants have appealed from the judgment. Each party seeks to have the other enjoined from using the words "B'nai B'rith" in any manner, and defendants are dissatisfied with the restrictions and conditions in the judgment applicable to the Record.

Fraternal organizations are essentially part and parcel of American life. They spring from deep-rooted needs of men and women for human companionship and brotherhood. As such they are to be commended and as such they are entitled to protection of their names. Since 1933, by statute the State of California has forbidden the use of names of fraternal societies by any one not entitled to do so under the constitution, by-laws or rules of the society. Stats.1933, p. 1037, Deering's General Laws, Vol. 1, Act 692, p. 326.

[1] The history of B'nai B'rith (which was formerly named Independent Order of B'nai B'rith) is coincident with the history of California. Its first lodge was established in San Francisco in 1855, and the order has been active and useful throughout the state ever since. Therefore the judgment of the trial court permitting it to use its own name in connection with its own official publication was proper.

[2, 3] To support a judgment enjoining the use of one's own name there must be evidence that the defendant authorized the exclusive use of its name by the plaintiff as a trade-mark. Ida May Co., Inc., v. Ensign, 20 Cal.App.2d 339, 66 P.2d 727. The fact that the Messenger used the words B'nai B'rith for a period of years will not support a finding that such publication constituted consent by the order of B'nai B'rith to the exclusive use of its name by the plaintiff. The case here comes more nearly within the rule in Tomsky v. Clark, 73 Cal.App. 412, 417, 238 P. 950, 952, wherein it is stated: "The mere fact that appellants filed a certificate of copartnership to operate a business under the family name of another gave them no perpetual right to the use of such name to the exclusion of the real owner * * *."

[4] But fraternal organizations may not permit individuals to publish papers or magazines over a period of years, using the name of the organization, and then deny such individuals the use of the name. This is for the reason that there can be built up a vested right to the use of a name in such cases.

It is true that such publications may cause embarrassment and trouble for the organization whose name they have been permitted to use; frequently advertising drives are conducted for the private benefit of the paper, but which some part of the public believes to be for the benefit of the organization; frequently editorial policies are contrary to what officers and members of the order think they should be. And it can happen that ownership of such publications may fall into the hands of non-members of the order, unfriendly and hostile to it, who would hamper, embarrass and actually harm it. In this case the real party plaintiff is a person who owns all of the stock of the plaintiff corporation. While not apparently hostile to B'nai B'rith, he is not a member, and his testimony on the trial showed no particular friendship for the order.

These possibilities must be considered by any fraternal society before property rights of individuals are built up over the years.

Therefore, the judgment of the trial court permitting the Messenger to retain the words B'nai B'rith as part of its name was proper.

[5] The conditions of the judgment with respect to the subscription lists, masthead and format of the Record are reasonable and proper under the circumstances in this case. Eastern Columbia, Inc., v. Waldman, 30 Cal.2d 268, 181 P.2d 865.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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91 Cal.App.2d 382

ORLINOFF v. CAMPBELL et al.

Civ. 16583.

District Court of Appeal, Second District, Division 3, California.

April 22, 1949.

1. Automobiles 🔑77, 108, 326

Truck operator employed by a beverage company to transport beverages, whose only obligation was to produce results by methods of his own, furnishing equipment and carrying all expense of operation and whose methods of operation were beyond control of beverage company was an "independent contractor", not an "employee" and hence was a "highway carrier" within scope of Highway Carrier's Act and was required to hold a permit of the Public Utilities Commission, in the absence of which permit, he was subject to punishment by way of fine and imprisonment and to civil monetary penalties. Gen.Laws, Act 5129a, §§ 14, 15.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Employee", "Highway Carrier" and "Independent Contractor".

2. Licenses 🔑39.1

In order to hold that a licensing statute or ordinance impliedly renders contracts with unlicensed persons unenforceable, courts must be satisfied, from a consideration of scope and purpose of particular legislation, that additional penalty follows as a necessary consequence of noncompliance.

3. Licenses 🔑39.1

Where licensing provisions are for revenue only, contracts of unlicensed persons are not void.

4. Automobiles 🔑107(1)

The Highway Carrier's Act, as respects its effect upon contracts of unlicensed persons, is construed as an act for regulation of the industry and not for revenue alone. Gen.Laws, Act 5129a.

5. Licenses 🔑39.1

The basis for doctrine that contracts of unlicensed person are unenforceable is that courts should not lend their aid to enforcement of contract where performance would tend to deprive public of benefits of regulatory measures.

6. Automobiles 🔑110

The public benefit which Highway Carrier's Act is intended to accomplish is not to protect against possible dishonesty and incompetence through a screening out of the unfit, but is to bring all highway carriers under jurisdiction of Public Utilities Commission and subject to powers of Commission to fix rates for hauling services on public highways. Gen.Laws, Act 5129a, §§ 10, 10¼.

7. Automobiles ⊂⇒110

Highway carrier is subject to regulation as to maximum and minimum rates notwithstanding that such carrier is not a common carrier, since such regulation is germane to regulation of business of common carriers engaged in like transportation. Gen.Laws, Act 5129a, §§ 3, 10, 10¼, 14, 15; Act 6386; Civ.Code, § 2168; Const. art. 12, § 22.

8. Automobiles ⊂⇒107(1)

A contract of an unlicensed highway carrier is unenforceable. Gen.Laws, Act 5129a.

9. Licenses ⊂⇒39.1

Penalty of nonenforceability of contracts, in addition to those of fine and imprisonment, may be made a necessary requirement to accomplish results intended by legislation, such as to restrict a regulated business to those who have been duly licensed; the penalty being imposed as a deterrent from a contract which would tend directly to defeat purpose of regulatory measure.

10. Automobiles ⊂⇒107(1)

Beverage company which had contracted with trucking concern as an independent contractor for the transportation of beverage company's beverages for two years was not liable to trucking concern for damages for terminating contract before expiration of term upon ascertaining that trucking concern was unlicensed under Motor Carrier's Act. Gen.Laws, Act 5129a.

◆

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by Arthur C. Orlinoff against Floyd Campbell, Henry Campbell and Phillip Gomer, doing business as Wagon Wheel Beverages Company, for damages for breach of contract to transport goods. Summary judgment for defendants and plaintiff appeals.

Affirmed.

Edward K. Brody and Irving I. Bass, both of Los Angeles, for appellant.

Borah & Borah, of Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff brought this action for the recovery of damages sustained through the alleged breach of an agreement with defendants under which he was to transport goods for defendants throughout Los Angeles County. Defendants answered the complaint and made a motion for summary judgment, which was granted. Plaintiff appeals.

Although the only ground stated in defendants' notice of motion was "that the action of the plaintiff has no merit," it appears from the briefs that the court rendered judgment of dismissal upon evidence that the services agreed to be performed by plaintiff were those of a highway carrier, and that plaintiff was not the holder of a permit to operate as a highway contract carrier or a radial highway common carrier under the Highway Carriers' Act, Stats. 1935, Ch. 223, as amended, Deering's Gen Laws, Act 5129a. The fact that plaintiff held no certificate or permit authorizing him to engage in transportation of property for compensation or hire as a business over any public highway in this State by means of a motor vehicle, or motor vehicles, under the Highway Carriers' Act, was established by affidavit filed in support of the motion, and stands undisputed.

The nature of plaintiff's undertaking must be determined from the contract, a copy of which was attached to the complaint as an exhibit. Its principal provisions were the following: That defendants would furnish to plaintiff for delivery to the trade in Los Angeles County, sufficient beverages and syrups to bring plaintiff's compensation to $4,200 a year, based upon rates of 7¢ per case for deliveries of 100 cases or more to any one address on the same day, and 10¢ per case for the delivery of 99 cases or less to one address on the same day. Plaintiff was to be given 24 hours' notice within which to pick up the goods and agreed to make such deliveries within a period of 48 hours thereafter. The agreement provided: "The party of the second part [plaintiff] agrees to furnish all the motor vehicles and trucks with which to make said deliveries, and that all operating expenses in connection with the said trucks and motor vehicles shall be borne by the party of the second part." Plaintiff was to be paid the amount earned by him on Monday of each week, and the contract was to run for two years.

[1] One of plaintiff's contentions is that he was merely an employee of defendants and therefore not subject to the regulatory statute. This contention is unsound. He was an independant contractor. His only obligation was to produce the results contracted for by methods of his own, furnishing the equipment and carrying all the expense of the operation. Defendants had no control as to the manner in which plaintiff's operation was conducted; they bound themselves for a period of two years to provide plaintiff with an agreed amount of business; and they had no right under the agreement to discharge him. These are the elements of the relationship which classify plaintiff as an independent contractor. Fidelity & Casualty Co. v. Industrial Acc. Com., 191 Cal. 404, 216 P. 578, 43 A.L.R. 1304; Luckie v. Diamond Coal Co., 41 Cal.App. 468, 183 P. 178.

Plaintiff's operation was that of a highway carrier for which he was required to hold a permit of the Public Utilities Commission. He alleged part performance on his part and refusal of defendants to provide him with the agreed amount of goods, which was the basis of his claim for damages. His operations were in violation of law, and subjected him to punishment by way of fine and imprisonment, and to civil monetary penalties, Highway Carriers' Act, supra, secs. 14, 15; but the additional penalty of nonenforceability of his hauling contracts would not necessarily result from the fact that in operating without a license he was guilty of a misdemeanor.

[2] In order to hold that a licensing statute or ordinance impliedly renders such contracts unenforceable, courts must be satisfied, from a consideration of the scope and purpose of the particular legislation, that the additional penalty follows as a necessary consequence of noncompliance. It is necessary, therefore, to examine the Highway Carriers' Act and the purposes sought to be accomplished thereby.

[3-5] It is uniformly held that where the licensing provisions are for revenue only the contracts of unlicensed persons are not void. Wood v. Krepps, 168 Cal. 382, 387, 143 P. 691, L.R.A.1915B, 851; Garvin v. Gordon, D.C., 36 N.M. 304, 14 P.2d 264; Ziemer v. Babcock & Wilcox Co., 22 F.Supp. 384; annotations 30 A.L.R. 848, 118 A.L.R. 650. The Highway Carriers' Act is clearly one for regulation of the industry and not for revenue alone. There is no provision in the act that contracts made by unlicensed carriers are void or unenforceable. The question whether the courts should impose that additional penalty seems not to have been decided in any reported case. As we shall see, the broad basis for the doctrine that contracts of certain unlicensed persons are unenforceable is that the courts should not lend their aid to the enforcement of contracts where performance would tend to deprive the public of the benefits of the regulatory measures.

The public interest is protected in many instances where personal service is to be rendered by the licensee through a requirement that a license may be issued only upon satisfactory proof of honesty, truthfulness, good reputation, competency or experience. For this reason those who practice the learned professions are required to be licensed, as well as accountants, architects, contractors, brokers, etc. Broad discretion is vested in the licensing agencies with respect to the scope of the examinations to be given, but the purpose in all cases is to screen out the dishonest and incompetent. Levinson v. Boas, 150 Cal. 185, 88 P. 825, 12 L.R.A.,N.S., 575, 11 Ann.Cas. 661 [pawnbroker]; Van Wyke v. Burrows, 98 Cal.App. 415, 277 P. 190 [stockbroker]; Payne v. De Vaughn, 77 Cal.App. 399, 246 P. 1069 [architect]; Force v. Hart, 209 Cal. 600, 289 P. 828 [architect]; Meyer & Holler

v. Bowman, 121 Cal.App. 112, 8 P.2d 936 [architect]; Rench v. Harris, 79 Cal. App.2d 125, 179 P.2d 341 [real estate broker]; Kirman v. Borzage, 65 Cal.App. 2d 156, 150 P.2d 3 [building contractor]; Fewell & Dawes, Inc., v. Pratt, 17 Cal.2d 85, 109 P.2d 650 [insurance agent]. See also, In re Estate of Butler, 29 Cal.2d 644, 177 P.2d 16, 171 A.L.R. 343 [attorney].

The Highway Carriers' Act differs in some respects from all of the licensing statutes considered in the cited cases in which the contracts of unlicensed persons were held unenforceable. There is no requirement in the act that an applicant for a license must produce evidence of good character, competency, or financial responsibility. Under section 3 of the act the petition for a license is required to set forth the name and address of the applicant, and those of its officers, if any; full information concerning the financial condition and physical properties of the applicant; and such other information necessary to the enforcement of the act as the Public Utilities Commission may require. The section further reads: "Except as otherwise provided in this act, a permit must be issued by the commission upon compliance with this act." The only other condition to be met by the applicant is the furnishing of a public liability bond or equivalent security as indemnity against injuries to or death of one or more persons, or damage to or destruction of property.

[6] It is clear, therefore, that the benefit to the public which the Highway Carriers' Act is intended to accomplish is not to protect against possible dishonesty and incompetence through a screening out of the unfit, as is done in the case of many occupations which call for personal services. From the statute as a whole it appears that its principal purpose is to bring all highway carriers under the jurisdiction of the Public Utilities Commission, and subject to the powers invested in the commission with respect to the fixing of rates for hauling services on public highways. Section 10 of the act requires the commission to establish maximum or minimum, or maximum and minimum rates to be charged by any highway carrier, other than highway common carriers, which latter are subject to the jurisdiction of the commission under the Public Utilities Act, Gen.Laws, Act 6386. It seems clear also that the power to fix rates, which is conferred by the act, is one to regulate the general business of trucking on the state highways. The act provides that the policy of the State is "to establish such rates as will promote the freedom of movement by carriers of the products of agriculture, including livestock, at the lowest lawful rates compatible with the maintenance of adequate transportation service." Gen.Laws, Act 5129a, § 10¼.

It is obvious that the interests of the general public, as well as those of the trucking industry, are promoted by the establishment of fair and uniform rates which tend to give stability to the industry, and to protect operators against unfair and destructive competition. Prior to the adoption of the Highway Carriers' Act private motor carriers were not subject to the jurisdiction of the Railroad Commission, and they were free to fix their own charges for services rendered. As a consequence, within a few years time, they had been able to take over a large percentage of the tonnage theretofore transported by rail with the result that the railroads, to meet the competition, were obliged to obtain from the Railroad Commission a reduction in the rates that had been fixed by the commission. The destructive tendency of this unrestrained and unregulated competition was pointed out by the court in Lang v. Railroad Commission, 2 Cal.2d 550, 564, 42 P.2d 639: the railroads would eventually drive the tank truck carriers out of business, although this might be accomplished only through placing an undue burden upon shippers of other merchandise. The act now under consideration no doubt was adopted for the purposes of correcting the conditions described in the opinion in the Lang case.

[7] Although it appears that the services to be rendered by plaintiff were not those of a common carrier, as defined by

section 2168 of the Civil Code or the Highway Carriers' Act, his business was nevertheless subject to regulation by the legislature. In Morel v. Railroad Commission, 11 Cal.2d 488, 81 P.2d 144, it was held that regulation of the business of private carriers is within the powers conferred upon the commission by section 22 of Article XII of the Constitution for the reason that it is cognate and germane to the regulation of the business of common carriers engaged in like transportation. Quoting from Frost v. Railroad Commission, 197 Cal. 230, 240 P. 26, 31, it was said: "The primary purpose of such regulation is to secure the adequacy, regularity, and reliability of service and the reasonableness of rates and charges therefor. Franchise Motor Freight Ass'n v. Seavey, 196 Cal. 77, 235 P. 1000." The same conclusions were re-affirmed by the court in Entremont v. Whitsell, 13 Cal.2d 290, 302, 89 P.2d 392, in upholding the validity of the Highway Carriers' Act.

[8, 9] The final question is whether the hauling contracts of unlicensed highway carriers should be denied enforcement in the courts. We are constrained to hold that public policy requires that they be not enforced. The reason for this conclusion, of course, is not that some unlawful object was sought to be accomplished by the agreement. It was a valid agreement when it was entered into, and performance under it would have been lawful had plaintiff procured a license for his contemplated operation. It is settled beyond question that the penalty of nonenforceability of contracts, in addition to those of fine and imprisonment, may be a necessary requirement to accomplish the results intended by the legislation, namely, to restrict the regulated business to those who have been duly licensed. It is commonly said that the purpose underlying the rule of nonenforceability is the protection of the public. This may not be questioned. The penalty is not imposed by way of punishment of the individual but is resorted to as a deterrent from conduct which would tend directly to defeat the purpose of the regulatory measure. It is thus that the public interest is benefited. Smith v. Bach, 183 Cal. 259, 262, 191 P. 14; Davis v. Chipman, 210 Cal. 609, 621, 293 P. 40.

The primary purpose of the rule of nonenforceability being the discouragement of practices forbidden by law, no reason exists for declining to apply it to the contracts of unlicensed highway carriers, as it has been consistently applied to the contracts of unlicensed architects, brokers, and others for the rendition of personal services.

[10] While plaintiff alleges that his contract was terminated by defendants without cause, it was made clear to the court on the motion for summary judgment that good cause did exist for its termination, namely, the invalidity of the contract. If the defendants, with knowledge that plaintiff was unlicensed, had aided him in his operation by further performance on their part, they would thereby have subjected themselves to penalties of fine and imprisonment and civil penalties under sections 14 and 15 of the act. The termination of the agreement by defendants imposed no liability upon them for damages, not only because the contract was not enforceable by plaintiff, but also because its invalidity furnished a sufficient legal ground for its termination.

In support of his contention that the contract sued on was valid, plaintiff relies on certain statements of the court in Macco Construction Co. v. Farr, 9 Cir., 137 F.2d 52, to the effect that the California City Carriers' Act, Deering's Gen.Laws, Act 5134, which does not differ materially from the Highway Carriers' Act, does not impliedly carry a penalty of nonenforceability of the contracts of unlicensed carriers. The principal holding in the case, however, was that the operation of the contractors did not bring them within the scope of the act inasmuch as the work contracted for did not require the transportation of material on a public highway, and the minor use that was made of the highway in moving material was unsubstantial and purely incidental to the main operation. The language upon which plaintiff relies should not be given effect in circumstances differing essentially from those which the court had under consideration. We do not deem the holding to be contrary to the views we have expressed.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

PEOPLE v. COHN.

Cr. 2544.

District Court of Appeal, First District,
Division 2, California.
April 20, 1949.

Rehearing Granted May 5, 1949.*

1. Gaming 🔑75(1)

A violation of statute prohibiting the occupying of premises with paraphernalia for purpose of recording bets on horse races is complete when it is shown that accused occupied premises with papers and paraphernalia for purpose of recording bets on horse races. Pen.Code, § 337a, subd. 2.

2. Gaming 🔑98(5)

Evidence sustained conviction for occupying premises with paraphernalia for purpose of recording bets on horse races. Pen.Code, § 337a, subd. 2.

3. Criminal law 🔑386

In prosecution for occupying premises with paraphernalia for purpose of recording bets on horse races, testimony as to telephone calls to premises occupied by defendant, some of which were answered by police officers and one of which was answered by defendant, was admissible to prove, not the truth of what was said, but that the premises occupied by defendant were being illegally used for taking bets on horse races. Pen.Code, § 337a, subd. 2.

4. Criminal law 🔑386

In prosecution for occupying premises with paraphernalia for purpose of recording bets on horse races, where premises occupied by defendant contained telephones listed both to defendant and another person, and evidence gave rise to an inference that the other person was a mythical person and that telephones listed to the other person were really owned and used by defendant and defendant's employees, testimony in relation to long-distance incoming calls over telephones listed both to defendant and to the other person was admissible. Pen.Code, § 337a, subd. 2.

5. Criminal law 🔑472

In prosecution for occupying premises with paraphernalia for recording bets on horse races, testimony of an expert on bookmaking that pads and other paraphernalia seized at premises occupied by defendant represented materials used in making bets on horse racing was admissible. Pen.Code, § 337a, subd. 2.

6. Criminal law 🔑404(3)

In prosecution for occupying premises with paraphernalia for purpose of recording bets on horse races, exhibits consisting of cards, sheets of paper, or pads showing bets made on horse races or results of races run, all of which were in defendant's possession at time of police raid on premises resulting in defendant's arrest, were admissible. Pen.Code, § 337a, subd. 2.

7. Criminal law 🔑726

In prosecution for occupying premises with paraphernalia for purpose of recording bets on horse races, statement of district attorney that a felony prosecution never came to trial if district attorney decided evidence was insufficient, was not improper where invited by remark of counsel for defendant. Pen.Code, § 337a, subd. 2.

8. Criminal law 🔑1171(1)

In prosecution for occupying premises with paraphernalia for purpose of recording bets on horse races, where jury must have known from the evidence that person other than defendant who defendant claimed owned telephones on the premises was a myth, statement of district attorney referring to failure of defendant to produce the other person as a witness, and inability of the police department and staff of district attorney's office, to uncover the other person, was harmless. Pen.Code, § 337a, subd. 2.

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* Subsequent opinion 211 P.2d 375.

9. Criminal law ⚷865(1)

In prosecution for occupying premises with paraphernalia for purpose of recording bets on horse races, request of trial court to jury for information as to how jury stood numerically was not objectionable as being coercive. Pen.Code, § 337a, subd. 2.

◆

Appeal from Superior Court, San Francisco County; Daniel R. Shoemaker, Judge.

Paul S. Cohn was convicted of occupying premises with paraphernalia for purpose of recording bets on horse races and he appeals from the judgment and from order denying a new trial.

Judgment and order affirmed.

Leo R. Friedman, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Clarence A. Linn, and B. Abbott Goldberg, Deputy Attys. Gen., for respondent.

NOURSE, Presiding Justice.

Appellant appeals from a judgment of conviction of violation of section 337a, subd. 2 of the Penal Code after jury verdict finding appellant guilty as charged in Count I of the amended information, and from the order denying a new trial. The jury failed to reach a verdict as to appellant Cohn on Counts II and III charging violations of section 337a, subd. 4, and of conspiracy to violate these sections. The jury also failed to reach a verdict as to Cohn's codefendant Frank Low on any count of the information. Appellant's motion for new trial was denied and he was sentenced to San Quentin for the term prescribed by law.

Section 337a, subd. 2, Penal Code, under which appellant was convicted, prescribes a penalty of imprisonment in the county jail or state prison of not less than thirty days and not exceeding one year for any person keeping or occupying for any time whatever any premises with betting paraphernalia for the purpose of recording bets, purported bets, wagers or pools on any contest "or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; * * *." This section applies to any person doing any one of the acts specified in subdivisions 1–6 inclusive, in a single instance as well as to one doing such acts as a business or occupation.

The main attack on the judgment is that the evidence is insufficient to support the verdict and for that reason we will give a detailed statement of the evidence following the fair and accurate outline in respondent's brief.

Defendant and appellant Paul Cohn, doing business as the Bouquet Cohn Cigar Company, was proprietor of the Bonanza Cafe, 141 Montgomery Street, San Francisco and of thirteen cigar stores in San Francisco for which he had obtained licenses to operate pin ball machines and off sale liquor licenses, and on which he paid personal property taxes. It was the theory of the State that defendant was using the premises at 141–145 Montgomery Street as a central clearing house for bets made at the various cigar stores operated by him.

The Steil Building, in which the events leading to defendant's arrest transpired, is a four story building facing Montgomery Street and bounded on the rear by Trinity Place. The Bonanza Cafe occupied the first floor; a suite of offices and a storeroom the second floor; a tailoring establishment the third; and a photostating business and reweaving service the fourth. The floors were connected by elevators and stairways. The State contended that the bookmaking activities took place in a suite of three small offices on the second floor near the rear of the building. There was also a large front office which was being renovated, and a storeroom containing supplies and beverages. In one of the small offices on this floor was a large table with three telephones, a wooden rack divided into partitions, each containing a pad of paper, and a smaller table with one telephone, wastebasket and two chairs.

On August 28, 1947, special investigator Hoy of the Attorney General's office and Sergeant Hanlon of the San Francisco police department visited the premises and went to the second floor by elevator where they encountered Cohn. They introduced themselves and told him they had information that bookmaking was being carried on there. Cohn gave an evasive answer but did not deny the accusation. The officers observed the three telephones on the large table and a fourth on a smaller table which was connected to a terminal box in the storeroom, also a fifth telephone located in another of the smaller offices and connected to one of the three telephones on the large table. Agent Hoy asked defendant if the telephones were his and he replied that they belonged to "Frank Peters" who was said to be in the advertising business but whose whereabouts defendant did not know. No bookmaking paraphernalia was observed on this visit. As the parties walked through the large front office agent Hoy made the remark. "I guess this is probably where your one hundred dollar bettors may be—will be sitting around." The defendant laughed and replied, "There is more money in 'Acey-Deucey' bettors."

On August 29, 1947, Hoy, Hanlon and Officer Keane of the San Francisco police department visited the premises. They found three telephones in the small office ringing busily. Officer Keane attempted to go up the stairway but found the second floor door locked. However defendant came up the stairway, unlocked the door and went in with the officer. Hoy was answering telephones. A voice on one call said, "This is 15." When he said "O.K. Go ahead," the telephone was hung up. Another call began, "This is 6." When Hoy replied the party hung up. There were other similar calls. Hoy estimated that he answered twenty-five or thirty calls. The telephones rang continuously and sometimes all three rang simultaneously. "As fast as you could pick one [up] the other would be ringing. You couldn't answer them all at one time." Sergeant Hanlon and Officer Keane had similar experiences. One party asked for Paul. Defendant took the call and the conversation consisted of "yes" and "no". There was a long distance call for defendant on the telephone on the smaller table. Defendant took the call and there was a conversation apparently relating to racing at Del Mar, during which Cohn remarked, "This place is wired for sound." At one time at the request of Sergeant Hanlon, the defendant took a call on one of the telephones on the larger table, said "hello" three or four times and then made a remark to the effect that "You have got them so scared they don't even recognize their master's voice." The telephones kept ringing for about twenty minutes, becoming less frequent and finally ceasing. Hoy and Keane saw pads piled on the table but no writing other than the numbers at the bottom ranging from 1 to 16. They saw no papers relating to "Frank Peters" or to any advertising business, and no "Frank Peters" ever appeared in these proceedings. The officers paid a third visit on the afternoon of August 29, when they found the elevator padlocked. They contacted defendant who unlocked the stair door. There was no activity nor were any papers visible.

On the morning of September 5, 1947, Hoy and Officers Overstreet, Talbot and Duggins of the San Francisco police department visited the premises. Hoy and Overstreet entered the second floor, through a window by means of a ladder, while Talbot went through the Bonanza Cafe to the stairway at the rear. As Hoy and Overstreet entered they heard a buzzer, scuffling of feet and a voice saying, "It is the cops. It is the cops." Talbot heard the sound of persons running. As Overstreet was entering he saw two men running; when he got in the men were gone. He unlocked the stairway door between the first and second floors and admitted Officer Talbot and Officer Duggins who was followed by defendant. On the third floor in the tailor shop, Giffen was found sitting on a sofa and Low was having a coat fitted which did not match his trousers, which was obviously too small for him, and on which the sleeves were three inches too short. Overstreet identified these men as the two he had seen running. Low admitted that he was a clerk for Cohn. Low took off the coat and said to the tailor, "This is all right after you shorten the sleeves." The men returned with the officers to the second floor. Hoy had found the receivers of three telephones off the hooks. When he replaced them they began to ring. Hoy answered one phone and a voice said, "This is Bill, and can I have 5 across on 428?" Then when the party asked for Roy or Frank and found they were out he hung up. Officer Overstreet had two similar conversations. He testified, "The man's voice said, 'This is Mission.' I said, 'O.K.' He said, '168, 3 to win. 174, 10 to win.' I repeated those numbers to him. I said, 'O.K.' and he hung up." Relating a later call, "The man's voice in answer to my 'Hello', said, 'Is this Roy?' And I didn't say anything. He said, 'Is this Roy?' I said, 'Yes.' He said, 'What is the password?' I didn't say anything. I said, 'O.K. go ahead.' He said, 'What is the password?' I said, 'Roy is downstairs for a moment.' 'Where is Frank?' I said. 'He went downstairs, also.' I said, 'They both left without telling me the password.' He said. 'Is it O. K.?' I said, 'If it wasn't O.K., I wouldn't be here.' He said, 'All right.' He said, 'Give me 5 to win on 184 field.' I said, 'O.K.' Repeated it to him. I said, 'O.K.' and he hung up." Giffen and Low refused to write their names for the officers following a warning nod of defendant.

Defendant took agent Hoy aside and the following conversation was detailed by the officer: "Mr. Cohn told me, he said, 'I want to make one more plea to you.' I told Cohn that it was all up to the Police Department from now on, that it was their case. Cohn said, 'Well, anyway, it is worth a nice package to you.' I said, 'What do you mean?' He said, 'If you let those two fellows go in there and forget the whole thing, it will be worth a nice package to you.' And he said, 'You name it.'"

On the occasion of their visit on the morning of September 5, 1947, the officers found and seized in the three rear offices on the second floor of the Montgomery Street property the following paraphernalia: One large clock; Three telephones; One extension telephone and switch box; One telephone; One extension cord and bell; Slotted box containing fourteen pads of paper which contained records of bets placed on horse races; Copies of the Daily Bulletin and Sports Review; Run down sheets; 62 sheets of paper containing records of bets made on horse races; 1 sheet of paper, the same being the run-down sheet for September 5, 1947.

[1, 2] The recital of this evidence is a refutation of appellant's claim that there was insufficient evidence to support the verdict. It was said in People v. Abraham, 67 Cal.App.2d 425, 427, 154 P.2d 450, 451: "A violation of section 337a, subdivision 2, is complete when it is shown that the accused occupied a place with papers and paraphernalia for the purpose of recording bets on horse races." Appellant's occupancy of the premises, the use of the telephones, and the presence of the racing sheets and betting paraphernalia all unite to complete the proof of violation of the statute. On this there is ample authority. People v. Warnick, 86 Cal.App.2d 900, 195 P.2d 552; People v. Kelley, 22 Cal.2d 169, 176, 137 P.2d 1; People v. Vertlieb, 22 Cal.2d 193, 196, 137 P.2d 437; People v. Ines, 90 Cal.App.2d 495, 203 P.2d 540.

[3] Appellant argues that the court erred in admitting the testimony as to telephone calls and erred in instructing and refusing to instruct the jury as to its limited purpose. The evidence was admissible to prove, not the truth of what was said, but that the premises occupied by appellant were being illegally used for taking bets on horse races. People v. Vertlieb, supra; People v. Kelley, supra; People v. Klein, 71 Cal.App.2d 588, 163 P.2d 71; People v. Onofrio, 65 Cal.App.2d 584, 151 P.2d 158; People v. Barnhart, 66 Cal.App.2d 714, 153 P.2d 214; People v. Radley, 68 Cal.App.2d 607, 157 P.2d 426; People v. Warnick, supra. The trial court, at the request of appellant, so instructed the jury. There is no error here.

[4] Appellant complains of the admission of testimony relating to long distance calls over the phones listed both to appellant and "Frank Peters." The most that this testimony showed was that identical persons sent long distance calls over the telephone listed to appellant and over those listed to "Frank Peters." There was a palpable inference, which appellant made nc

effort to meet, that "Frank Peters" was a mythical person and that the telephones listed to him were really owned and used by appellant and his employees for the purpose of receiving bets. The testimony was properly admitted.

[5] Appellant complains of the admission of the testimony of an expert on bookmaking that certain pads and other paraphernalia seized at the premises represented materials used in making bets on horse racing. This point has been raised so frequently in these bookmaking cases, and so uniformly ruled adversely to appellants, that it is sufficient to cite People v. Newman, 24 Cal.2d 168, 174, 148 P.2d 4, 152 A.L.R. 365, where approval was given to People v. Hinkle, 64 Cal.App. 375, 378, 221 P. 693. See also People v. Bateman, 57 Cal. App.2d 585, 135 P.2d 192; People v. Green, 59 Cal.App.2d 219, 138 P.2d 399; People v. Onofrio, supra, and People v. Miller, 67 Cal.App.2d 382, 154 P.2d 435.

[6] Appellant objected to the introduction of certain exhibits which were seized at the time of the arrest. Generally these exhibits were cards, sheets of paper, or pads showing bets made on horse races or results of races run. Many were shown to have been made by appellant's employees. All were in his "possession" at the time of the raid. There was no error here. People v. Davis, 65 Cal.App.2d 255, 155 P.2d 474, and cases cited above.

[7] Appellant assigns as misconduct the statement of the district attorney: "You know your District Attorney has the power and does screen all the felony cases and he decides whether there is sufficient evidence to bring the case to trial or not. If there is not sufficient evidence the case never comes to court." The statement was invited by a derogatory remark of counsel for appellant referring to the failure to make an arrest on the occasion of the first visit to the premises. The jury was instructed to disregard the statement, but without the instruction there was no error.

[8] Misconduct is also assigned in the reference to the failure of the defendants to produce the witness "Frank Peters" and the inability of the very capable police department and staff of the district attorney's office to uncover him. The district attorney may have been overzealous in his praise, but his reference to the failure of the defense to produce the witness was unobjectionable. The evidence showed that the building was owned by appellant's wife, that her books failed to show a lease to "Frank Peters", that his name appeared only on the listed telephones which were used by appellant and his employees. If such a person as "Frank Peters" existed appellant could either have produced him or shown that he was unable to do so. As the case stood at the time the statement of the district attorney was made the jury must have known that "Frank Peters" was a myth and the statement of the district attorney had no effect on its conclusion.

[9] Finally it is argued that the trial court erred when it asked the jury how it stood numerically and when told "11–1" on one count, and again, "On one we have twelve" instructed the jury to return for further deliberation. The jury then returned with a verdict of guilty as to Cohn on the first count, and failed to reach a verdict as to him on the second and third counts. It also failed to reach a verdict as to Low on any of the counts. Whether an earlier failure to agree concerned both defendants or Low alone does not appear because there is uncertainty in the numbers used by the forewoman—whether she referred to the parties or to the three counts of the information. All parties were apparently content to risk a chance on the further deliberations of the jury and no objection was made to the procedure. The appellant now argues that this was coercive. The point is not well taken. People v. Curtis, 36 Cal.App.2d 306, 325, 98 P.2d 228, and cases cited.

The judgment and order are affirmed.

GOODELL and DOOLING, JJ., concur.

On Petition for Rehearing

Rehearing granted; NOURSE, P. J., dissenting.

NOURSE, Presiding Justice.

I dissent from the order since the petition is filed for the sole purpose of keeping the appellant at liberty on bail pending a frivolous appeal.

91 Cal.App.2d 469

SHURMAN v. FRESNO ICE RINK, Inc.

Civ. 3769.

District Court of Appeal, Fourth District,
California.
April 26, 1949.

1. Damages 🔑132(15)

A plaintiff who was awarded $800 for chin wound which required 25 or 30 stitches, 8 or 10 days hospitalization, plastic operation lasting one hour and thirty-five minutes, one week's attendance at home, attendance at physician's office for some three weeks, and which caused great pain and which resulted in permanent slight depression of lip and pain in articulation of jaw and headaches and scar tissue and who had medical bills of $572.10 was entitled to new trial for inadequacy of damages.

2. Appeal and error 🔑1056(1)
Theaters and shows 🔑6(24)

In action for injuries sustained when patron was struck by flying puck at hockey game, evidence that arena was constructed in substantially the same manner as other arenas in reference to walls, screening, and seating and that other arenas did not take the precaution taken by defendant's arena in maintaining signs warning of danger from flying pucks or in announcing such danger over public address system was admissible and was entitled to consideration by jury in determining whether defendant exercised due care, and refusal to admit such evidence was prejudicial where the question was close.

3. Theaters and shows 🔑6(30)

In action against operator of ice rink for injuries sustained when spectator at hockey game was struck by flying puck, evidence whether operator exercised reasonable care in assigning patron, who asked and paid for best seats and who knew nothing of game or seating arrangements, to seat unprotected by wire netting, and whether operator sufficiently warned patron of danger by posting signs and making announcements on public address system was for jury.

4. New trial 🔑9

A limited new trial should not be granted, where substantial justice requires that a new trial, if granted at all, should cover all of the issues.

5. Theaters and shows 🔑6(18)

The general public is not so familiar with hazards of hockey and seriousness of risk as to have common knowledge of such matters or to have assumed risk of danger of flying pucks while witnessing game.

6. Appeal and error 🔑110

An order denying a new trial is not appealable.

◆

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Personal injury action by Marvel Shurman against Fresno Ice Rink, Inc., a corporation. From a judgment for the plaintiff, and from an order granting plaintiff's motion for a new trial on a question of damages only, and from an order denying defendant's motion for a new trial, the defendant appeals.

Attempted appeal from order denying new trial dismissed, order granting new trial on question of damages only affirmed as modified, and judgment reversed and new trial ordered on all issues.

Wild, Carlson & Reeve and Robert M. Barnard, all of Fresno, for appellant.

L. Kenneth Say, of Fresno, for respondent.

GRIFFIN, Justice.

This is an action for damages. Defendant corporation operates the "Ice Arena" in Fresno. It promotes and controls Ice Hockey games between a team representing defendant corporation and other teams playing in the Pacific Coast Hockey League.

On the night of October 28, 1947, such a game was being played in the arena. Plaintiff and her husband attended it for the first time and they knew nothing about the equipment used by the players nor the method of playing the game. Plaintiff's husband asked for "the best seats in the house" and he purchased the highest-priced tickets. They were seated in seats assigned to them in the front row immediately adjacent to the iced surface which was surrounded by a wooden wall about 40 inches high. A protective wire screen was installed around the top of the 40 inch railing in front of certain numbered seats and at each end of the rink surrounding the "Goal Net". This section was about ¾ths occupied that night. Plaintiff was ushered to a seat located several seats south of and away from the end seats protected by this wire netting. Plaintiff testified that the seats were so close together she would have been unable to move quickly to dodge a "football" if she saw one coming. A few minutes after the first intermission of the Ice Hockey game, which was conducted by defendant, plaintiff was struck by a puck (a circular piece of hard rubber about 3–½ inches in diameter and weighing about four ounces). This puck is left in ice until the play, for the purpose of hardening it. During the play it was hit with a hockey stick in the hands of one of the players. He drove it through the air, over the railing and it struck plaintiff on her chin. She was taken to the hospital where she remained for 8 or 10 days. 25 or 30 stitches were taken in her chin. Her front teeth were loosened. Hospital, doctor and nursing bills amounted to $572.10. The medical testimony showed that one hour and 35 minutes were consumed in repairing the wound by plastic operation; that she suffered a great deal of pain; that she was attended at her home for about one week and after that she was attended at the doctor's office until December 5th; that at the time of trial she had a scar on her chin and there was a slight depression of the lip which was permanent in character. The scar was "pulled". She complained of pain in articulation of the jaw and of headaches due to the blow. Treatments were given to the scar tissue. Plaintiff testified that at the time of trial, when she chewed, her jaw bone slipped out of the socket and she was unable to tell whether or not she would always be thus troubled.

There is very little, if any, dispute as to these facts. However, defendant claims and showed evidence of the fact that about 22 signs (15" x 24") were posted in and about the building, reading: "Warning, Danger from Flying Pucks * * * Patrons Assume all Risk of Injury from Flying Pucks", and one read: "Notice to Patrons * * * Protected Screen Seats Available for Requesting Same". There was testimony that these signs were plainly visible. There was also evidence that a loud speaker system was installed within the arena and that defendant caused at least two warnings to be broadcast concerning the danger from pucks prior to the time Mrs. Shurman was injured.

Plaintiff and her husband testified that when they entered the arena the hallway and the place were crowded and there was considerable noise; that they did not see the signs nor hear any such announcements.

Upon this evidence the jury returned a verdict in favor of plaintiff for $800. Plaintiff moved for a new trial on the issue of damages only which was granted on grounds of insufficiency of the evidence to justify the verdict in that the amount was inadequate, and ordered that a new trial be had on that issue alone. Defendant's motion for a new trial on all issues was denied. Defendant appeals from the original judgment, from the order granting plaintiff's motion for a new trial, and from the order denying its motion for a new trial.

Based upon these facts it is defendant's position that there was no sufficient evidence of its negligence and therefore its motion for a nonsuit, directed verdict and motion for judgment notwithstanding the verdict should have been granted, citing such cases as Shanney v. Boston Madison Square Garden Corp., 296 Mass. 168, 5 N.E. 2d 1; Tite v. Omaha Coliseum Corp., 144 Neb. 22, 12 N.W.2d 90, 149 A.L.R. 1164; Lemoine v. Springfield Hockey Ass'n, 307 Mass. 102, 29 N.E.2d 716; James v. Rhode Island Auditorium, 60 R.I. 405, 199 A. 293; Hammel v. Madison Square Garden Corp., 156 Misc. 311, 279 N.Y.S. 815; and Thurman v. Ice Palace, 36 Cal.App.2d 364, 97 P.2d 999, all based on the claim of assumption of risk. However, the court there held that there was no assumption of risk as a matter of law.

In Ingersoll v. Onondaga Hockey Club, 245 App.Div. 137, 281 N.Y.S. 505, 508, it is said: "The risk of being hit by a baseball or by a puck at a hockey game is a risk incidental to the entertainment and is assumed by the spectators. Any other rule of law would place an unreasonable burden upon the operator of a ball park or hockey rink."

In Thurman v. Ice Palace, supra (hearing denied by the Supreme Court), the court rejected this rule announced in the Ingersoll case and definitely held that a spectator at an ice hockey game, who voluntarily selects a seat, which is not protected by a screen, on the edge of the rink, does not, as a matter of law, assume the risk of being struck by a puck used in the game, but where such spectator has never visited the rink nor seen such a game before, it is a question of fact to be determined by the jury from all the evidence whether the defendant was negligent in not providing either notices warning patrons of danger from flying pucks, or screens to protect the spectators, in case a puck should be driven above the railing surrounding the rink. Under these circumstances it was held that it was error to direct a verdict in favor of the defendant.

Defendant here points out that in none of the cited cases were any warnings given either by posting of signs or by the making of announcements over loud speakers or by any other means. It is therefore argued that even under the Thurman case, inasmuch as warnings were given by signs as well as by loud speaker, the duty imposed by law upon defendant, if any, had been more than fulfilled, and therefore there was no negligence upon which the verdict could have been based, citing Restatement of the Law of Torts, secs. 340, 342 and 343; Crane v. Smith, 23 Cal.2d 288, 144 P.2d 356; Newman v. Fox West Coast Theatres, 86 Cal.App.2d 428, 194 P. 2d 706.

In this connection it is also argued that the Thurman decision was in 1939, and since that time over 100,000 persons have seen ice hockey games and should be familiar with the method of playing it and should assume the risk, as is ordinarily done by occupants of baseball bleachers. Blackhall v. Capitol District Baseball Ass'n, 154 Misc. 640, 278 N.Y.S. 649.

[1] A mere recitation of plaintiff's injuries suffered, when considered in connection with the amount of special damages admitted, clearly indicates that the trial court was justified in granting a new trial on the grounds that the amount allowed by the jury was inadequate. Clippinger v. Reiss, 17 Cal.App.2d 604, 62 P.2d 418.

[2] In connection with defendant's lack of negligent operation of the arena it offered to prove that the Fresno arena was constructed in substantially the same manner as other rinks in reference to walls, screening and seating, and that other rinks did not take the precautions taken by this one in maintaining the signs above indicated, or in announcing the danger over the public address system. The trial judge sustained objections to this proffered testimony and ordered the jury to disregard the question. Plaintiff's counsel now concedes that this ruling was erroneous. Thurman v. Clune, 51 Cal.App.2d 505, 125 P.2d 59. This case definitely holds that the practice in other places relative to the safeguarding of ice hockey rinks and the opinion of experts relative to the proper safeguards to be taken in the construction of ice hockey rinks is evidence which is admissible and is entitled to consideration with other evidence on the query of whether defendant in a particular instance has properly safe guarded the ice hockey rink in question. While this evidence does not conclusively fix the standard of care of the operator, it is merely evidence which the jury may consider in determining whether the operator has exercised due care. Tite v. Omaha Coliseum Corp, supra; James v. Rhode Island Auditorium, supra.

In some states it has been held, pertaining to baseball games, that where a spectator is given a choice between seats which are protected by a screen and those which are not, and he selects or accepts an unprotected seat, irrespective of whether seats behind the screen are available, he thereby becomes guilty of contributory negligence or assumes the risk of the reasonable hazards inherent in and incident to the game, and it has been held that a spectator at a hockey game, under similar circumstances, as a matter of law, assumes the risk of being injured by a puck driven into the stands. 149 A.L.R. 1177, III.

As has been noted, Thurman v. Ice Palace, supra, has rejected this latter holding and the general question was discussed by this court in Ratcliff v. San Diego Baseball Club, 27 Cal.App.2d 733, 81 P.2d 625, and it was there held (quoting from the syllabus): "The exercise of ordinary care for the protection of patrons of baseball games requires that they should be protected from flying bats, at least in the area where the greatest danger exists and where such an occurrence is reasonably to be expected;" and that "While those in charge of professional baseball games are not insurers of their patrons, they are required to exercise ordinary care to protect those patrons from injuries from batted or thrown balls, but they are not required to screen all seats and they have met this burden when they have provided a protected area sufficiently large to accommodate as many as may be reasonably expected to call for such protection; and one who voluntarily occupies a seat outside the area thus protected assumes the natural and well known risk of being struck by thrown or batted balls."

In 149 A.L.R. 1175, it is said that the care required of the proprietor or operator of a place of amusement is that degree of care that would be expected of an ordinarily careful and prudent person in his position, and his duty is fulfilled when he makes the place as little dangerous as such a place can reasonably be made, having regard to the contrivances necessarily used in conducting such a place; that he is not, however, an insurer of their safety against all damages incident to the exhibition, but is required only to use the care and protection of an ordinarily prudent person to protect the spectators against danger and is not required to anticipate the improbable.

[3] Ingersoll v. Onondaga Hockey Club, supra, relied upon by defendant, was decided by a divided court, and the appellate courts of this state have rejected the majority holding therein that a guest, at an ice hockey game, occupies the same status as a spectator at a ballgame. The dissenting opinion points out that where the guest was unfamiliar with the game and the seating arrangements and he asked for "good tickets" and he was conducted to seats by the usher at a place other than behind the screen, and was subsequently struck by a puck, it was said the question whether defendants had fulfilled their duty of exercising reasonable care, under all the circumstances, should have been left to the jury to determine. It was likewise said that the practice of other rinks as to precautions taken to guard against such injuries, is entitled to be considered by the jury but is not conclusive; that otherwise, those promoting such forms of amusement could create a rule of law for their own exemptions, citing cases. It appears to us that this rule should be applied to the instant case as the facts are quite similar except that here there were signs posted and announcements made of the danger of the flying pucks. There is also evidence that plaintiff asked for the "best seats". The same price as would be exacted for seats behind the screen was paid. Whether the failure to continue the screen to cover these seats was a proper safeguard to be taken, under the circumstances, appears to be a factual question and not one of law. Ratcliff v. San Diego Baseball Club, supra. It does not appear, as a matter of law, that this is a case where the plaintiff, as an invitee, was fully informed and had knowledge of the attendant dangers of the game and notwithstanding that knowledge chose to occupy another or less costly seat, which might have been sufficient to bring her under the rule of assumed risk, as was held in Elliott & Elliott v. Amphitheatre, Ltd., 1934, Manitoba, 3 Western Weekly Reports 225, 149 A.L.R. 1175, where plaintiff selected his own seat away from the protecting screen, where there was ample space behind the screened ends, and where plaintiff himself was a hockey player and had full knowledge of the dangers incident to the game and of the construction of the rink and the protection afforded spectators, a recovery was denied. Plaintiff in the instant case testified she did not select the seats away from the screened portion but was assigned these seats by the management; that she did not know of the dan-

gers incident to their location or of the game. The mere posting of signs or making of announcements of the dangerous condition, in and of itself, does not necessarily relieve defendant of its negligence, when the danger was apparent to it, and of which it had full knowledge. Otherwise, defendant could have well disposed of the wire netting at each end of the rink, where the greater danger lies, and rely upon the posted signs to relieve it of all liability. Whether posted signs were sufficient or whether other protective measures were necessary under the circumstances, was likewise a factual question for the jury. Knowing the greater danger attached to the occupants of these end seats it did take precautions to guard against such known danger by installing netting to avoid injury to the occupants thereof, as well as posting signs and making announcements as to the danger. Whether, with this knowledge defendant should have, in the exercise of reasonable care, continued the netting further to the south to cover the same priced seats to which plaintiff was assigned was a factual question.

[4] Since defendant was erroneously precluded by the trial court from showing the practice in other places relative to the safeguarding of ice hockey rinks we must conclude, on such a close question, that defendant was prejudiced thereby and the defendant's motion for a new trial should have been granted. This question, as well as the question of damages, should be retried. A limited new trial should not be granted, where substantial justice requires that a new trial, if granted at all, should cover all of the issues. Keogh v. Maulding, 52 Cal.App.2d 17, 125 P.2d 858.

[5] Finally, it cannot be held, as a matter of law, that the general public has, at this particular date, become so familiar with the hazards of this sport and of the actual appreciation of the seriousness of the risk as to bring them within the "common knowledge" rule and under the doctrine of assumption of risk. Thurman v. Ice Palace, supra; 13 Southern California Law Review 374.

[6] No appeal lies from an order denying a new trial. The attempted appeal therefrom is dismissed. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301. The order granting a new trial on the question of damages only should have been made without limitation. As thus modified, the order is affirmed. Judgment is reversed and a new trial ordered on all issues.

MUSSELL, J., concurs.

BARNARD, P. J., being disqualified, did not participate herein.

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91 Cal.App.2d 555

PRAIRIE OIL CO. v. CARLETON et al.

Civ. 3764.

District Court of Appeal, Fourth District, California.

April 29, 1949.

Rehearing Denied May 23, 1949.

Hearing Denied June 27, 1949.

1. Estoppel 🔑119

Waiver is ordinarily a question of fact.

2. Estoppel 🔑52

Waiver of a legal right may be implied as well as express.

3. Mines and minerals 🔑78(5)

Acceptance of rents by landlord after breach of conditions of an oil lease with full knowledge of all the facts is a waiver of the breach and precludes landlord from declaring a forfeiture by reason of breach.

4. Mines and minerals 🔑78(5)

Acceptance by lessor's manager of royalties under lease with knowledge and by long acquiescence in conduct of lessee and assignee with respect to development of property constituted a waiver of performance of conditions of lease requiring commencement of drilling operations for oil within 30 days after execution of lease and provision requiring an additional well to be commenced within 90 days from completion of first well, so as to preclude forfeiture of lease.

5. Mines and minerals ⚷78(5)

Where an oil lease contains a covenant to carry on drilling operations for oil with due diligence, acceptance of royalties does not constitute a waiver of future breaches of lease.

6. Appeal and error ⚷1010(1)

Trial court's findings are conclusive on reviewing court unless unsupported by any substantial evidence.

7. Mines and minerals ⚷78(7)

Evidence sustained finding that all during year 1946 there was an acute scarcity of oil well casing, and that lessee's assignee was unable to secure such casing and suspended oil drilling operations on account of such inability, so as to preclude forfeiture of oil lease under provision therein permitting suspension of oil well drilling schedule if lessee was unable to obtain material and supplies.

8. Mines and minerals ⚷78(7)

Evidence sustained finding that manager of lessor had full knowledge of operating agreement by lessee giving defendant right to drill oil wells on land pursuant to terms of lease, and acceptance of performance from defendant without objection constituted a waiver of provision of lease requiring written consent of lessor before lease could be assigned or transferred and precluded forfeiture of lease.

9. Mines and minerals ⚷78(7)

Where assignee of lessee of oil lease removed and sold equipment and materials from leased premises in violation of terms of lease, court could give judgment to lessor for amount of materials so sold and lessor could not complain that by its interlocutory decree court revoked contract of parties by not decreeing a forfeiture of lease, where conditions imposed upon lessee and assignee in terms of decree were reasonable and were not prejudicial to lessor.

◆

Appeal from Superior Court, Kern County; Norman F. Main, Judge.

Action by Prairie Oil Company, a corporation, against Frank E. Carleton, a trustee, Frank E. Carleton individually, and Frank C. Creasey in ejectment, wherein defendants filed a cross-complaint. From the judgment, plaintiff appeals.

Affirmed.

John W. Preston and John W. Preston, Jr., both of Los Angeles, for appellant.

Siemon, Maas & Siemon, of Bakersfield, for respondents.

MUSSELL, Justice.

The complaint in this action in ejectment contains allegations that plaintiff is the owner and entitled to possession of certain real property in the County of Kern; that defendants are unlawfully in possession of the property and are withholding possession from plaintiff to its damage. Defendant's claim to possession of the premises is based on a lease dated April 17, 1941, whereby plaintiff leased the property for oil and gas purposes to defendant Frank E. Carleton, Trustee, and on a writing called an operating agreement dated August 10, 1943, between Carleton and defendant Creasey pursuant to the terms of which Creasey took control of and operated the property. Plaintiff contends that defendants were in default in the performance of their obligations under the lease, and the defendants assert that the default, if any, was waived and excused by plaintiff.

The lease to Carleton contained the following drilling requirements:

"(a) On or before thirty (30) days Lessee must commence actual drilling in the ground on said land and must diligently prosecute the same without interruption, unless delay is excused as hereinafter provided, to a depth of not less than One Thousand (1000) feet, unless oil is found in paying quantities at a lesser depth.

"(b) Should further drilling of the first hole drilled hereunder become impossible by reason of accident, or unprofitable in the judgment of the Lessee, that hole may be abandoned.

"(c) Within ninety (90) days of the completion of the first well, or within thirty (30) days after abandonment of same as aforesaid, Lessee must commence the actual drilling of a new well and prosecute to the completion or abandonment in the same manner provided herein for the first well, and so on with each succeeding well until there shall have been drilled on said land nine (9) producing wells."

Paragraph 10 provides that: "The drilling and operating requirements of this lease shall be suspended while, but only as long as, Lessee is prevented from complying therewith, in whole or in part, by strikes, lockouts, war or inability (other than financial) of Lessee to obtain material or supplies, as well as delays in transportation, accidents and other matters of any kind or nature whatsoever beyond the control of Lessee, or when the price of oil falls below forty (40) cents per barrel at the well."

The lease provides for termination in the following language:

"11. In the event of a breach of any of the terms or conditions of this lease, by the Lessee, and failure by the Lessee to remedy the same within thirty (30) days after written notice from the Lessor so to do; then, at the option of the Lessor, this lease shall forthwith cease and determine and all rights of the Lessee in and to said premises be at an end:"

The provisions as to assignment or transfer and subletting the premises are thus stated:

"It is expressly understood and agreed that this lease shall not be assigned or transferred, nor shall the premises and rights covered thereby be leased, assigned or sub-let as to any portion thereof, without the written consent of the Lessor first being had and obtained."

By the terms of the so-called "Operating Agreement" of August 10, 1943, Carleton gave defendant Creasey the right to produce wells upon the property in question in accordance with the terms of the lease of April 17, 1941, reserving in Carleton 24 2/3 % of the first 500 barrels of oil produced in any one month, and 20 2/3% of oil production in excess thereof. Carleton to pay the royalty obligations to lessor under the lease. Creasey agreed "to legally commence operations and to diligently prosecute the same and at all times strictly comply with all the terms and conditions of said lease."

At the time of the execution of the lease to Carleton in 1941, three wells had been drilled on the property. These wells, numbered 1, 2 and 3, had been shut down and no oil had been produced from them for several years. From the date of the Carleton lease until the Creasey agreement, the property was operated by several parties under the Carleton lease. Well No. 3 was officially abandoned as no oil had been produced from it, and Well No. 4 was drilled by one Hicks or by the Great Western Oil and Development Company. After Creasey took possession in 1943 he entered into a contract with the Standard Oil Company for the sale of oil, and in February, 1946, had completed the drilling of a new well on the leased premises which was known as No. 5. Creasey testified that in May of 1946, he had filed a notice to drill an additional well, No. 6, and had posted a bond; that about December 17, 1946, he spudded in that well but was unable to get casing, and on or about December 24, 1946, plaintiff served upon him a "Notice of Default" of the lease. The notice contained six grounds for default, summarized as follows:

"1. That drilling was not begun within 30 days following execution of lease;

"2. That if the operations actually conducted are claimed to constitute drilling, no additional well was commenced within 90 days of completion of first well;

"3. That operations were not carried on with due diligence and in good faith, and that the leased property has been used contrary to the lease by lessee and his assignee as a base for the treatment of road oils produced from other properties;

"4. That lessee and assignee failed to pay their portion of taxes;

"5. That lessee and assignee sold material taken from the leased premises, for which they failed to account to lessor-plaintiff; and

"6. That lessee assigned the lease and sub-let the premises without lessor's consent."

The notice further provided that: "Unless you cure *all* of the above-mentioned defaults within thirty (30) days after receipt of this notice the undersigned lessor will terminate this lease as provided in Paragraph 11 of said lease." On February

24, 1947, plaintiff served upon the defendants a "Notice to Quit" and on March 12, 1947, filed the complaint herein.

It is quite apparent from the record before us that defendants failed to comply with the drilling requirements of the lease, as only two wells were drilled for a period of over five years, and the lease contract called for the drilling of not less than nine additional wells on the property. After the completion of the first well defendants were obligated to begin drilling within ninety days and to thereafter continuously conduct drilling operations until nine producing wells were completed.

Defendants assert that plaintiff waived strict performance of the terms of the lease and is estopped from declaring a forfeiture. In this connection there is evidence that George M. Brown, president and managing agent of plaintiff oil company, was thoroughly familiar with the property. He visited it many times and had many conversations with the operators prior to the Creasey agreement as well as with Creasey after he took possession in 1943. With full knowledge of the operations being conducted under the Carleton lease, Brown accepted, for the plaintiff, royalties from the production of oil from March, 1944, to and including December, 1946. The last shipment of 642 barrels in February, 1947, was not distributed. The statements called "run tickets" show that Creasey received about 80%, Carleton 4% and plaintiff 16% of the production. The production reports made to the Division of Oil and Gas, indicate that in August of 1943, 48 barrels of oil per month were being produced from Wells 2 and 4, while in 1946, production averaged 410 barrels per month from Wells 2, 4 and 5.

[1-3] Waiver is ordinarily a question of fact, Lyons v. Brunswick-Balke-Collender Co., 20 Cal.2d 579, 583, 127 P.2d 924, 141 A.L.R. 1173, and a waiver of a legal right may be implied as well as express. Johnson v. Kaeser, 196 Cal. 686, 698, 239 P. 324. The acceptance of rents by the landlord after breach of the conditions of an oil lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of the breach. Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 440, 6 P.2d 71, 80 A.L.R. 453.

[4, 5] We conclude that plaintiff waived performance of the conditions of the lease requiring the commencement of drilling operations within 30 days after the execution of the lease, and also the provision requiring an additional well to be commenced within 90 days from the completion of the first, by acceptance of the royalties and benefits and by long acquiescence in the conduct of the defendants with respect to the development of the property. However, there was a continuing covenant to carry on drilling operations with due diligence until nine additional producing wells had been completed, and where such continuing covenants exist, the acceptance of the royalties would not constitute a waiver of future breaches of the lease. Extension Oil Co. v. Richfield Oil Corp., 52 Cal.App. 2d 105, 108, 125 P.2d 895.

Plaintiff then had the right to take the necessary steps to declare a forfeiture of the lease because of the failure of defendants to diligently prosecute drilling operations without interruption. The notice of default provided that defendants cure all defaults within 30 days after receipt of the notice, and, as we view the situation, defendants were required to resume drilling operations within that time unless other provisions of the lease excused performance of this condition.

Paragraph 10 of the lease provides that "the drilling and operating requirements of the lease shall be suspended while, but only so long as lessee is prevented from complying therewith, in whole or in part, * * * by inability (other than financial) of lessee to obtain material and supplies." Defendant Creasey testified that after spudding in Well No. 6, in December of 1946, he was unable to get casing to continue drilling operations; that on December 19, 1946, he wrote to Carleton and sent a copy of the letter to plaintiff, in which letter he stated that he had contacted several supply houses in an effort to get casing and was unsuccessful and that he was suspending operations under the provisions of paragraph 10 of the lease. Creasey testified that he had tried to get casing "every place that I thought any pipe could be obtained;" that he made inquiry at ten supply houses, and kept repeating his contacts to get pipe at intervals. Plaintiff produced witnesses who testified that they were able to buy casing during 1946.

[6, 7] The trial court found, on conflicting evidence, that during all of the year 1946 there was an acute scarcity of oil well casing and that only a small amount of second hand casing was available, and then only in defective condition and at irregular intervals; that on December 17, 1946, defendant Creasey was unable to secure the necessary oil well casing with which to continue drilling and suspended operations on account of such inability on or about December 19, 1946, and that on December 26, 1946, while defendant Creasey was still unable to secure the necessary casing he was served with the notice of forfeiture. The findings of the court thus made, cannot be disturbed here. Nichols v. Mitchell, 32 Cal.2d 598, 606, 197 P.2d 550.

Plaintiff contends, as a ground of forfeiture, that the lessee assigned the lease and sublet the premises without the lessor's consent. It is not necessary to decide whether the so-called "Operating Agreement" between Carleton and Creasey was an assignment or a sublease as there was only one such agreement, dated August 10, 1943. At about that time Creasey went into possession of the property and remained in possession to the exclusion of Carleton. Creasey operated the leased premises as he chose, subject only to the provisions of the Carleton lease. He shipped oil, drilled Well No. 5, commenced Well No. 6, and purchased casing and other materials for use on the premises. As plaintiff puts it—"He has, in short, exercised every right and power granted to the lessee in respect to every phase of drilling, producing and operating the leased premises."

[8] There is a conflict in the evidence as to whether Brown, President of the plaintiff corporation, was aware of the terms of the operating agreement. Brown testified that in January, 1943, Creasey presented a document to him which he refused to sign on the ground that he considered it an assignment of the lease, and Creasey testified that he explained his position to Brown fully at the time. The court found that "at all times since August 10, 1943, plaintiff has had full and complete knowledge * * * of all operations carried on by defendants; that through the entire term of said lease plaintiff * * * has permitted, allowed and acquiesced in the operation of said property by defendant Creasey, and the manner in which and the time at which certain covenants of the lease have been performed without regard to the strict terms and provisions of the lease, and have accepted performance at certain times when performance was overdue without any objection." These findings are supported by substantial evidence and cannot be here disturbed.

Assuming that the operating agreement was a sublease, there is nothing in the record to indicate that the property was subleased after Creasey took possession in 1943, and we conclude that there was a waiver of the terms of the lease as to the operations of Creasey under the agreement.

It is claimed that material was taken from the lease and sold in violation of the terms of the lease. The court found in this connection, on conflicting evidence, that certain equipment and materials were sold from the leased premises prior to August 10, 1943, which was of the reasonable value of $1221, for which no payment was made to plaintiff as provided for in paragraph 10 of the lease, and gave judgment to plaintiff for that amount, to be paid within ten days from the date of the interlocutory decree.

[9] Plaintiff complains that by its interlocutory decree the court rewrote the contract of the parties to the lease. However, upon an examination of the terms of the decree it appears that the conditions imposed upon defendants were reasonable, and in any event were not prejudicial to plaintiff.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

ESSICK et al. v. CITY OF LOS ANGELES et al.

Civ. 16819.

District Court of Appeal, Second District,
Division 2, California.
April 22, 1949.
Rehearing Denied May 11, 1949.
Hearing Granted June 20, 1949.*

1. Municipal corporations 🔑57

The charter of a municipality is its constitution or organic law and operates as a limitation on powers which may be exercised by a city counsel.

2. Municipal corporations 🔑61

Where a municipal charter definitely contains a method of procedure for exercise of a power granted to municipal authorities, all other methods of exercising the power are excluded.

3. Municipal corporations 🔑46, 111(1)

The provisions of a municipal charter may be changed only by amendment in method prescribed by law, and may not be amended by passage of an ordinance.

4. Municipal corporations 🔑111(1)

An ordinance passed by a municipal corporation cannot change or limit the effect of a provision of the municipal charter, and, in order for an ordinance to be valid, it must conform to the provisions of the charter.

5. Municipal corporations 🔑111(1)

In determining validity of a municipal ordinance attacked as contrary to provisions in municipal charter, charter is to be considered according to its provisions at time ordinance was enacted and not in light of subsequent amendments.

6. Declaratory judgment 🔑129

Complaint of owners of realty located in one family zone of city, alleging that city ordinances amending procedure established under another ordinance for obtaining a conditional use permit were contrary to city charter and void, presented a justiciable controversy giving superior court jurisdiction of declaratory judgment action by owners against city, members of city council, and corporation which had been granted a conditional use permit under ordinance. Code Civ.Proc. 1060.

7. Municipal corporations 🔑621.3

Where city charter provided two methods by which the owner of realty could obtain a variance from provisions of a zoning ordinance, city ordinances which were adopted by city council while charter was in effect, and which attempted to create a third method by which the owner of realty might obtain a variance from a zoning ordinance, were void.

8. Municipal corporations 🔑621.9

Use of 486 acres for cemetery purposes in a zone in city restricted to one-family homes constituted a "variance" in use of the 486 acres as well as permission to use it for a purpose other than that for which it was zoned, though resolution of city council authorizing such variance referred to a "conditional use permit".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Conditional Use Permit" and "Variance".

9. Declaratory judgment 🔑6

The power of a court to refuse to entertain an action for declaratory relief is not an arbitrary power, but is a sound discretion which must be exercised to permit the maintenance of a declaratory relief action if the complaint sets forth facts showing that a declaratory adjudication is appropriate. Code Civ.Proc. §§ 1060, 1061.

10. Declaratory judgment 🔑123, 129

A declaratory relief action may be invoked to test the constitutionality of a statute or zoning ordinance. Code Civ.Proc. § 1060.

11. Declaratory judgment 🔑311, 344

In seeking declaratory relief, a plaintiff in pleading and proof is not bound by the rules applicable in an action for an injunction or which apply in equity cases. Code Civ.Proc. § 1060.

12. Declaratory judgment 🔑312

If a complaint alleges facts sufficient to show that a declaratory judgment is appropriate, trial court is bound to take cognizance of the action. Code Civ.Proc. § 1060.

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* Subsequent opinion 213 P.2d 492.

13. Declaratory judgment ⚷313

Complaint did not fail to show that case was appropriate for declaratory relief because of the absence of allegations that plaintiffs suffered injury different from that which other people similarly situated might suffer. Code Civ.Proc. § 1060.

14. Evidence ⚷18

It is common knowledge that the proximity of a cemetery to residential property affects its value.

15. Declaratory judgment ⚷129

Where from complaint it appeared that plaintiffs were owners of realty in area in city zone for one-family dwellings, and that corporation was claiming right under invalid city ordinances to use 486 acres located in the same zone and within a few miles from plaintiffs' realty for cemetery purposes, it was necessary for superior court to grant declaratory relief. Code Civ.Proc. §§ 1060, 1061.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Bryant Essick and others, on behalf of themselves and all others similarly situated, against the City of Los Angeles, a municipal corporation, and Leland S. Warburton and others as members of the council of the City of Los Angeles, and the Forest Lawn Company, a corporation, for declaratory relief relative to the validity of city ordinance authorizing issuance of a conditional use permit. From a judgment of dismissal, the plaintiffs appeal.

Judgment reversed.

Carl W. Barrow, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., and Bourke Jones and Roger Arnebergh, Asst. City Atty., all of Los Angeles, for respondents City of Los Angeles and its officials.

Ugene U. Blalock and Harold S. Morrison, both of Glendale, and Towson T. MacLaren, of Los Angeles, for respondent Forest Lawn Company.

McCOMB, Justice.

From a judgment of dismissal on motion of defendants of an action for declaratory relief relative to the validity of section 20 of Ordinance No. 91,503 of the City of Los Angeles, plaintiffs appeal.

FACTS

i. Complaint: In their complaint as amended plaintiffs alleged that they were qualified voters and electors of the City of Los Angeles and owned real property located in an R-1 One Family Zone; that defendant Forest Lawn Company also owned in the same zone 486 acres of land; that they filed the action on behalf of themselves and all real property owners located in the same zone similarly situated; that on March 7, 1946, the city council of defendant city passed Ordinance No. 90,500, commonly known as the Comprehensive Zoning Plan of the City of Los Angeles, which ordinance provided, among other things, that no cemeteries were to be located in the zone which included the respective properties of plaintiffs and defendant Forest Lawn Company, except that a procedure for the obtaining of a permit for the "conditional use" of property for cemetery purposes was established by subsection C of section 12.24 of said ordinance; that in February, 1947, the city council of defendant city passed section 20 of Ordinance No. 91,503 which amended the procedure established under section 12.24 of Ordinance No. 90,500 for obtaining a "conditional use permit;" that the procedure provided for in the ordinance as thus amended was that an applicant desiring to obtain permission to put his property to a nonconforming use should apply to the city planning commission; that a hearing was to be had thereon and in the event the city planning commission disapproved the application the applicant could apply to the city council which might "by resolution" modify or overrule the determination of the city planning commission by a two-thirds vote of the council and thereby grant a "conditional use;" in compliance with the provisions of the ordinance just mentioned defendant Forest Lawn Company submitted an application to the city planning commission on December 8, 1947, for a "conditional use" for cemetery purposes of their property, consisting of 486 acres of land located in the zone above mentioned; after a public hearing such application was denied by the city planning commission; on

February 5, 1948, said defendant appealed to the city council of the City of Los Angeles, which on March 8, 1948, passed a resolution reversing the action of the city planning commission and granted defendant Forest Lawn Company's application for a "conditional use" of its property for cemetery purposes pursuant to which said defendant has commenced the construction of a cemetery upon its property.

It was further alleged that the foregoing ordinances are contrary to the provisions of section 97 of Article VIII of the Charter of defendant city and are therefore null and void.

Finally, it was alleged that an actual controversy existed between plaintiffs and defendants relating to their legal rights under the above mentioned ordinances and charter provisions, and it is prayed that the court make an adjudication thereof and declare the ordinances void.

ii. Motion to Dismiss: Defendants filed motions to dismiss the complaint on the grounds that (a) the court had no jurisdiction on the subject of the action since the complaint did not present a justiciable controversy, and (b) it was not necessary or proper under the circumstances at that time for the court to make a declaration or determination of the rights and duties of the plaintiffs relative to the subject matter of the complaint as amended. This motion was granted.

Questions

First: *Did the complaint present a justiciable controversy?*

[1-6] The answer to this question is yes, because of these rules:

1. The charter of a municipality is its constitution or organic law and operates as a limitation upon the powers which may be exercised by a city council. (Wehrle v. Board of W. & P. Com'rs, 211 Cal. 70, 73, 293 P. 67; Platt v. City and County, 158 Cal. 74, 84, 110 P. 304; Thille v. Board of Public Works, 82 Cal.App. 187, 189, 255 P. 294.)

2. When a municipal charter definitely contains a method of procedure for the exercise of a power granted to municipal authorities all other methods of exercising the power are excluded. (McQuillin, Municipal Corporations, 2d Ed.1940, vol. 1, para. 386, p. 1061.)

3. The provisions of a municipal charter may be changed only by amendment in the method prescribed by law, and may not be amended by the passage of an ordinance. (Platt v. City and County, 158 Cal. 74, 83, 110 P. 304.)

4. An ordinance passed by a municipal corporation cannot change or limit the effect of a provision of the municipal charter. In order to be valid an ordinance must conform to the provisions of the charter. (Marculescu v. City Planning Comm., 7 Cal.App.2d 371, 373, 46 P.2d 308.)

5. In determining the validity of an ordinance, where the basis of the attack is that the ordinance is contrary to provisions in the municipal charter, the latter is to be considered according to its provisions at the time the questioned ordinance was enacted and not in the light of subsequent amendments. (Fleming v. Hance, 153 Cal. 162, 164, 94 P. 620; German Sav. etc. Soc. v. Ramish, 138 Cal. 120, 131, 69 P. 89, 70 P. 1067; Banaz v. Smith, 133 Cal. 102, 104, 65 P. 309.)

In 1946 and in February, 1947, when the ordinances hereinafter mentioned were adopted, the Charter of defendant municipality read in part as follows:

Section 97: "No ordinance, order or resolution shall be adopted by the Council authorizing, ordering or involving any of the following enumerated matters, unless and until such ordinance, order or resolution shall have first been submitted to the City Planning Commission for report and recommendation concerning the relation of the matter involved to and its effect upon any portion of the master plan of the City or any plans being prepared by said department: * * *

"c. The creation of districts or zones for the purpose of regulating the use of lands, density of population, the height, bulk, location or use of buildings therein, or the size of yards, open spaces or setbacks adjacent to buildings, *or the changing, amending, or altering of any such zones, districts or regulations.*

"It shall be the duty of the City Planning Commission within thirty (30) days from the receipt of any such proposed ordinance, order or resolution, to make and file its report and recommendation thereon with the Council, *and should said Planning Commission recommend against the approval of the matter involved, the Council may adopt such ordinance only upon a two-thirds vote of the whole of said Council. Should the City Planning Commission recommend approval or fail to make any recommendation within the time mentioned herein, said Council may adopt such ordinance, order or resolution by a majority vote of the whole Council.* * * *"

"Sec. 98. There is hereby created the office of Zoning Administrator. * * *

"(c) Subject to such rules and regulations as the Council may by ordinance prescribe he shall investigate, hear and determine all applications for variances from the rules, regulations, restrictions and requirements of the zoning ordinances and shall have power to grant such variances as may be in harmony with the general purpose and intent of said ordinances and in accordance with the general and specific rules therein contained and subject to such conditions and safeguards as he may impose. He shall have authority to grant variances only when practical difficulties, unnecessary hardships or results inconsistent with the general purposes of the zoning regulations may result from the strict and literal interpretation and enforcement of the provisions thereof and before any variance may be granted, it shall appear and the Zoning Administrator shall specify in his findings the facts in each case which shall establish beyond a reasonable doubt:

"(1) That there are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property that do not apply generally to the property or class of uses in the same district or zone;

"(2) That such variance is necessary for the preservation and enjoyment of a substantial property right of the petitioner, possessed by other property in the same zone and vicinity; and

"(3) That the granting of such variance will not be materially detrimental to the public welfare or injurious to the property or improvements in such zone or district in which the property is located; and

"(4) That the granting of such variance will not adversely affect the master plan.

"The determination of the Zoning Administrator shall be final except that appeals therefrom may be taken to the Board of Zoning Appeals, as hereinafter provided, by any person aggrieved or by an officer, board, department or bureau of the City. * * *"

"Sec. 98½. There is hereby created a Board of Zoning Appeals, consisting of three (3) members, who shall be appointed by the Mayor subject to confirmation of the Council, one of whom may be a member of the City Planning Commission. * * *"

"Sec. 99. The Board of Zoning Appeals shall have and exercise the following powers: * * *

"(b) To hear and determine appeals from the rulings, decisions and determinations of the Zoning Administrator granting or denying applications for variances from any rule, regulation, restriction or requirement of the zoning ordinances, or any section thereof.

"Upon the hearing of such appeals said board may affirm, change or modify the ruling, decision or determination appealed from, or, in lieu thereof, make such other or additional determination as it shall deem proper in the premises, subject to the same limitations as are placed upon the Zoning Administrator by this charter." (Italics added.)

Defendant city council on March 7, 1946, adopted Ordinance No. 90,500 and in February, 1947, Ordinance No. 91,503, whereby a procedure was established for what was termed "conditional use of zoned property." By these ordinances it was provided that an applicant desiring to obtain permission to put his property to a nonconforming use should apply to the city planning commission; that if after a hearing had been had thereon the city planning commission disapproved the application, the applicant could appeal to the city council which might "by resolution" modify or overrule the determination of the city planning commission by a two-thirds vote of the council, thereby granting a "conditional use" of the property.

Two methods were provided a property owner by the city charter for obtaining a variance from the provisions of a zoning ordinance: (1) A matter could be submitted by the city council to the planning commission and if the planning commission disapproved the application for a variance the city council might thereafter adopt an ordinance upon a two-thirds vote of the whole council granting the requested variance. (Sec. 97 of the municipal charter, supra.) (2) An owner of property could apply for a variance from the requirements of the zoning ordinance by applying to the zoning administrator from whose decision an appeal might be taken to the Board of Zoning Appeals. This body's decision was final. (Sections 98, 98½ and 99 of the municipal charter, supra.)

[7] It is apparent that the city council in adopting Ordinances No. 90,500 and No. 91,503 attempted to create a third method by which a property owner might obtain a variance from a zoning ordinance, to wit, by permitting him to apply to the city planning commission and if his application was denied, appealing to the city council, which "by resolution" could modify or overrule the decision of the city planning commission by a two-thirds vote.

We are now confronted with this proposition urged by plaintiffs: That Ordinances No. 90,500 and No. 91,503 are invalid and void because contrary to the provisions of the charter of defendant municipality. This proposition is tenable in view of the above stated rules. Since defendant city and its agencies are limited in the exercise of their powers by the provisions of the municipal charter (rule 1, supra), and since the charter provides only two methods of obtaining a variance from a zoning ordinance, these methods constitute a limit of defendant municipality's power to grant variances in zoning ordinances (rule 2, supra). The ordinances being contrary to the provisions of the charter can not amend or alter the procedure set forth in the charter for obtaining a variance from a zoning ordinance (rules 3 and 4, supra). Finally, since at the time the ordinances were adopted the charter referred to above was in effect, such provisions control and render invalid the ordinances which were adopted contrary to the provisions of the charter (rule 5, supra).

[8] Defendants' attempt to draw a distinction in this case between the granting of a "variance" and a "conditional use permit" is without merit. It is obvious that permitting the use of 486 acres for cemetery purposes in a zone restricted to one-family homes constitutes a variance in the use of the property as well as a permission to use it for a purpose other than that for which it was zoned. (See Webster's New International Dictionary, 2d Ed.1947, page 2818, wherein "variance" is defined as "change; variation or a degree of such; difference; deviation.") There is no doubt that if defendant Forest Lawn Company is permitted to use its 486 acres for cemetery purposes it will constitute a variance in the zoning ordinance.

North Side Property Owners' Ass'n v. County of Los Angeles, 70 Cal.App.2d 598, 161 P.2d 613, and North Side Property Owners' Ass'n v. Hillside Memorial Park, 70 Cal.App.2d 609, 161 P.2d 618, are not authorities to the contrary.

In view of the foregoing, the complaint, contrary to defendants' contention, did not show from the allegations contained therein that the ordinances were valid but did show that they were invalid and thus presented a justiciable issue.

Second: *Was it necessary or proper under the circumstances alleged in the complaint as amended for the court to make a declaration of the rights and duties of the respective parties in regard to the matters alleged?*

[9-11] This question must be answered in the affirmative and is governed by these rules:

1. The power of the court to refuse to entertain an action for declaratory relief brought pursuant to the provisions of section 1060 of the Code of Civil Procedure* is not an arbitrary power (see sec. 1061)

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* Section 1060, Code of Civil Procedure reads: "(Declaratory relief.) Any person interested under a deed, will or other written instrument, or under a con-

but is a sound discretion vested in the trial court which must be exercised to permit the maintenance of a declaratory relief action if the complaint sets forth facts and circumstances showing that a declaratory adjudication is appropriate. (Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 762, 161 P.2d 217, 162 A.L.R. 747.)

2. A declaratory relief action may be invoked to test the constitutionality of a statute or zoning ordinance. (Lord v. Garland, 27 Cal.2d 840, 852, 168 P.2d 5; Andrews v. City of Piedmont, 100 Cal.App. 700, 701, 281 P. 78; Jones v. Robertson, 79 Cal.App.2d 813, 819, 180 P.2d 929.)

3. In seeking declaratory relief a plaintiff in pleading and proof is not bound by the rules applicable in an action for an injunction or which apply in equity cases. (See Borchard, Declaratory Judgments, 2d Ed.1941, pages 239, 240, 365.)

[12, 13] Under rule 1, supra, if the complaint alleges facts sufficient to show that a declaratory judgment is appropriate the trial court is bound to take cognizance of the action. That it did allege such facts is demonstrated because plaintiffs were seeking to have declared void an invalid ordinance (see rule 2, supra), and the complaint did not fail to show that it was an appropriate case for declaratory relief because of the absence of allegations that plaintiffs suffered injury different from that which other people similarly situated might suffer (rule 3, supra). Since it appears from the allegations of the amended complaint that it is necessary and proper under the circumstancees alleged that there should be a declaration and determination of the legal rights and duties of the respective parties the court abused its discretion in adjudging that the amended complaint did not present a justiciable issue. (Code Civil Procedure, sec. 1061.)

[14, 15] From the complaint it appears that plaintiffs are property owners in an area which was zoned for one-family dwellings; that defendant Forest Lawn Company was claiming the right under an invalid ordinance to use 486 acres of its land located in the same zone and within a few miles (approximately 5½ miles) from plaintiffs' property for cemetery purposes. It is a matter of common knowledge that the proximity of a cemetery to residential property affects its value. In view of the foregoing facts it is evident that plaintiffs are entitled to maintain their action for declaratory relief.

The judgment is reversed.

MOORE, P. J., and WILSON, J., concur.

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tract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

91 Cal.App.2d 528

EAST COALINGA OIL FIELDS CORPORATION v. PURE OIL CO. et al.

Civ. 3768.

District Court of Appeal, Fourth Disrict, California.

April 28, 1949.

Hearing Denied June 27, 1949.

1. Judgment ⇨713(3)

Judgment, in action brought by grantee of deed against grantor, to determine whether grantor waived its right to percentage of net profits by consenting to community oil lease between grantee lot owner and oil companies, was not binding in subsequent action by grantor against lot owners and oil companies to determine its right to percentage of net profits reserved in deeds, since parties and some of issues were different and additional evidence was presented.

2. Mines and minerals ⇨79(1)

Where drilling contract and deed of subdivision of lots reserved to grantor 20 per cent of net production from wells drilled on lots for 50-year period and grantor subsequently consented to a community lease of lot owners with oil companies and executed drilling agreements with such companies giving them right to drill thereon, grantor waived right to 20 per cent of royalties payable to lot owners, and provision in drilling contracts that grantor's right to any royalty would not be affected thereby applied only to lots still owned by grantor.

3. Mines and minerals ⇨79(1)

Where deed conveying subdivision lots and drilling contract between grantor and grantee disclosed that grantor reserved right for 50 years to drill for oil "upon said quarter section" and parties' respective shares in profits were interdependent, respective rights of participation in net profits during period extended to any well drilled in any part of tract, including grantor's proposed roads on which lots were located.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by East Coalinga Oil Fields Corporation, a corporation, against Pure Oil Company, a corporation, and others for declaratory relief, wherein defendants filed a cross-complaint. From a judgment for the defendants, plaintiff appeals.

Affirmed.

W. Eugene Craven and Margaret A. Flynn, both of Merced, for appellant.

Barstow & Barstow, Thomas F. Lopez, Iener W. Nielsen, and Harold V. Thompson, all of Fresno, Dockweiler & Dockweiler, Thomas A. J. Dockweiler, and Mortimer Kline, all of Los Angeles, and Ben A. Harper and E. S. Morris, both of Chicago, Ill., for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment in an action for declaratory relief.

In 1919, a tract of about 183 acres was subdivided into the equivalent of 2640 lots for the purpose of oil development. The plaintiff, which will be referred to as East Coalinga, acquired title to this tract and sold a large number of the lots at a price of $110 per lot. Each purchaser of a lot executed a drilling contract with East Coalinga and upon payment of the purchase price received a deed. These instruments provided that for a period of 50 years East Coalinga should have the exclusive right to drill for oil upon the entire tract; that the purchasers should receive a proportionate share of 80% of the net profits from the sale of oil from any well or wells which East Coalinga might drill on any part of the tract; and that East Coalinga should retain 20% of said net profit. It was provided that each purchaser should thus share in the profits in proportion to the number of lots he owned, as compared with the total number of lots in the tract. There was a further arrangement by which East Coalinga was to set apart 30% of all money received from the sale of lots to establish a fund to carry on drilling operations. East Coalinga commenced drilling an oil well in April, 1921. In May, 1923, the drilling fund became exhausted, operations were abandoned and the equipment was lost by foreclosure.

In 1938, oil was discovered in the vicinity of this tract and efforts were resumed to again bring about drilling operations in the hope of developing oil on this tract. Counterpart leases constituting a community oil and gas lease with Zeb A. Terry, as lessee, were executed by the owners of all of the 2640 lots with the exception of 62 lots. These counterpart leases provided that they should be construed as one lease, and that Terry should have the exclusive right to drill for and produce oil, gas, etc. on the leased premises. They also provided that a ⅛ royalty should be paid by the lessee to the lessors, respectively. East Coalinga consented in writing to the execution by lot owners of the counterparts of the Terry community lease. By various assignments the counterparts of the Terry community lease were transferred to the Pure Oil Company, Pacific Western Oil Corporation, and George F. Getty, Incorporated, which will be referred to as the oil companies. Subsequently, as a result of drilling operations carried on by the oil companies under the Terry lease, oil was produced in paying quantities. For some five years the oil companies paid the ⅛ royalty to the respective lot owners in accordance with the terms of the community lease.

In a former action brought by the owner of two lots in this tract, MacNicol v. East Coalinga Oil Fields Corp., 22 Cal.2d 742, 140 P.2d 793, East Coalinga contended that under its original drilling contracts it was entitled to 20% of any royalties received by the lot owners under the terms of the community lease. The plaintiff in that action contended that East Coalinga had waived its right to a share of such royalties by executing its written consent to the community lease. The court held that the evidence in that case was sufficient to support the trial court's conclusion that East Coalinga, by consenting to the execution of the community lease, had not waived its right to 20% of the ⅛ royalty payable under the community lease. Most of the preliminary facts are more fully set forth in the opinion in that case.

In June, 1945, East Coalinga brought this action for declaratory relief, naming the oil companies and some 70 individual lot owners as defendants. The complaint alleged the execution of the original contracts and deeds with the lot owners, with a reservation of 20% of the profits to East Coalinga; that East Coalinga had drilled a well to a depth of 4780 feet, and otherwise fully performed the original drilling contracts; the execution of the counterparts of the Terry community lease; the assignment of the community lease to the oil companies; the execution of new drilling contracts between East Coalinga and the oil companies as successors to the rights of Terry under the community lease; and the production of oil on the tract by the oil companies. A judgment was prayed for decreeing that East Coalinga is the owner of and entitled to, for the period of 50 years from February 1, 1922, 20% of all profits or royalties from oil and gas produced under the terms of the community lease. Various answers and a cross complaint were filed. At the hearing it appeared that there are only five shares of stock in East Coalinga outstanding, and that four of these are owned by one man.

The court found in all respects in favor of the defendants finding, in addition to other facts, that on May 19, 1939, East Coalinga executed drilling contracts with the oil companies; that the oil companies had drilled wells and were producing oil, and were performing said contracts in accordance with their terms; that since February, 1941, the oil companies have paid to the respective lot owners the proportionate ⅛ royalty provided for in the community lease, in accordance with the terms of that lease; that the owners of 2578 lots in the tract have executed counterparts of the Terry community lease; and that East Coalinga, as the owner of 470 lots in said tract, executed one of the counterparts of the Terry community lease. The court concluded that by executing the written consent to the community lease and the new drilling contracts with the oil companies dated May 19, 1939, East Coalinga waived and relinquished its right to participate in any of the profits or royalties derived or resulting from operations under the Terry community lease as to each and all lots in said tract, except as to lots therein which were wholly owned by East Coalinga and except as to any lot or lots not then or thereafter covered by the Terry community lease. Judgment was entered accordingly and East Coalinga has appealed.

[1] The appellant mainly relies on the decision in MacNicol v. East Coalinga Oil Fields Corp., supra, as conclusively determining that it has not waived its right to 20% of the ⅛ royalty payable to the other lot owners under the community lease, and as being controlling here. Not only are the parties and some of the issues different here, but important additional evidence here appears which was not presented in the former action. Under these circumstances the decision thus relied on is not controlling here. Standard Oil Co. v. John P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797; Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 P. 459.

The appellant further contends that, in any event, the evidence is not sufficient to support the court's findings to the effect that it had relinquished and waived its rights to 20% of the royalties accruing to the other lot owners under the terms of the community lease. It is argued that under the original deeds and drilling contracts executed by the lot owners East Coalinga had the exclusive right to drill for oil for a period of 50 years, with the right to receive 20% of the profits from any wells drilled by East Coalinga, its successors or assigns; that the consent to the community lease which was executed provided that nothing therein should affect the rights of East Coalinga in connection with any lot in the tract which was not leased to Terry or the Pure Oil Company; and that East Coalinga's consent to drilling operations by third parties could not alter its right to 20% of the royalties which had theretofore been expressly reserved to it.

The consent to the execution of the Terry community lease by other lot owners, which was executed by East Coalinga, recites that East Coalinga "hereby consents to each and every lease agreement bearing date July 19, 1938, heretofore given to Zeb A. Terry by the owners of any lot or lots" and to each such lease agreement in similar form and bearing the same date thereafter given to Terry or the Pure Oil Company by the owners of any lot before July 1, 1940. It also recites:

"It is specifically understood and agreed that nothing herein stated shall affect the rights of the East Coalinga Oil Fields Corporation in, on or to any lot or lots in the said quarter section not leased to Zeb A. Terry or the Pure Oil Company, in accordance with the aforesaid lease agreement."

The resolution of the Board of Directors of East Coalinga authorizing the execution of this consent to the Terry lease now appears in evidence. That resolution recites:

"Whereas, it appears that the lots (in this subdivision) have been involved in such a way that there has been no development of said lots for many years last past, and it further appearing that said drilling agreement originally entered into upon said lots is impracticable and impossible of performance;"

that it appears that the owners of over 2150 of the lots have signed the lease covering said lots; and that it would be to the best interest of the lot owners and of the corporation that consent to said lease on said lots be given. It is then resolved that the corporation consent to each and every lease given to Terry, and that the president and secretary be authorized to execute such consent for the corporation. It is then provided that this consent is given subject to the understanding that no lot shall be quitclaimed by Terry or his assigns "except with the express agreement that said lots shall continue to share in production on said remaining lots in said quarter section, whether such production has commenced at said time or thereafter commenced."

East Coalinga also executed two counterparts of the Terry community lease covering 470 lots still owned by it, together with any right, title and interest it might have in and to the streets in the subdivision.

Also, under date of May 19, 1939, East Coalinga executed two "drilling contracts," one with Pacific Western Oil Corporation and George F. Getty, Inc. and the other with the Pure Oil Company, giving them the right to drill on the south ⅝ and the north ⅜, respectively, of this tract. Each of these contracts recited that all deeds conveying lots in this tract which had previously been executed had reserved in East Coalinga for a period of 50 years the exclusive right to drill for oil; that a great majority of the owners of lots have, by community lease dated July 19, 1938, leased their respective lots to Zeb A. Terry; that Terry has assigned and conveyed said community lease and every counterpart thereof to Pacific Western-Getty or the Pure Oil Company; that East Coalinga had theretofore executed a written consent to this community lease and its counterparts; that East Coalinga believes it is to the best interest of the respective owners of lots in the subdivision that the mineral rights therein and thereunder be developed under and pursuant to the terms and conditions of the community lease of July 19, 1938; and that East Coalinga desires to fully protect and conserve the interests of all lot owners who have not already leased their lots under the said community oil lease. It is then provided that any lot owners who have not already signed the community lease may do so, that the oil companies shall have the right to drill on this subdivision until it is fully developed, and that East Coalinga will not drill on any lots not covered by the community lease.

A part of Paragraph 7 of these two drilling contracts, except that a different oil company and a different parcel are named in one, reads as follows:

"7. If, as and when, any well is or wells are drilled and completed by Pacific Western-Getty on said South five-eighths (S ⅝) of said fractional quarter section, Pacific Western-Getty shall account to the owners of the lots in said East Coalinga Oil Fields Subdivision who have executed the aforesaid Community Oil and Gas Lease for their proportionate share of the proceeds of production therefrom as provided for in said Community Oil and Gas Lease, and East Coalinga does hereby waive any and all right, title and interest in and/or to any portion of the royalty accruing to such lot owners under said Community Oil and Gas Lease."

Paragraph 7 then goes on to provide that the oil companies shall pay to East Coalinga "for division and distribution between itself and the owners of lots in said East Coalinga Oil Fields Subdivision who have not executed said Community Gas and Oil Lease" a certain portion of the proceeds from any oil wells, which is to be determined in accordance with the formula therein set forth.

Paragraph 17 of these new drilling contracts provides that:

"Anything in this agreement to the contrary notwithstanding, it is specifically understood and agreed that by virtue of this agreement East Coalinga shall not waive any of its rights to royalties or otherwise under and by virtue of any property owned by it and subject to the Community Oil and Gas Lease executed by East Coalinga dated July 19, 1938. It is further understood and agreed that it shall not affect East Coalinga's right to any royalty or other bonus by virtue of any subsequent execution upon any property which it may have of a counterpart of said Community Oil and Gas Lease."

Paragraph 16 of these drilling contracts reads: "This agreement is made subject to all existing rights of record."

There is also evidence that for approximately five years before this action was brought the oil companies paid the ⅛ royalty called for by the community lease to the respective lot owners, without objection being made by East Coalinga.

The appellant argues that Paragraph 17 of the new drilling contracts, as above quoted, discloses that it did not waive any of its rights under the community lease, and that Paragraph 16 required the oil companies to pay royalties to the owners of the record title, as their interests may appear. Paragraph 17 was clearly intended to obviate any possibility that the waiver otherwise provided for in the contract might be taken as affecting East Coalinga's right to its ⅛ landowner's royalty in connection with the lots owned by it, some 470 in number. Paragraph 16 was a general expression that title was not warranted, and was obviously not intended to nullify the specific agreements contained in the contracts.

A peculiar situation appears here. Originally, the lot owners gave an exclusive right to drill to East Coalinga, which was to receive only 20% of the profits since the lot owners were supplying the funds with which to conduct drilling operations. Those operations were a failure, the funds were exhausted, and active work was abandoned for some 15 years. All parties were then interested in renewing the operations. East Coalinga was unable to operate under its old drilling contracts. No one could take an assignment and operate under them, as they called for an 80% royalty to the lot owners. Of necessity, a new plan and new contracts were called for. Nearly all of the interested parties joined in the new plan, which took the form of a new community lease.

[2] It seems rather clear that the intention was to substitute new terms and conditions for those which had originally been provided. Most of the individual lot owners gave a new exclusive lease to the oil companies and East Coalinga not only consented thereto but joined in that community lease with respect to the lots it still owned. Also, and as a part of the same general scheme, East Coalinga executed new drilling contracts with the oil companies, agreeing that the oil companies should pay royalties to the lot owners as provided for in the community lease to which it had consented, specifically waiving its right to such royalties, and providing, with respect to any lots which had not joined in the community lease, that it should receive a certain proportion of the royalties which it might divide between itself and the owners of those lots. It was further specifically provided in those new drilling agreements that East Coalinga did not waive its right to royalties in connection with the lots which it still owned and which it had placed under the community lease. It hardly seems reasonable to believe that it was intended, under this new arrangement, in which East Coalinga participated after stating that their original drilling contracts were impracticable and impossible of performance, that the lot owners should pay two sets of drilling royalties or that they should continue with an obligation to pay East Coalinga for something it admittedly could not do and obviously would not attempt. Under the facts now disclosed, which are undisputed, it rather clearly appears to have been the intention of East Coalinga to relinquish its rights under the old drilling contracts, including the royalties therein provided for, and to join the new common enterprise with respect to the large number of lots which it still owned. In addition, the practical interpretation made by the parties themselves in paying royalties to the various lot owners and allowing this to be done over a period of practically five years, is most suggestive. In our opinion the evidence, with the reasonable inferences therefrom, fully supports the findings of the court which are material here.

[3] It further appears, in the evidence in this action, that the streets in this subdivision had been formally dedicated to public use and regularly accepted for that purpose. However, this is immaterial for the reason pointed out in MacNicol v. East Coalinga Oil Fields Corp., supra. It further here appears that during the 15-year interval between 1923 and 1938, more than 1000 of these lots were sold to the state for taxes. A number of the respondents acquired ownership of their lots through deeds from the state, or are the successors in interest of persons who thus acquired title to their lots. These respondents make the additional point that as purchasers from the state they took title freed from any claim that East Coalinga might have had for 20% of the royalty under its original drilling contracts. While there seems to be merit in this contention it is unnecessary to consider this point, as well as certain other points made by the respondents, in view of our holding on the main issues involved.

The judgment appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, J., dissenting.

PENINSULA PROPERTIES CO., Limited, et al. v. SANTA CRUZ COUNTY et al.
PEOPLE v. PENINSULA PROPERTIES CO., Limited, et al.

Civ. 13820.

District Court of Appeal, First District,
Division 1, California.
April 20, 1949.
Rehearing Denied May 20, 1949.
Hearing Granted June 16, 1949. *

1. Attachment 🔑232

Where pleading constituting basis for attachment is fatally defective and subject to general demurrer, the attachment must fall if the pleading is not amended prior to hearing of motion to dissolve attachment.

2. Attachment 🔑250

While a motion to dissolve an attachment cannot be made to perform the office of a demurrer, and permission should be granted to amend complaint if complaint can be amended so as to make complaint valid, the amendment must be made before motion is ruled upon.

3. States 🔑190

The state as a litigant is bound by the general rules of practice and procedure applicable to all litigants.

4. Attachment 🔑232
Taxation 🔑809(3)

In action contesting validity of tax deeds issued to state, statutes stating evidentiary effect of duly acknowledged or proved deeds did not relieve state of necessity of pleading in its cross-complaint based on tax sales, at least substantially, facts leading up to issuance of tax deeds, or of attaching deeds to cross-complaint if deeds contained necessary recitals, and, in absence of such pleadings or attachment of deeds, motion to quash attachment for rents, issues and profits from the land received by plaintiffs, issued on affidavit of state, would be dismissed on plaintiffs' motion for insufficiency of cross-complaint. Revenue and Taxation Code, §§ 3517, 3518.

5. Taxation 🔑809(1)

When a tax title is relied upon in a pleading, pleader must set forth, at least in substance, the basic facts showing compliance with statutory provisions required to be followed to acquire tax title.

6. Attachment 🔑232
Taxation 🔑809(2)

In action contesting validity of tax deeds issued to state, wherein state counterclaimed and filed affidavit for attachment for rents, issues and profits received by plaintiffs from the land, allegation of counterclaim that state claimed through recorded tax deed was not a compliance with requirement that, where tax title is relied upon in pleading, pleader must set forth, at least in substance, basic facts showing that statutory provisions have been complied with, and writ of attachment issued on affidavit of state would be quashed on plaintiffs' motion for insufficiency of cross-complaint in absence of other allegations meeting requirement imposed upon state.

7. Taxation 🔑809(3)

Statute authorizing purchaser of tax deeded land from state to bring action to determine adverse claims to land where all subsequent taxes levied have been paid, and requiring complaint to aver that taxes levied subsequent to sale from state have been paid, did not relieve state of necessity of alleging substantial compliance with tax laws in its cross-complaint in action contesting tax deeds issued to state. Revenue and Taxation Code, § 3950.

8. Taxation 🔑809(2, 3)

Statute authorizing purchaser of tax deeded land from state to bring action to determine adverse claims to the land where all subsequent taxes levied upon have been paid, and requiring complaint to aver that taxes levied subsequent to sale from state have been paid, does not dispense with requirement that where a tax deed is relied upon substantial compliance with tax laws must be pleaded, but simply adds requirement of pleading payment of subsequent taxes. Revenue and Taxation Code, § 3950.

9. Courts 🔑107

A decision which does not discuss or refer to a particular point of law cannot be considered as an authority on that point.

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* Subsequent opinion 213 P.2d 489.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by Peninsula Properties Company, Limited, etc., and others against County of Santa Cruz, etc., and others, and by Peninsula Properties Company, Limited, a corporation, against the People of the State of California, to contest the validity of tax deeds issued to the State, wherein the State cross-complained and filed affidavits for an attachment. From order denying plaintiffs' motion to quash writ of attachment, plaintiffs appeal.

Order reversed with directions to grant motion.

Carlyle Miller, of Aptos, for appellants.

Fred N. Howser, Atty. Gen., and E. G. Benard, Deputy Atty. Gen., for respondents.

PETERS, Presiding Justice.

Appellants commenced this litigation to contest the validity of certain tax deeds issued to the State of California on certain lands located in the County of Santa Cruz. The State cross-complained. This pleading alleged that the properties involved were conveyed by deed to the State by the tax collector of the county on certain designated dates for non-payment of delinquent taxes and/or assessments, and that the deeds thereto were subsequently recorded in the office of the recorder of the county. The properties were described and the pages on which the deeds were recorded were listed. The cross-complaint then alleges that at all times subsequent to the recordings of the various deeds the State has been the owner of the various parcels and entitled to the rents, issues and profits from such lands; that since the dates the deeds were recorded the appellants have taken and retained the rents, issues and profits; that the exact amount thus retained is unknown to the State, but on information and belief is alleged to be $40,000; that the State has demanded of appellants an accounting, but appellants have refused to comply and have not accounted nor paid to the State any portion of such rents, issues and profits. The prayer is for the sum of $40,000, for an accounting, and for costs.

Concurrently with the filing of the cross-complaint the respondent filed an affidavit for attachment, alleging that appellants were indebted to respondent in the sum of $40,000 "upon a contract for the direct payment of moneys, to wit: for rents, issues and profits" taken from real property owned by respondent. The writ of attachment was issued on October 1, 1947. On October 17, 1947, appellants moved to discharge the writ on various grounds, among them being that the cross-complaint did not state facts sufficient to constitute a cause of action, and that the affidavit was insufficient and the writ improperly issued. On November 17, 1947, respondent amended its affidavit to allege that the money claimed was due "upon a contract for the direct payment of moneys, or upon an obligation imposed by law, or upon both such contract and such obligation." On December 1, 1947, there was filed a further amendment to the affidavit in support of the attachment, this time alleging that the money claimed was due "upon an obligation imposed by law."

On December 11, 1947, the court denied the motion to discharge the attachment and from that order this appeal is taken.

[1,2] Appellants make many contentions challenging the validity of the order under attack. We do not find it necessary to pass on most of these contentions because, in our opinion, there is one basic defect in the proceedings that requires a reversal, and that is that the cross-complaint is subject to a general demurrer. It is quite clear that, where the pleading constituting the basis for the attachment is fatally defective and subject to a general demurrer, the attachment must fall if the pleading is not amended prior to the hearing of the motion to dissolve. Pinkiert v. Kornblum, 5 Cal.App. 522, 90 P. 969; Wolford v. Neustadter, 21 Cal.App.2d 417, 69 P.2d 909; Redwood Fibre, etc., Co. v. Miller Mfg. Co., 61 Cal.App.2d 505, 143 P.2d 389; Yosemite, etc., Ass'n v. Case-Swayne Co., 73 Cal.App.2d 806, 167 P.2d 541; Syrett v. Strickland, 86 Cal.App. 623, 261 P. 484. While it is true that the motion to dissolve an attachment cannot be made to perform the office of a demurrer, and that if the complaint can be

amended so as to make it valid such permission should be granted, such amendment must be made before the motion is ruled upon. Wolford v. Neustadter, 21 Cal.App. 2d 417, 69 P.2d 909. Here no attempt to amend was made.

[3] It is equally true, and not questioned by respondent, that where the State enters the courts as a litigant it is bound by the general rules of practice and procedure applicable to all litigants. Superior Oil Co. v. Superior Court, 6 Cal.2d 113, 56 P.2d 950; People v. Kings County Dev. Co., 48 Cal.App. 72, 191 P. 1004; Rio Del Mar, etc., Club v. Superior Court, 84 Cal.App.2d 214, 190 P.2d 295.

[4-6] The cross-complaint here involved is fatally defective in that it fails to mention directly or inferentially, substantially or at all, the proceedings leading up to the tax sales constituting the basis of respondent's claimed title. The deeds are not attached to the pleadings as exhibits. While, as an evidentiary matter, when such tax deeds to the State are introduced into evidence, the deeds are prima facie evidence of certain facts, § 3517, Revenue & Taxation Code, and conclusive evidence as to others, § 3518, Revenue & Taxation Code, such sections do not dispense with the necessity of pleading, at least substantially, the facts leading up to the issuance of the deed or, where the deed contains the necessary recitals, of attaching it to the pleading. Respondent concedes that its only claim to the rents, issues, and profits involved is based upon ownership, and that its ownership is based upon the tax deeds. See State v. Royal Consolidated Min. Co., 187 Cal. 343, 202 P. 133. Here the respondent knew that appellants were challenging the validity of the tax deeds, because appellants started this action by filing a complaint, the sole purpose of which was to challenge those very deeds. From a very early date in this state it has been, and still is, the law that, when a tax title is relied upon in a pleading, it is essential that the pleader set forth, at least in substance, the basic facts showing that the statutory provisions have been followed. One of the early and leading cases so holding is Russell v. Mann, 22 Cal. 131. That was an action to recover a quartz mill. The defendant claimed title through a tax deed. The trial court sustained a demurrer to the answer on the ground that the defendant had failed to plead all of the required facts. In affirming, the Supreme Court stated, 22 Cal. at page 133: "All the provisions of the statute for the assessment of taxes and for the sale of property for their non-payment must, in their substance, be strictly pursued in order that a title acquired at such a sale should be valid. Whenever a tax title is specially set forth in a pleading it is necessary that every fact should be averred which is requisite to show that each of the statutory provisions has been complied with. Owing doubtless to the number of acts required to be done in the assessing and levying of taxes, and in the proceedings to sell property for their non-payment, and the embarrassments attending the proof of many of them, especially after the lapse of any considerable time, the Legislature has provided that the deed executed upon such a sale shall state certain of these essential facts, and shall be proof of the matters by it set forth, subject to certain exceptions. But this provision as to the effect of the deed as evidence does not dispense with the necessity of averring every essential fact in a pleading in which a tax title is specially set forth."

The Court concluded that even though the answer alleged "in detail, and in proper form, a pursuance of all the requirements of the revenue law subsequent to the levy," 22 Cal. at page 132, the answer was fatally defective in that it failed to allege the year in which the tax was imposed. See, also, Dye v. Dye, 11 Cal. 163; Keane v. Cannovan, 21 Cal. 291, 82 Am.Dec. 738.

In People v. Jackson et al., 24 Cal. 630, it was held that when a tax title is relied upon, although the code dispenses with the necessity of pleading conditions precedent in contract cases, such rule cannot be extended, and therefore in tax cases all conditions precedent to the issuance of the deed must be pleaded. See, also, Hall v. Theisen, 61 Cal. 524; Himmelman v. Danos, 35 Cal. 441.

The rule of these cases, although somewhat relaxed, has been frequently followed.

In Metteer v. Smith, 156 Cal. 572, 105 P. 735, a defendant was relying upon a tax deed. The deed was excluded from evidence. This was upheld on appeal, the court stating, 156 Cal. at page 575, 105 P. at page 736, "The court's ruling excluding the offered deed was also entirely defensible under the general objection that it was incompetent, irrelevant, and immaterial because there was no allegation in the answer of the matters essential to the validity of the tax deed. 'The recitals in a tax deed are declared by the statute to be prima facie evidence of the proceedings recited; but it has never been supposed that a party who sets forth a tax title was thereby excused from alleging that those proceedings were had. The reverse has been decided by this court.' Himmelman v. Danos, 35 Cal. [441] 449." The Court then cites and quotes from Russell v. Mann, supra.

In Tilton v. Russek, 171 Cal. 731, 154 P. 860, the defendant, in a quiet title action, claimed that he owned a valid mortgage which had been executed by a mortgagor who held title through tax deeds. The precise holding was that in such a case all the steps leading up to the tax sales need not be alleged, but the Court also held that, had the party "undertaken to plead a title derived under a delinquent sale, he would have been required to allege every proceeding essential to the validity of such sale." 171 Cal. at page 735, 154 P. at page 861. See, also, Smart v. Peek, 213 Cal. 452, 2 P.2d 380; Kinley v. Thelen, 158 Cal. 175, 110 P. 513.

The latest case discussing this problem appears to be the recent decision of this court in Penaat v. Guasco, 84 Cal.App.2d 445, 191 P.2d 564. This was an action to quiet title to property purchased at a tax sale. The complaint failed to allege directly the facts required by Russell v. Mann, supra, but the pleader attached a copy of the tax deed to his pleading, and the tax deed contained the necessary recitals. This was held sufficient compliance with the rule. The Court stated the problem as follows, 84 Cal.App.2d at page 448, 191 P.2d at page 565: "Defendant recognizes that in the ordinary quiet title suit it is not necessary for the plaintiff to allege his chain of title, but urges that where a tax title is set forth in a complaint compliance with all statutory provisions must be alleged. The following statement from 24 Cal.Jur., pages 395, 396, § 366, is quoted in support of this contention: 'One who sets up a title derived from a sale for delinquent taxes is required to show by appropriate allegations that all the proceedings necessary to the regularity of such sale were had. And this is true despite the fact that the legislature has declared that a deed, duly acknowledged or proved, is primary evidence of certain matters affecting its validity.'" The Court then quotes and discusses several of the early cases, including Russell v. Mann, and then states, 84 Cal.App.2d at page 450, 191 P.2d at page 567: "There are later cases that do not state such a strict rule as that found in Russell v. Mann, supra, but the case still seems to be held as an authority. * * * The so-called strict rule in Russell v. Mann would hardly receive the considered approval in 1948 that was given in 1863." We then went on to hold that, inasmuch as the deed was attached to the pleading as an exhibit, and since the deed contained recitals of all the facts, compliance with the rule of Russell v. Mann had been had.

It will thus be seen that, although the rule of Russell v. Mann has been somewhat relaxed, it has never been held sufficient to plead merely that the party claims through a recorded tax deed. That is all that is alleged in the instant case, even though the respondent knew the validity of its tax deeds was in issue.

[7, 8] Some reference should be made to § 3950 of the Revenue and Taxation Code, although the section is not mentioned or relied upon by the parties. That section, adopted in 1943 and amended in 1945, authorizes a purchaser of tax-deeded property from the State to bring an action to determine adverse claims to the property where "all subsequent taxes levied have been paid," and requires that the complaint in such an action shall be "verified and shall aver the matters above enumerated." The section is of no assistance to the State. In the first place, inasmuch as it requires an averment that taxes levied subsequent to the sale from the State have

been paid, by its very terms it does not apply to the State. In the second place, and of more importance, the section, even where it applies, does not dispense with the requirement that where a tax deed is relied upon substantial compliance with the tax laws must be pleaded—it simply adds the requirement of pleading payment of subsequent taxes.

Respondent's only reply to the above point is that its cross-complaint was practically copied from, and is in substantially the same form as, the complaint in People v. Maxfield, 30 Cal.2d 485, 183 P.2d 897. That was an action by the State to recover rents and profits from real property received by the defendant during the period the State had title under a tax deed, but brought after the former owner had redeemed. The only question discussed in either the majority or dissenting opinions in that case was whether, after redemption of the property, the State is entitled to an accounting, and to the rents collected by the redemptioners during the period the State was the owner. The majority opinion held that the State was entitled to these rents as an incident of its ownership. The three dissenting justices disagreed. But in neither the majority nor the dissenting opinions is there any discussion of the sufficiency of the complaint insofar as it relates to the title of the State. Russell v. Mann, supra, is not mentioned nor is any mention made of the rule of that case. Both opinions assume the validity of the tax deeds. That is quite different from this case where the State knew, by reason of the complaint already on file, that the validity of its deeds was the basic question involved.

[9] We have secured the record in the Maxfield case. It demonstrates that both sides conceded the validity of the tax deeds, and that this assumption in the Supreme Court opinions was correct. While the complaint in that case was substantially similar to the one here, and examination of the briefs filed in both the Appellate and Supreme Courts demonstrates that neither litigant raised the question of the sufficiency of the allegations of the complaint insofar as the allegations of the State's title were concerned, and neither side cited Russell v. Mann or any of the other cases stating the rule of that case, or discussed or referred to, in any way, the rule of that case. It is elementary law, of course, that a decision which does not discuss or refer to a particular point of law, cannot be considered as an authority on that point. Mortgage Guarantee Co. v. Chotiner, 8 Cal.2d 110, 64 P.2d 138, 108 A.L.R. 1080; Oakland Pav. Co. v. Whittell Realty Co., 185 Cal. 113, 195 P. 1058; Donner v. Palmer, 31 Cal. 500. It is inconceivable that the Supreme Court intended to overrule Russell v. Mann and the long line of cases following it, without either mentioning the cases or the rule of that case.

The order denying the motion to quash the writ of attachment is reversed, with directions to grant the same.

WARD and BRAY, JJ., concur.

91 Cal.App.2d 214

PEOPLE v. MITCHELL.

Cr. 4299.

District Court of Appeal, Second District, Division 2, California.

April 12, 1949.

Hearing Denied May 9, 1949.

1. Prostitution 🔑1

"Prostitution" is the common, indiscriminate, illicit intercourse of a woman for hire.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Prostitution".

2. Prostitution 🔑1

A "house of prostitution" is one in which the prostitute plies her trade.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "House of Prostitution".

3. Prostitution 🔑4

In prosecution for attempted pandering, circumstances from which the existence of a house of prostitution maintained by defendant may be inferred may be shown, and neither direct or positive proof is necessary. Gen.Laws, Act 1906.

4. Criminal law 🔑414

In prosecution for attempted pandering, evidence supported finding that a house of prostitution was maintained by defendant, and warranted receiving in evidence defendant's extra judicial statements. Gen. Laws, Act 1906.

5. Prostitution 🔑1

"Pandering" is established when evidence shows that accused has succeeded in inducing his victim to become an inmate of a house of prostitution. Gen.Laws, Act 1906.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Pandering".

6. Prostitution 🔑1

"Attempted pandering" is proved by evidence of the acts of accused which have failed to accomplish purpose of accused by reason of its frustration by extraneous circumstances rather than by virtue of a change of heart on part of accused. Gen. Laws, Act 1906; Pen.Code, § 663.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Attempted Pandering".

7. Prostitution 🔑4

In prosecution for attempted pandering, evidence justified implied finding that defendant had committed overt acts in attempting to induce another to become an inmate of a house of prostitution, so as to justify conviction. Gen.Laws, Act 1906.

8. Prostitution 🔑1

A defendant may be convicted for attempted pandering if the necessary overt acts reach far enough toward accomplishment of the intended offense to amount to commencement of its consummation. Gen. Laws, Act 1906.

9. Prostitution 🔑1

In prosecution for pandering or attempted pandering, prosecution need not prove a scheme, promise, device, or violence. Gen.Laws, Act 1906.

10. Criminal law 🔑553

Trial court may disregard any inadvertences, or contradictions in testimony of a witness, while adopting other statements made by witness, and may rely upon a witness who has testified falsely in part.

11. Criminal law 🔑260(11)

Whether a witness is prejudiced against accused, or is biased in favor of prosecution, and whether either affects the testimony given, is to be determined by the trier of facts.

12. Witnesses 🔑378

A witness is not disqualified because he gives color to his testimony, favorable or antagonistic to one side.

13. Criminal law 🔑260(11)

Conflicts in testimony of police officers did not render their testimony inherently improbable so as to justify reversal of attempted pandering conviction. Gen.Laws, Act 1906.

14. Criminal law 🔑260(11)

To warrant rejection of testimony of a witness believed by trial court, there must exist either a physical impossibility that the testimony is true, or its falsity must be apparent without reference to inferences or deductions.

15. Prostitution 🔑4

In prosecution for attempted pandering, evidence justified finding that crime of pandering was averted only by refusal of witness defendant attempted to induce to become inmate of house of prostitution to report for work. Gen.Laws, Act 1906.

16. Criminal law 🔑1030(1)

Neither an accused or a convicted person may remain silent in face of a ruling and thereafter assert error by reason of the ruling.

17. Criminal law 🔑260(4)

Where trial court deferred pronouncement of judgment against defendant who had been found guilty of attempted pandering, rather than pronouncing judgment within 20 days as provided for by statute, and defendant at time of continuance knew of pendency of a charge in another court but did not advise trial court of anticipated prejudice should sentence not be pronounced before trial on pending charge, defendant could not after conviction on pending charge which was tried within the 20 days, assert that continuance was prejudicial error because had sentence been rendered prior to trial on pending charge the pending charge would have been required to be dismissed as being included in attempted pandering conviction. Gen.Laws, Act 1906; Pen.Code, § 1191.

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Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Marie Mitchell, also known as Brenda Allen, was convicted of attempted pandering and she appeals.

Judgment and order affirmed.

John J. Bradley and Max Solomon, both of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen. and Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Having been convicted of the crime of attempted pandering, Stats. 1911, p. 9, Deering's General Laws, Act 1906[1], defendant now demands a reversal of the judgment on the grounds that (1) the evidence is insufficient and (2) the time for pronouncing judgment was extended beyond the 30 days allowed by the Penal Code. Sec. 1191 as amended, 1947, Stats.1947, ch. 1178.

The facts established are that Sergeant Stokes of the Los Angeles police department placed the residence of appellant in the western part of Los Angeles under observation from the first week in April to May 5, 1948. He watched it assiduously every working day. Sometimes after his observations in the early evening he would return during the early morning. His definite discoveries were that appellant resided there; several girls stayed with her; at times some of them would disappear while others would succeed them; they came in the early evening and departed after midnight. During the month, about 100 different men came and went. Some made return visits. Four of the women were seen to engage in sexual intercourse with the male visitors in lighted rooms. The drawn shades were left sufficiently ajar to permit the observations. On one occasion a motorist parked his car 25 yards from the entrance but entered through the front door. The sergeant thereupon peered through the window, saw appellant go into a bedroom and leave as the recent arrival and a woman entered and engaged in a sexual act. On the evening of May 4, 1948, the sergeant saw appellant enter a bedroom, place a pillow on the bed and withdraw, whereupon a man and a woman occupied the bed and engaged in copulation. At that juncture the sergeant and two other police officers moved in to find the disrobed couple standing in the same bedroom with appellant and a female companion nearby but outside the room.

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[1] Deering's California General Laws, Act 1906, page 855, Vol. 1.

"Any person who shall procure a female inmate for a house of prostitution, or who, by promises, threats, violence, or by any device or scheme, shall cause, induce, persuade or encourage a female person to become an inmate of a house of prostitution, or shall procure for a female person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state, or any person who shall, by promises, threats, violence or by any device or scheme, cause, induce, persuade or encourage an inmate of a house of prostitution or any other place in which prostitution is encouraged or allowed to remain therein as such inmate, or any person who shall, by fraud or artifice, or by duress of person or goods, or by abuse of any position or confidence or authority, procure any female person to become an inmate of a house of ill-fame, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution, or who shall receive or give, or agree to receive or give, any money or thing of value for procuring, or attempting to procure, any female person to become an inmate of a house of ill-fame within this state, or to come into this state or leave this state for the purpose of prostitution, shall be guilty of a felony, to wit: pandering, and upon conviction for an offense under this act shall be punished by imprisonment in the state prison for a period of not less than one year nor more than ten years."

A House of Prostitution as a Factor

[1, 2] Prostitution is defined to be the common, indiscriminate, illicit intercourse of a woman for hire. People v. Marron, 140 Cal.App. 432, 434, 35 P.2d 610. A house of prostitution, therefore, is one in which the prostitute plies her trade.

[3, 4] Appellant contends that evidence of the existence of quarters in a house of prostitution ready for the intended victim is essential to the proof of attempted pandering and that this feature of the corpus delicti was not established. While no authorities can be found to support such thesis, see People v. Benenato, 77 Cal.App. 2d 350, 357, 175 P.2d 296, the evidence in the case at bar amply proved the readiness of quarters in a bawdy house. Such evidence is not confined to the extra judicial statements of appellant. Neither is direct or positive evidence essential to the proof, but circumstances may be shown from which the existence of such house may be inferred. People v. Hudson, 139 Cal.App. 543, 546, 34 P.2d 741; People v. Wiezel, 39 Cal.App.2d 657, 664, 104 P.2d 70. The circumstances shown herein are the nocturnal visits to the house of appellant by some 100 strange men over a period of 30 days, the presence there of strange women, four separate acts of prostitution, some of which were arranged for by appellant. These facts in connection with the testimony of the sergeant furnish ample support for the finding that a house of prostitution was maintained by appellant and warranted receiving in evidence appellant's extra judicial statements. People v. Van Scoyoc, 25 Cal.App.2d 416, 418, 77 P.2d 485.

The Overt Acts

[5, 6] Appellant next contends that the evidence is insufficient to establish the overt act essential to the crime of attempted pandering. Pandering is established when the evidence shows that the accused has succeeded in inducing his victim to become an inmate of a house of prostitution. People v. Robinson, 74 Cal.App.2d 80, 82, 167 P.2d 778. Attempted pandering is proved by evidence of the acts of the accused which have failed to accomplish the actor's purpose by reason of its frustration by extraneous circumstances rather than by virtue of a change of heart on the part of the one who made the attempt. Penal Code, sec. 663[2]; see People v. Grubb, 24 Cal.App. 604, 608, 141 P. 1051.

The overt acts of appellant were clearly established by the testimony of a police woman. She testified that during April, 1948, in pursuit of her official duties she had occupied quarters in a hotel on Hollywood boulevard. About 2 o'clock p.m. on May 2 she was called on the telephone by appellant who stated that she had heard that the witness was out of employment, requested the latter to visit her to discuss a business proposition and inquired whether the witness had worked in Los Angeles or in "a house" anywhere. Pursuant to appointment then made, Miss Davis visited appellant's house about an hour after their telephonic contact. While they sat in the living room, appellant told the witness that she had worked in Los Angeles about 12 years, had four girls working for her at night; that each made about $100 nightly, one half of which was paid to appellant; while she could guarantee nothing, she had been arrested 18 times, but had "never done any time"; for each trick in her house a girl was paid "$20 and up"; however, financial matters were never mentioned by the girls, but were handled by appellant. While the witness was there awaiting the arrival of a taxicab, appellant admitted a man and escorted him downstairs. She promptly returned to Miss Davis and asked the latter to accommodate the "old customer"; he was a "$30 trick" which meant "$15 quick" for Miss Davis. The latter tactfully excused herself.

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[2] Penal Code, section 663. "Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court, in its discretion, discharges the jury and directs such person to be tried for such crime."

Pursuant to arrangement then made, appellant telephoned Miss Davis at 11:30 a.m. on May 3 and advised the latter that she had seen the doctor; that he would see the witness "for sure the next day"; that the latter could begin at 1 p.m. on the 4th when one of her girls was sure to quit; but if the latter should leave the night of the 3rd instead of the morrow, Miss Davis could go to work at once. When the witness attempted to reach appellant by telephone on the evening of May 3 she was informed that appellant was not at home.

[7, 8] Such testimony when believed and reasonably interpreted amply warrants the implied finding that appellant committed overt acts which completes the proof of the crime charged. It is sufficient if the overt acts reach far enough toward the accomplishment of the intended offense to amount to the commencement of its consummation. Thus the crime of attempted pandering is demonstrated. People v. Petros, 25 Cal.App. 236, 244, 245, 143 P. 246; People v. Grubb, 24 Cal.App. 604, 607, 608, 141 P. 1051; People v. Matsicura, 19 Cal.App. 75, 124 P. 882, is no authority on the crime here charged. The defendant there was accused of pandering, the consummated crime. Because the facts there were insufficient to substantiate the accusation it does not follow that the evidence in the instant case is likewise insufficient.

[9] Appellant contends that in order to establish the crime of attempted pandering the prosecution must prove a scheme, promise, device or violence. Such evidence has been held to be unnecessary to prove pandering. People v. Snyder, 36 Cal.App.2d 528, 531, 97 P.2d 976; People v. Cimar, 127 Cal.App. 9, 14, 15 P.2d 166, 16 P.2d 139. Therefore inasmuch as such proof is not necessary to establish the crime of pandering it follows as a logical sequitur that it is not essential to the proof of attempted pandering.

Testimony of People's Witnesses not Incredible

[10-14] Appellant specifies some particulars in the testimony of Officers Stoker and Davis which she contends to be inconsistent with other portions of their testimony. Also, she points to certain statements and acts of the witnesses which she maintains renders the testimony of both witnesses incredible. Such comments are of no value. The trial court is privileged to disregard any inadvertences or contradictions in the testimony of a witness while adopting other statements made by them. Whether a witness is prejudiced against the accused or is biased in favor of the prosecution and whether either affects the testimony given is to be determined by the trier of facts. It is strictly the function of the trial court to determine to what extent it will believe or disbelieve testimony. It may rely upon a witness who has falsely testified in part, Robinson v. Robinson, 159 Cal. 203, 113 P. 155, or whose testimony contains contradictions or inconsistencies. Bitsekas v. Parechanian, 67 Cal.App. 148, 226 P. 974; Hansen v. Bear Film Company, 28 Cal.2d 154, 184, 168 P.2d 946. Because a witness may give color to his testimony favorable or antagonistic to one side of a controversy he is not thereby disqualified. It is the judicial function to glean the truth from all the proof, to weigh it, to determine which is incredible and to appropriate that which is worthy of belief. Because police officers are engaged in the task of uprooting a vicious evil in a metropolitan area they do not necessarily lay aside their sense of honor and strive only to register a success. The court below having adopted the testimony of the officers, drawn its inferences and derived its conclusion, the fruits of its labors cannot be discarded by reviewing courts upon the plea that one feature of a witness' testimony is contradicted by inferences from his own testimony or by the testimony of another witness. People v. Fremont, 47 Cal.App.2d 341, 349, 117 P.2d 891; People v. Collins, 102 Cal.App. 527, 533, 283 P. 129; People v. Ferello, 92 Cal. App. 683, 686, 268 P. 915. Such conflicts do not render testimony inherently improbable. People v. Chaddock, 2 Cal.App. 2d 643, 645, 38 P.2d 473; People v. Becker, 140 Cal.App. 162, 165, 35 P.2d 196. The only bases for the total rejection of any testimony are (1) its apparent falsity without resorting to inference or deduction or (2) its physical impossibility. People v.

Campbell, 80 Cal.App.2d 798, 800, 182 P.2d 626; People v. Weatherford, 78 Cal.App.2d 669, 672, 178 P.2d 816. Neither basis is found in the testimony of the two officers. The quibbles of appellant concerning the failure of Miss Davis to obtain the name of appellant's physician, the want of corroboration of her testimony as to her conversations with appellant, her failure to obtain the name of the "mutual friend" mentioned by appellant over the telephone at her first call, the asserted conflict of Miss Davis' testimony with the records of a telephone exchange through which appellant claims to have received her calls, and other such matters were disposed of by the court's impliedly finding either that they were nonessentials or that they were overbalanced by explanations of the officers.

Frustration of Appellant's Plan

[15] Appellant contends that her "alleged arrangements" with Miss Davis were defeated by her own refusal to accept the telephone call from the officer on May 3 or to arrange thereafter for a medical examination of the latter. There is no evidence that appellant withdrew her offer to make Miss Davis' an inmate of her house. Their agreement at their last conversation was that Miss Davis should begin work on May 4 and that was not dependent upon further telephonic conversation. Miss Davis' attempt to reach appellant in the evening of May 3 was for the purpose of advising the latter whether she would come to work that very night. On the testimony of Miss Davis that she rejected appellant's invitation to engage in an act of prostitution in the latter's house on May 2 and that she declined to report for work on May 4, the court was justified in finding that only thereby was the crime of pandering averted.

Postponement of Sentence not Prejudicial

[16, 17] The final assignment of error is that "the court failed to pronounce sentence in accordance with the provisions of section 1191 of the Penal Code"[3] resulting in a miscarriage of justice. While conceding that such failure to pronounce judgment within the limitation of section 1191 did not automatically entitle appellant to a new trial, she argues that the effect of deferring the pronouncement of judgment until after the hearing on her application for probation on September 8 resulted in injury to her cause. Such prejudice, she insists, flowed from the fact that within 20 days after the court's announcement of finding her guilty of attempted pandering she was compelled to stand trial on the charge of having in May, 1948, operated a house of prostitution, a misdemeanor, and was convicted and sentenced to serve six months' imprisonment. She maintains that since such misdemeanor was necessarily included in the felony conviction, it would have been dismissed had judgment herein been pronounced within 20 days after the court's announcement of her guilt. There is nothing in the record from which such a conclusion could be reasonably derived. No law is cited and none has been discovered to the effect that such misdemeanor is necessarily included in the felony of attempted pandering. Nor is any reason advanced why the municipal court should or would dismiss a pending action by reason of another court's having pronounced judgment against the same defendant for a different crime. At the time of the continuance of the matter to the September date

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[3] "After a plea or verdict of guilty, or after a verdict against the defendant on a plea of a former conviction or acquittal, or once in jeopardy, the court must appoint a time for pronouncing judgment, which must be within 20 days after the verdict or plea of guilty, during which time the court shall refer the case to the probation officer for a report if eligible to probation and pusuant to Section 1203 of this code; provided, however, that the court may extend the time not more than 10 days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment, or of receiving the probation officer's report made pursuant to Section 1203 of this code. If in the opinion of the court there is a reasonable grond of believing a defendant insane, the court may extend the time for pronouncing sentence until the question of insanity has been heard and determined, as provided in Chapter 6, Title 10, Part 2 of this code and furthermore may extend the time until any proceedings under Section 1203 of this code have been disposed of. [Am.Stats.1947, ch. 1178, § 1.]"

for sentence, appellant knew of the pendency of the other charge. With such knowledge it was incumbent upon her to advise the court of her anticipated prejudice so that other arrangements might be made to avert it. Neither an accused nor a convicted person may remain silent in the face of a ruling and thereafter assert error by reason thereof. No prejudice is shown to have resulted from the delay in pronouncing sentence.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB, and WILSON, JJ., concur.

91 Cal.App.2d 562

BERAN et ux. v. HARRIS et ux.

Civ. 3766.

District Court of Appeal, Fourth District, California.

April 29, 1949.

1. Vendor and purchaser 🔑18

An "option" is an agreement by which an owner invests another with exclusive right to buy certain property at a stipulated price within a limited time, and it is not a sale of the property, but is a sale of the right to purchase.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Option".

2. Deeds 🔑94

Upon execution and delivery of deed conveying property pursuant to option agreement, the option agreement becomes a nullity and the deed becomes measure of rights of the parties.

3. Deeds 🔑94

Where option agreement contained provision requiring permanent residence to be set back 60 feet from center of road right of way, but no set-back restrictions were incorporated in deed or referred to therein, vendors could not enforce such restrictions.

4. Appeal and error 🔑1011(1)

Trial court's ruling resolving a conflict in evidence cannot be disturbed on appeal.

5. Deeds 🔑144(1)

To create a condition subsequent in a grant, apt and appropriate words must be appended importing that a vesting or continuance of estate is to depend upon the condition.

6. Deeds 🔑155

Conditions subsequent tending to restrict and defeat an estate are not favored.

7. Deeds 🔑144(1)

The use in deed of words, such as "upon the express condition", is appropriate to create a "condition subsequent" and likewise evidence of intention to create condition subsequent may be found in a provision for forfeiture and a right of reentry or power of termination.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Condition Subsequent".

8. Deeds 🔑144(1)

Provision in deed that the "property is to be used for residence and service station purposes only" would not be construed as creating a "condition subsequent", especially in absence of any provision for forfeiture or right of re-entry or power of termination.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Sidney S. Beran and Evalyn Beran, his wife, against Doyle Alvin Harris and Eve Marie Harris, his wife, to compel defendants to reconvey to plaintiffs a certain lot or, in the alternative, for permanent injunction restraining defendants from using property for any purpose except a service station and residence, wherein the defendants filed a cross-complaint. From adverse judgment, the plaintiffs appeal.

Affirmed.

N. Lindsay South, of Fresno, for appellants.

Matt Goldstein, of Fresno, for respondents.

MUSSELL, Justice.

This action was brought to compel defendants to reconvey to plaintiffs a certain lot in the County of Fresno, or in the alternative, for a permanent injunction restraining defendants from using the property for any purpose except a service station and residence.

On January 1, 1947, an option was given by plaintiff Sidney S. Beran to defendant Doyle A. Harris for the purchase of the property which is the subject of this action. The option contained, among other things, the following provisions:

"Building Setbacks: Permanent residence must be set back sixty (60) feet from center of road right of way, and must contain at least six hundred (600) square feet of floor space. Temporary residences must be set back one hundred (100) feet from center of road right of way. Tents or house trailers are not to be used for purpose of living quarters. Property to be used for residential & service station only." It also contained the further provision that "If restrictions or reservations are violated within twenty-five (25) years from date, property reverts to seller."

On February 14, 1947, plaintiffs executed and delivered to defendants a grant deed in the usual form, conveying the property in question without restrictions with respect to any building setbacks. The only named restriction set forth in the deed was that for fifty years the property could not be used or occupied by any other than the white race. After a recital therein that the property was subject to certain taxes, the following sentence appears: "Property to be used for residence and service station purposes only."

It was admitted by the defendants that they used the premises purchased by them, not only as a residence but also for the sale of automobile parts, prepared food, beer, soda water, milk and bread, and for the repair and lubrication of automobiles.

The Option Agreement.

[1] An option has been defined as an agreement by which an owner invests another with the exclusive right to buy certain property at a stipulated price, within a limited time. Tufts v. Mann, 116 Cal.App. 170, 178, 2 P.2d 500. As was said in Bruce v. Mieir, 120 Cal.App. 287, 289, 290 7 P.2d 1037, 1038: "An option is something that means what the term implies—its terms may or may not be complied with at the election of the optionee. If the terms be complied with, the optionee has rights that he or his assignee may enforce, but, if he elects not to comply, the optionor may not compel compliance with its terms." An option contract relating to the sale of land is therefore not a sale of the property but is a sale of the right to purchase. Warner Bros. Pictures v. Brodel, 31 Cal.2d 766, 772, 192 P. 2d 949, 3 A.L.R.2d 691.

[2-4] In the instant case, by the execution and delivery of the deed conveying the property, the option agreement became a nullity and the deed became the measure of the rights of the parties. It is the final and exclusive memorial of the rights of the parties. Wing v. Forest Lawn Cemetery Ass'n, 15 Cal.2d 472, 479, 101 P.2d 1099, 130 A.L.R. 120. No setback restrictions were incorporated in the deed, or referred to therein, and plaintiffs may not enforce such restrictions. Moreover, the evidence of a violation of the setback restrictions was very meager and at the most produced a conflict which was resolved by the court in favor of the defendants and his ruling cannot be disturbed on appeal. Nichols v. Mitchell, 32 Cal.2d 598, 606, 197 P.2d 550.

Restrictive Provisions of the Deed.

The remaining question is the effect of the provisions of the deed that the "Property is to be used for residence and service station purposes only."

[5-7] To create a condition in a grant, apt and appropriate words must be appended importing that the vesting or continuance of the estate is to depend upon the condition, Streicher v. Heimburge, 205 Cal. 675, 684, 272 P. 290, and it is fundamental that conditions subsequent tending to restrict and defeat an estate are not favored.

Buttram v. Finley, 37 Cal.App.2d 459, 469, 99 P.2d 1093. The use of the words, such as "upon the express condition * * * that", have been held to be appropriate to create a condition subsequent. Victoria Hospital Ass'n v. All Persons, 169 Cal. 455, 147 P. 124, 125. And likewise evidence of the intention to create a condition subsequent is found in a provision for forfeiture and right of re-entry or power of termination. Rosecrans v. Pacific Elec. Ry. Co., 21 Cal.2d 602, 605, 134 P.2d 245.

In the deed before us, no appropriate words are used to show an intention to create a condition subsequent. The only so-called restriction is as to occupancy by those not of the white race, no power of termination is stated and no right of re-entry is given.

In Fitzgerald v. Modoc County, 164 Cal. 493, 129 P. 794, 44 L.R.A.,N.S., 1229, the plaintiff made a deed conveying real property to the County of Modoc. Immediately following the description of the property in the deed, the following clause appeared: "To be used as and for a county high school ground and premises, for the county of Modoc, state of California." In discussing the effect of such a clause the court there said:

"'Reciting in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition, not being in terms upon condition, nor containing a clause of re-entry or forfeiture.' 2 Washburn, Real Property, 4, 8; Cullen v. Sprigg, 83 Cal. 56, 23 P. 222. Of course, where the language employed declares a condition and imports a forfeiture, a clause of re-entry is not necessary. (Citing cases.) Under no decision of this or any other court, within our knowledge, has language such as is here used ever been construed to create a condition subsequent. At the least, it is but a declaration of the purpose for which the grantor expected the land would be used."

[8] We conclude that no condition was created by the words used in the instant case, and that the findings of the trial court that the option agreement was superseded by the deed, and that the provisions of the deed attempting to restrict or restrain the use of the premises by defendants are void and unenforceable, are sustained by the evidence.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

91 Cal.App.2d 549

GERARD v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 17009.

District Court of Appeal, Second District, Division 3, California.

April 29, 1949.

1. Process 🔑119, 120

Generally, nonresidents who come within the territorial limits of the state as party litigants or to testify as witnesses in judicial proceedings are afforded an immunity from service of civil process while in actual attendance at the hearing and during such reasonable time as may be consumed in going to, and returning from, the place of trial.

2. Process 🔑125

The immunity of a nonresident from service of civil process while within the state as a party litigant or as a witness in judicial proceedings extends for a reasonable time, and what constitutes a reasonable time necessarily depends on circumstances.

3. Process 🔑125

Nonresident parties are entitled to a reasonable amount of time for conferences with their counsel prior to commencement of the trial, during which time they are immune from service of civil process.

4. Process 🔑125

A nonresident who has come into the state as a party or a witness, in order to have the benefit of immunity from service of civil process, need not set out for home immediately after the trial, or take the most direct route.

5. Process ⚿125

A nonresident, who comes into the state as a party or witness in legal proceedings, is entitled to reasonable delay in returning to his domicile, during which time he is entitled to immunity from civil process, provided that delay does not arise in carrying out a purpose entirely distinct from the purpose of going to, attending, or returning from court.

6. Process ⚿125

The rule requiring a nonresident, who has come into the state as a party or witness in legal proceedings, to depart from the state within a reasonable time, in order to be entitled to immunity from service of civil process, is not so exacting as to impose on the nonresident the duty of making hot pursuit of the first train out of the state.

7. Process ⚿125

If the controlling purpose of the presence of a nonresident within the state is to attend a trial, other subordinate activities will not destroy his immunity from service of civil process.

8. Process ⚿125

Citizen of Mexico, who came to Los Angeles solely because of requirement that he be personally present to appear and testify at three-day trial of action against him and corporation of which he was chief officer, was immune from service of civil process during the trial, though he enrolled for kiln-drying lectures while in Los Angeles in order to utilize his surplus time, though he came to Los Angeles two days before the trial in order to confer with counsel, and though he did not leave Los Angeles until day after trial was over on airline on which he had a round-trip ticket.

9. Prohibition ⚿10(2)

Where service of summons on citizen of Mexico was void, prohibition proceeding by citizen of Mexico to restrain superior court from proceeding further in action against him was the appropriate remedy.

Prohibition proceeding by Fernando Gerard, also known as Fernando Gerard Cortes, petitioner, against the Superior Court of the State of California in and for the County of Los Angeles, respondent, to restrain the respondent from proceeding further in an action against the petitioner.

Peremptory writ issued.

Schultheis & Laybourne and Everett B. Laybourne, all of Los Angeles, for petitioner.

Harold W. Kennedy, Co. Counsel, and Wm. E. Lamoreaux, Deputy Co. Counsel, both of Los Angeles, for respondent.

G. Harold Janeway, of Los Angeles, for real party in interest.

VALLÉE, Justice.

Petitioner seeks a writ of prohibition directed to the Superior Court of the County of Los Angeles to arrest the rendition of a judgment by default against him in an action for false imprisonment, entitled "Arthur C. Penberthy v. Fernando Gerard, et al.," No. 554662, on the ground that the purported service of the complaint and summons on him is wholly void and of no effect because he is immune and exempt from such service and the court therefore lacks jurisdiction over him.

Petitioner was and is a citizen of the Republic of Mexico, residing in Mexico City. He had been named a party defendant in an action entitled "A. C. Penberthy v. Distribuidora, S. A., a corporation, and Fernando Gerard," No. 538089, in the superior court of Los Angeles County. About March 16, 1948, this action was set for trial on January 19, 1949. Petitioner was immediately notified thereof by his attorney and requested to "be personally present to testify as a witness therein and otherwise to assist in the defense thereof." He assured him he would be present and on December 8, 1948, he informed him that certain kiln-drying lectures were scheduled to be given in Los Angeles at about the time of the trial and that since he was required to be in Los Angeles "he would like to attend said lectures to the extent and during such periods as his time and attention would not be required in connection with preparation for and participation in the aforesaid trial, or during the period of any delay in the actual commencement of said trial." He was advised by his attorney that such arrangement would be satisfactory "so long as he would be available at any and all times on and after January 17, 1949, for all purposes connected with said trial." Accordingly, on January 6, 1949, he enrolled for the course.

Petitioner purchased a round trip ticket on Pan American Airways in Mexico City and arrived in Los Angeles on the evening of Sunday, January 16, 1949, at which time he immediately contacted his attorney and reported that he was available. He was advised by the attorney that he would be busy on the following morning preparing the case for trial and could not see him until the afternoon of that day. Petitioner then attended the morning session of the kiln-drying lectures and in accordance with arrangements made with his attorney by telephone during the course of such morning, left the session at noon and reported to his attorney's office about 2:45 p. m. on Monday, January 17, 1949. The conference with his attorney preparing for the trial lasted until 6:45 p. m. Petitioner was then given copies of various depositions in the action and was requested by his attorney to study them. On the morning of Tuesday, January 18, petitioner had a telephone conversation with his attorney respecting these depositions and his attorney not desiring his presence that morning, he again attended the morning session of the kiln-drying lectures. At about 2:00 p. m. of that day he again conferred with his attorney, preparing for the trial. The conference extended until 6:30 p. m. On Wednesday morning, January 19, the action was called and assigned for trial. At the conclusion of the first day of the trial, as petitioner was leaving the courtroom and proceeding through the hallway, he was handed a copy of the summons and complaint in the false imprisonment action C (No. 554-662). He did not accept the summons or complaint but permitted them to fall to the floor and remain there while he and his attorney boarded the elevator. The trial continued for two additional days, concluding at about 4:15 p. m. on Friday, January 21. Petitioner was present in court throughout the trial. After its conclusion he again conferred with his attorney at his office concerning matters pertaining to the case just concluded. The conference terminated at about 6:15 p. m. In the evening of the same day petitioner contacted Pan American Airways but was unable to take the plane leaving that evening because of insufficient time within which to pack his effects and travel to the airport prior to the flight of the plane. He accordingly made a reservation and left for Mexico City on the next available flight, which was on Saturday evening, January 22, at 10:45 p. m.

Petitioner appeared specially in the false imprisonment action and moved the court to quash the purported service upon him. The motion was denied.

Petitioner alleges that he came to Los Angeles "solely because of the requirement that he be personally present to appear and testify at the aforesaid trial"; that his "only purpose" in enrolling for the kiln-drying lectures "was to utilize such surplus time as he might have during the course of his stay in Los Angeles when his time and attention would not be required in connection with preparation for and participation in the aforementioned trial." These allegations are established.

[1] Respondent does not question the general rule that nonresidents of a state who come within the territorial limits of the state as party litigants or to testify as witnesses in judicial proceedings are afforded an immunity or privilege from the service of civil process while in actual attendance at the hearing and during such reasonable time as may be consumed in going to, and returning from, the place of trial. See collection of cases in 21 Cal. Jur. 530; 42 Am. Jur. pp. 119, 123, 124, secs. 139, 142, 143; 50 C.J. secs. 226, et seq., p. 547; 162 A.L.R. 280; 19 A.L.R. 828; 13 A.L.R. 368; 25 L.R.A. 721; 42 L.R.A.,N.S., 1101; 76 Am.St.Rep. 536; 6 Ann.Cas. 337; 18 Ann.Cas. 127; Ann.Cas. 1915D, 985; 61 L.Ed. 193. It asserts that petitioner voluntarily waived his immunity by arriving within the jurisdiction several days prior to the trial, attending the kiln-drying lectures, and by remaining more

than twenty-four hours after its conclusion when other means of transportation were available from Los Angeles to Mexico City.

[2,3] No definite rule can be laid down as to when the immunity from process is lost by a party or witness by reason of the period of time expended in going to, attending, and returning from the place of trial. The immunity or privilege has been held to extend for a reasonable time. Hammons v. Superior Court, 63 Cal.App. 700, 708, 219 P. 1037. What constitutes a reasonable time necessarily depends upon the facts and circumstances of each case. Parties litigant are entitled to a reasonable amount of time for conferences with their counsel prior to commencement of the trial, the reasonableness being necessarily dependent upon the surrounding circumstances. Where, as here, petitioner was not only a defendant but also a witness in the action, being the principal officer of the defendant corporation, it was imperative that his attorney confer with him in the preparation of his defense. As any one with any experience in the trial of cases well knows, preparation is the most important phase of a lawsuit. Two days' preparation for a trial which lasted three days was obviously a minimum. It cannot be said that petitioner's arrival two days prior to the trial date was unreasonable or excessive. Hammons v. Superior Court, 63 Cal.App. 700, 219 P. 1037; see also, Grundy v. Refior, 312 Mich. 428, 20 N.W.2d 261; Linton v. Cooper, 54 Neb. 438, 74 N.W. 842, 69 Am.St.Rep. 727; Dixon v. Ely, 4 Edw.Ch., N.Y., 557; Ballinger v. Elliot, 72 N.C. 596.

Service was attempted on petitioner during the course of the trial and not during a period prior or subsequent thereto. In Linton v. Cooper, 54 Neb. 438, 74 N.W. 842, 69 Am.St.Rep. 727, the trial was concluded on October 11, and summons served on October 13. Judgment, however, was not rendered until October 20. While the date of departure is undisclosed, the court held an immunity existed, and said, 74 N.W. 843: "We think, under the facts disclosed by this record, Cooper was privileged from service of summons in this action; especially since the cause in which he had appeared as a party and testified as a witness was undetermined when this service was had, and because a reasonable time after the hearing therein for him to take his departure from the state had not yet elapsed."

[4-6] It is not necessary, in order to have the benefit of the immunity or privilege, that a party or witness set out immediately after the trial, or take the most direct route. See, collection of cases in 42 Am.Jur. 133, sec. 154; Annotation 11 Ann. Cas. 1148. What is a reasonable time for returning to one's domicile depends upon the particular facts of each case. Reasonable delays are allowable "provided they do not arise in carrying out a purpose entirely distinct from the purpose of going to, attending, or returning from court." 42 Am.Jur. 134, sec. 154; 50 C.J., sec. 254, p. 560. Where, as here, petitioner was a resident of Mexico and had purchased a round trip ticket on a particular airline, he was not required, under the circumstances, to return to his domicile by another airline, or by train or bus, merely because such other means of transportation afforded an earlier departure. The language used by the court in Turner v. Randall, 134 Minn. 427, 159 N.W. 958, L.R.A.1917B, 250, is particularly appropriate: "But the rule requiring a departure from the state within a reasonable time is not so exacting as to impose upon the party the duty of making hot pursuit of the first train out of the state."

[7,8] Petitioner's immunity was not affected in any way by reason of his enrollment and attendance at the kiln-drying lectures during the mornings only of January 18 and 19, being the only times he was not required on those days to confer with his attorney and prepare for the trial. It is clear that the main and controlling reason for petitioner's presence in California was the pending trial and his attendance at the lectures was solely to consume surplus time not required in connection with the trial. This activity was wholly incidental and subordinate to the primary purpose of his presence in California. In applying the principle of immunity, the courts follow one of two theories: In one, which may be termed the "sole purpose doctrine," the courts take the position that the privilege is not to be invoked unless the person's sole business in the foreign jurisdiction is to at-

tend the litigation and that the protection is gone if, with that affair, other business is intermingled. In the other, which may be termed the "controlling reason doctrine," the courts take the view that it is sufficient for the preservation of the privilege that attendance upon court business constitutes the main and controlling reason for the litigant's or witness' presence in the state, and that as long as this is true he may transact some other business not connected therewith. See, collection of cases, 162 A.L.R. 280. California follows the latter view. Hammons v. Superior Court, 63 Cal.App. 700, 708, 219 P. 1037; cf. Murrey v. Murrey, 216 Cal. 707, 710, 16 P.2d 741, 85 A. L.R. 1335; Fox v. Hale & Norcross Silver Min. Co., 108 Cal. 369, 424, 41 P. 308; Von Kesler v. Superior Court, 109 Cal.App. 89, 90, 292 P. 544. If, therefore, the controlling purpose of the presence within the jurisdiction is that of attending the trial, other subordinate activities will not destroy the immunity. The principle is stated in Hammons v. Superior Court, 63 Cal.App. 700, 708, 219 P. 1037, 1040, thus: "Bearing upon the contention that any immunity which Hammons may have had was lost because he attended to some other business while here, we find in Burroughs v. Cocke [& Willis], supra [56 Okl. 627, 156 P. 196, L.R.A.1916E, 1170], the following: 'However, it appears to us that the more reasonable rule and proper test in such cases should be that if the main and controlling reason that occasioned the party's being in the jurisdiction of the court was to attend upon court business, then merely because he elected to transact other business, not connected with the court that he should not thereby forfeit his immunity; but if it should be determined that his claim of being within the jurisdiction for the purpose of attending upon court business was not bona fide but was being used by him as a mere subterfuge, and that he was in fact there to transact other business not connected with the trial, and but for the desire to transact said other business he would not have come within the jurisdiction of the court, then he is not entitled to immunity. It thus becomes a question of fact, and each particular case must be decided on its own merits.'" There is no showing here that petitioner's claim of being within the jurisdiction for the purpose of attending the trial was not bona fide. Upon the facts which are undisputed, the showing is that he was within the jurisdiction at the direction of his attorney in good faith for the sole purpose of attending the trial and that it was his intention to leave the state as soon as he reasonably could do so after its conclusion. It follows, as a matter of law, that he was immune from service of process.

[9] The service of summons on petitioner was void. Prohibition is the appropriate remedy. Hammons v. Superior Court, 63 Cal.App. 700, 707, 219 P. 1037.

Let the peremptory writ issue as prayed.

SHINN, P. J., and WOOD, J., concur.

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91 Cal.App.2d 416

DENIZ v. FERRAIZ.

Civ. 3763.

District Court of Appeal, Fourth District, California.

April 25, 1949.

1. Mortgages 🔑**36**

A deed absolute on its face is presumed to be what it appears to be, and party claiming that it is only a mortgage has the burden of proof.

2. Mortgages 🔑**36**

That all parties intended deed to be a mortgage must be made to appear beyond reasonable controversy in order to overcome presumption that deed absolute on its face is what it purports to be.

3. Appeal and error 🔑**1008(1)**

Conflicting evidence as to whether deed absolute on its face conveying realty to grantor's sister was intended to be an absolute deed or mortgage presented a question for trial court sitting without a jury.

4. Appeal and error ⚿931(1), 1011(1)

Where the evidence is conflicting, considered opinion of trial judge sitting without a jury on questions of fact should prevail, and all reasonable presumptions and inferences are to be indulged in favor of the correctness of his findings.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by Joaquin B. Deniz, as administrator of the estate of Joe B. Deniz, also known as Joe Borges Deniz, and also known as Joe Deniz, deceased, against Jack Ferraiz, as executor of the last will of Caroline Xavier, deceased, to have a deed to realty declared to be a mortgage and loan secured by mortgage declared paid in full. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Clarence H. Wilson, of Hanford, for appellant.

O. L. Duemler, of Tulare, and J. O. Reavis, of Delano, for respondent.

GRIFFIN, Justice.

Plaintiff and appellant, Joaquin B. Deniz, as administrator of the estate of Joe B. Deniz, deceased, filed this action against defendant and respondent Jack Ferraiz, as executor of the last will of Caroline Xavier, deceased, to have a deed executed by Joe B. Deniz to Caroline Xavier, covering a house and lot in Los Angeles County, declared to be a mortgage and to declare that the loan which the mortgage secured was paid in full. A prayer for a reconveyance of the property to plaintiff's estate, and for an accounting for rents received followed. Defendant answered and denied that the deed was intended for a mortgage and denied that the loan was paid. After trial, the court, sitting without a jury, entered judgment in favor of defendant. The crucial finding was that the deed was not intended as a mortgage. Judgment was entered accordingly.

Plaintiff's contention is that the evidence does not support the finding to this effect. Joe B. Deniz executed the grant deed of the property to his sister Caroline in 1939. It was recorded shortly thereafter. Deniz died on January 17, and Xavier on March 14, 1947. There was no direct evidence as to the circumstances under which the deed was executed. Plaintiff testified that, on the date the deed was executed, he was living in Merced County and his sister Caroline and his brother Joe were living together in Tulare County; that Joe had poor eyesight, was uneducated and could not read, but could sign his name; that Caroline lacked similar educational qualifications. He then testified that he was present when 40 or 50 conversations were had between Joe and Caroline about the property; that several times Joe said Caroline had loaned him money and that Joe had paid her back and was demanding that the property be deeded back to him; that Caroline would say that she was going to do so as soon as they went to town; that plaintiff tried to persuade her to deed it back but Caroline said Joe still owed her $1,000; that the house was rented at times from $37 to $90 per month; that it was registered to Joe, as owner, in the OPA office and that he collected the rent up to the time he died, by checks made payable to him; that there was a loan on the property in 1939 and Joe made all payments thereon and paid all taxes; that a note dated October 3, 1939, signed by Joe, payable to Caroline, was found among Joe's papers after his death but no chattel mortgage, as mentioned in the note, was found.

A Mrs. C. Costa, housekeeper for Joe for about nine years, testified that in 1937, Joe met with a serious accident and never completely recovered; that she did most of his business for him; that in 1937, Joe's truck was attached for a grocery bill and Caroline paid the balance due; that in 1940, Joe transferred the pink slip of his truck to Caroline; that Joe and Caroline later lived on the property in Los Angeles; that on occasions she heard Joe ask Caroline to return the deed and she said "No" because Joe would leave the property to the housekeeper for work done by her for him; that Caroline said, in 1945, that all of Joe's debts to her had been paid; that she "understood" the deed was made as security for the money Joe owed Caroline;

that when the rent was paid on the property to Joe he would pay it over to Caroline.

Other witnesses testified that Joe and Caroline were, on occasions, fighting about the property, and Joe told her he wanted a deed to it, and Caroline said when she got back to the bank she would obtain the deed, or that she would not give him a deed because she did not owe him anything, or she was afraid he would give the property to the housekeeper.

Defendant's witness, a Mrs. John Costa, testified that about a week before his death Joe told her that he had deeded the property to his sister and he did not think he was doing anything more than right in giving it to her and it would be up to her to do what she wanted with it before her death; that Joe wanted to sell the home in Hanford because he was pretty sick and did not think he had long to live and that the property here in question was "already fixed"; that Joe and Caroline said they had helped each other out with money; that when he was sick and needed help, she would help him out; that when she was sick and needed money, he would help her out; that Deniz also told her that Caroline could do what she wanted with the property before she died and that he wished her to have the house; that Deniz made no reference to any claim that he had deeded the property to his sister to secure a loan, but did state that as she had been taking care of him and his four children, that "I provided for my sister that had provided for me"; that Deniz never asked Caroline to return the deed while in her presence. This witness was not related to any of the parties nor to any of the witnesses in the action.

[1, 2] Immediately, plaintiff is confronted with the presumption that a deed absolute on its face is presumed to be what it purports to be, and the burden of proof is upon the party claiming that it is only a mortgage. Kohn v. Parent, 174 Cal. 570, 571, 163 P. 1008; Duncan v. Ledig, 90 Cal.App.2d 7, 202 P.2d 107. Under such circumstances, it must appear to the trial court, beyond reasonable controversy, that it was the intention, not only of one but of all of the parties that the deed should be a mortgage. Wehle v. Price, 202 Cal. 394, 396, 260 P. 878.

Plaintiff concedes the rule but argues that the undisputed evidence shows that the presumption above mentioned was completely overcome and dispelled by the evidence opposed to it and no other conclusion could be drawn from the facts established except that the deed was intended as a mortgage and that a confidential relationship existed between Joe and his sister Caroline.

[3, 4] In addition to the presumption that the deed was absolute on its face, there is the added testimony that Caroline and Joe Deniz had helped each other out with money, over a period of years; that Joe permitted her to retain title to the property for many years and until his death. He took no steps toward regaining title during this period. While there is ample evidence opposed to defendant's evidence and the inferences and presumptions arising therefrom, plaintiff's evidence only creates a conflict therewith. The trial judge was the one to determine that issue. It is the considered opinion of the trial judge that should prevail, where the evidence is conflicting, and all reasonable presumptions and inferences are to be indulged in favor of the correctness of his findings. People v. Jefferson, 31 Cal.App.2d 562, 566, 88 P.2d 238; Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301; Watwood v. Steur, 89 Cal.App.2d 620, 201 P.2d 460.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

33 Cal.2d 776

In re FILTZER'S ESTATE.

HARDER v. ALLEN.

L. A. 20497.

Supreme Court of California, in Bank.
April 28, 1949.

1. Bastards ⟹11
Marriage ⟹11

A purported marriage between parties, one of whom was already married, was void as between the parties but was within the scope of the legitimating statute for the protection of the issue who become in relation to their father the inheritors of his name, his heirs apparent, and entitled to look for, and demand from him, his care, maintenance and protection. Probate Code, § 680; Civ.Code, § 85.

2. Bastards ⟹5

On petition of mother of infant for order directing administrator of infant's alleged father to pay certain sum for support of infant, where petitioner's testimony was undisputed that she and decedent had gone through purported marriage ceremony in Mexico and that petitioner received a certificate to that effect, purported marriage certificate and translation thereof were properly received in evidence, not to prove a valid marriage but to support testimony of petitioner that she had gone through a marriage ceremony and that she believed that she was legally married to petitioner. Probate Code, § 680; Civ.Code, § 85.

3. Bastards ⟹8

In petition by mother of infant against estate of alleged father for support of infant, trial court's finding that petitioner had entered into purported marriage with decedent in Mexico in good faith and that the parties thereafter lived together as husband and wife was sustained by substantial evidence. Probate Code, § 680; Civ.Code, § 85.

4. Executors and administrators ⟹194(1)

In petition by mother of infant against alleged father's estate for allowance for support of infant, trial court properly allowed petitioner attorney fees as part of the order granting the family allowance. Probate Code, § 680; Civ.Code, § 85; Code Civ.Proc. § 1021.

Appeal from Superior Court, Los Angeles County; Wm. M. Byrne, Judge pro tem.

Proceeding in the matter of the estate of Francis W. Filtzer, also known as Bob Filtzer, deceased, on petition of Mary Louise Harder for an order directing R. E. Allen, administrator with the will annexed of the estate of Francis W. Filtzer, deceased, to pay to petitioner a family allowance for the support and maintenance of Gregory Francis Filtzer, the minor child of the petitioner and the decedent. From an order for petitioner, the administrator, etc., appeals.

Order affirmed.

Prior opinion, see 198 P.2d 329.

Voorhees, Stewart & Voorhees and Grace A. Voorhees, all of Los Angeles, for appellant.

Leonard Wilson and Arnold L. Leader, both of Los Angeles, for respondent.

SPENCE, Justice.

This is an appeal from an order which directs the administrator-with-the-will-annexed of the estate of Francis W. Filtzer to pay to petitioner and respondent, Mary Louise Harder, a family allowance "for the support and maintenance" of Gregory Francis Filtzer, the minor child of petitioner and decedent. In challenge of the propriety of such order, there is argued: (1) the insufficiency of the evidence to sustain the application of the legitimating statute, Civ.Code, sec. 85; and (2) the error of the trial court in awarding attorney fees in this proceeding. Neither of these points is well taken in view of the record and settled legal principles bearing thereon.

Francis W. Filtzer died on or about May 9, 1947, leaving as his surviving spouse Evelyn R. Filtzer. In 1945 she had filed an action for divorce against said decedent and an interlocutory decree was granted in September of that year, but a few months thereafter the action was dismissed. In November, 1945, divorce proceedings were instituted between Mary Louise Harder, petitioner herein, and Hans Frederick Harder, and on January 3, 1946, an interlocutory decree was entered therein. On or about January 13, 1946, petitioner and Francis W. Filtzer, the decedent, went through a "marriage ceremony" in Tijuana, Mexico, and thereafter lived together as husband and wife in California. As a result of that marital union a child was born on July 22, 1947—said Gregory Francis Filtzer. In pursuance of the provisions of section 85 of the Civil Code—that "The issue of a marriage which is void or annulled or dissolved by divorce is legitimate"—petitioner sought "a reasonable allowance" from the decedent's estate for the "support and maintenance" of said minor child, together with "attorney's fees * * * on account of * * * services * * * rendered" in the proceeding.

After hearing, the trial court made an order in which it found that petitioner and decedent "entered into a marriage ceremony in the State of Morales, Republic of Mexico, and that said marriage between said decedent and said petitioner, Mary Louise Harder, was, by said Mary Louise Harder, entered into in good faith, and that said marriage has never been dissolved, annulled or otherwise set aside. That following said marriage, said petitioner, Mary Louise Harder and said Francis W. Filtzer lived together in the City of Avalon, County of Los Angeles, State of California, as husband and wife, and engaged in the marital relationships of husband and wife." The court further found that petitioner was "entitled to [a] reasonable allowance out of the above entitled estate for the maintenance of said child, for the payment of doctor and hospital bills, and for the employment of attorneys to protect the interest of said child." Accordingly, the court ordered the administrator to pay to petitioner "$500.00 attorneys fees, $275.00 hospital and doctor bills, and $100.00 for the support and maintenance of said minor child * * * each and every month * * * until further order of the * * * court." From such order the administrator has appealed.

Section 680 of the Probate Code declares, as here material, that a minor child is "entitled to such reasonable allowance out of the estate [of its father] as shall be necessary for [its] maintenance according to [its] circumstances, during the progress of the settlement of the estate". Appellant contends that the evidence was insufficient to bring petitioner's claim within the scope of this section and therefore the order for an allowance to the minor child in question was improperly made. In this connection he maintains: (1) that no marriage was in fact proved; but (2) if a marriage actually did take place, it was not shown to have been contracted, in good faith on the part of either party and the child accordingly would not be legitimate under section 85 of the Civil Code.

The only testimony relative to the marriage was that of petitioner, who stated that she and the decedent "went through" a "marriage ceremony" before an official in Tijuana, Mexico, who delivered to her "a document written in the Spanish language" purporting to evidence the ceremony just performed; and that thereafter she received through the mail "a document" purporting to be an official "translation" in English of the "marriage certificate." Each of these documents was introduced into evidence over objection that "no proper foundation [had been] laid" therefor. With regard to the issue of good faith, petitioner testified that decedent told her that "we could not get married anywhere in the State of California, but that we could go to Mexico and it would be valid in any state"; that whenever they talked of their forthcoming marriage, the decedent assured her "we could get married in Mexico and it [we] would be married anywhere"; that she relied upon these statements of the decedent, went through the "ceremony in reliance upon" them, and thereafter they "live[d] together as husband and wife," she "using [his] name."

[1] In his attack upon the sufficiency of petitioner's proof of the marriage, appellant urges that "no evidence was adduced as to [the] laws" of the State of Morales, Mexico, and therefore "it must be presumed" that the laws of that state are "the same" as California; that "no evidence was presented that the parties had obtained a license to marry," that "the person * * *

perform[ing] the purported marriage ceremony was authorized by law" so to do, or "of his official capacity * * * [or] identity"; and that "the court erred in receiving into evidence the purported marriage certificate and translation thereof." But such evidentiary considerations have no pertinency here in derogation of the force of petitioner's claim as directed solely to the establishment of the legitimacy of the minor child in question. A purported marriage which, by reason of a legal disability existing at that time [one of the parties already married], is rendered void [as creating a bigamous relationship between the parties] and so "deemed null in law" as regards them, nevertheless comes within the scope of the legitimating statute for the protection of the issue, who become "in relation to their father, the inheritors of his name, his heirs apparent, and entitled to look for, and demand from him, his care, maintenance and protection." Graham v. Bennet, 2 Cal. 503, 506. To like effect is the In re Estate of Shipp, 168 Cal. 640, 144 P. 143, where the offspring of a marriage "null in law" because of the "want of a license" was held legitimate in determining the right of heirship upon distribution of the alleged father's estate.

[2] Here the testimony of petitioner stands undisputed that she and the decedent actually went through what purported to be a marriage ceremony and received a certificate to that effect. As bearing upon her description of the ceremony, the purported marriage certificate and translation thereof were properly introduced into evidence. The authorities cited by appellant in challenge of their admissibility in the absence of "competent outside evidence" establishing their authenticity—that a "marriage certificate does not prove itself", and that "proof of the signature of the person by whom it purports to have been signed, and of his authority to perform the marriage ceremony, is necessary", People v. Le Doux, 155 Cal. 535, 550, 102 P. 517, 523; People v. Jordan, 72 Cal.App. 406, 408, 237 P. 757—are not applicable here for, as declared by the trial court, the documents were admitted in evidence "not * * * to prove a valid marriage" but to support the testimony of petitioner that "she went through a * * * marriage ceremony down there [Mexico] at that time," that "a certificate"—"whether or not * * * valid"—"was presented to [her] when she entered into [the] marriage," and that she believed that she was legally married—the "effect on [her] mind." In short, the documents were relevant in substantiation of petitioner's claim, and in corroboration of her testimony, that she acted in good faith and assumed marital relations with the decedent in the belief that they were legally married.

[3] It is frequently said that in order to legitimate the issue of a bigamous marriage—as is here involved—under statutes identical with or similar in wording to section 85 of the Civil Code, it must appear that at least one of the parties to such attempted marriage contracted in good faith, believing it to be a valid marriage. See annotation, 84 A.L.R. 499, 501; 3 Cal.L.Rev. 160, 162; 19 So.Cal.L.Rev. 457, 458. However, here it is unnecessary to pass upon that question, for the trial court found, upon substantial evidence, that the "marriage was, by [petitioner], entered into in good faith" and that thereafter she and the decedent "lived together * * * as husband and wife." Appellant attacks this finding upon the premise that the testimony of petitioner as to her good faith is so inherently improbable as to be unworthy of belief, and that this court should therefore disregard her statements and declare the findings of the trial court based thereon to be without support in the evidence. But he cannot prevail in the light of the record sustaining the trial court's determination of the point as a question of fact.

[4] Nor can it be said that the trial court erred in awarding attorney fees as part of the order granting the "family allowance." As appears from the record incident to the discussion of the point at the hearing, the payment of the attorney fees was ordered as "something * * * necessary for his [the child's] support and maintenance, just the same as room and board or anything else." In so distinguishing the premise of the award of the attorney fees as in "the interest of the child,"

the court expressly limited its consideration to services rendered "in connection with [the] petition for family allowance."

While appellant cites no authority holding that attorney fees are not allowable in a proceeding such as this, he relies on the general rule that "attorney's fees" are not recoverable unless "specifically provided for by statute * * * [or] agreement * * * of the parties", Code Civ.Proc. sec. 1021; see 7 Cal.Jur. sec. 27, p. 286; Los Angeles Trust & Savings Bank v. Ward, 197 Cal. 103, 107, 239 P. 847; City of Los Angeles v. Abbott, 217 Cal. 184, 194, 17 P.2d 993; Murphy v. Murphy, 71 Cal.App. 389, 392, 235 P. 653; Bank of America National Trust & Savings Association v. Moore, 18 Cal.App.2d 522, 529, 64 P.2d 460; Exchange National Bank of Tulsa v. Ransom, 52 Cal.App.2d 544, 547, 126 P.2d 620, except in "certain actions in equity"—representative or class suits, "where the courts will award" to the successful litigant from the fund preserved or protected "for the benefit of [himself] and others * * * compensation * * * for the services of [his] attorneys" as justice requires. In re Estate of Marré, 18 Cal.2d 191, 192, 114 P.2d 591, 592. However, such authorities have no relevancy here, for the trial court did not deem "petitioner * * * entitled to attorneys fees as attorneys fees" but correlated such added relief with the concept of an obligation assumed by her on behalf of the child "to defend his rights" to share in the decedent's estate. Thus, the trial court expressly declared its views to be that an "allowance" to petitioner "out of the [decedent's] estate * * * for the employment of attorneys to protect the interest of said child" rested on the same principle as one made "for the payment of doctor and hospital bills" incurred on his behalf—"necessary" for his support and maintenance.

In line with this theory of the trial court is the case of Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163, where suit was instituted to compel a father to support his illegitimate child under section 196a of the Civil Code, which at that time (1937) read as follows: "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife." After discussing the evidence sustaining the finding on the parentage issue against the defendant, the court stated, 10 Cal.2d at page 434, 74 P.2d at page 1047: "Also, as section 196a of the Civil Code requires a father to support his child, the trial court had power to order him to pay attorney's fees in the action brought to enforce that obligation." In other words, the attorney's fees in an action prosecuted under authority of said section 196a were allowed as a part of the final judgment, not upon an express authorization of the statute but as a necessary element entering into considerations affecting the support and maintenance of the minor child. See Kyne v. Kyne, 38 Cal.App.2d 122, 131–132, 100 P.2d 806, citing Paxton v. Paxton, 150 Cal. 667, 89 P. 1083; also Kyne v. Kyne, 60 Cal.App.2d 326, 329, 140 P.2d 886, 141 P.2d 221. Nor did the amendment of section 196a in 1939, by adding in the last clause a reference to sections 137 and 137.5 of the Civil Code and, as construed in Carbone v. Superior Court, 18 Cal.2d 768, 770–772, 117 P.2d 872, 136 A.L.R. 1260, so giving to the trial court, in an action brought under that statute, a power which it did not theretofore have—the right to order attorney fees pendente lite in the same manner as "in a suit for divorce by a wife"—render "the law as it existed prior thereto and as it was interpreted by the courts * * * obsolete so far as * * * concerned * * * attorney's fees * * * assessed * * * in the final judgment." Andrade v. Newhouse, 54 Cal.App.2d 339, 345, 128 P.2d 927, 930—"the allowance * * * predicated upon the theory that such legal services are part of the child's right to support." Id., 54 Cal.App.2d at page 344, 128 P.2d at page 930; see, also, Berry v. Chaplin, 74 Cal.App.2d 669, 678, 169 P.2d 453.

It is true that the present action is not a filiation proceeding instituted against a living parent to enforce the obligation of support, but the same reasoning should apply where the claim is against the estate of the deceased father under section 680 of the Probate Code, entitling the minor child "to such reasonable allowance out of the estate as shall be necessary for [its] *maintenance* according to [its] circumstances, during the progress of the settlement of the estate * * *". (Emphasis added.) "Maintenance" and "support" are synonymous terms, Webster's New International Dict., 2d Ed., Unabridged, p. 1484; see In re Lazar, 37 Cal.App.2d 327, 332, 99 P.2d 342, envisaging alike the same considerations necessary to sustaining a livelihood—and a child's need would in nowise differ according to whether the father was living or deceased, or whether it was the illegitimate or legitimate offspring of the parent. In this connection it is pertinent to note that "family allowances are strongly favored in the law, 11A Cal.Jur., p. 507, * * * [statutes providing therefor] must be construed with the same spirit of liberality that prompted their enactment. * * * to guard and protect the family * * *". In re Estate of Jacobs, 61 Cal. App.2d 152, 155–156, 142 P.2d 454, 456. Accordingly, it would seem proper to conclude that in giving a child the right to an allowance for "maintenance" against his father's estate, the legislature intended to comprehend in such term all such elements as would reasonably enter as factors essential to the satisfaction of that obligation, including an allowance for attorney fees necessarily incurred in the prosecution of the statutorily authorized proceedings. Thereby the same protection is given the child in the matter of provision for a livelihood whether sought under section 196a of the Civil Code or section 680 of the Probate Code, and the trial court's power to order the payment of attorney fees for services rendered in the prosecution of the proceedings on behalf of the child would be identical in either case, consistent with the finding that they were "necessary for his support and maintenance, just the same as room and board or anything else."

In opposing these views, appellant unavailingly relies on certain observations in the In re Estate of Marré, supra, 18 Cal.2d 191, 114 P.2d 591, an appeal by a beneficiary of a trust from that portion of an order which denied his petition for an allowance from the trust funds with which to pay the fees of his attorney. The beneficiary had been successful in obtaining an order requiring the trustees of the trust to make payments to him for his support and maintenance, with the "amount" thereof, however, "to be determined in [their] sole judgment". In re Estate of Marré, 18 Cal. 2d 184, 190, 114 P.2d 586, 590. Consistent therewith this court, in disposing of the controversy affecting the payment of the attorney fees, stated, 18 Cal.2d at pages 192–193, 114 P.2d at page 592; "It is suggested that under the facts of this case attorney's fees constitute a necessary expense of the beneficiary and should, therefore, be paid from the trust funds as a portion of the amount due for support and maintenance. The amounts payable, however, are to be determined in the sole judgment of the trustees, and under the facts here presented no ground is shown entitling appellant to an order of the court awarding him attorney's fees." In other words, the refusal of a court award of attorney fees was placed, not on the ground that such allowance would be without the concept of "support and maintenance," but because it would be a payment the amount of which was for the trustees to determine in the exercise of their discretion. In re Estate of Marré, supra, 18 Cal.2d 184, 190, 114 P.2d 586. But the present case is distinguishable, for here the court itself had the duty to determine what would be "necessary" for the child's "maintenance"—and so was authorized to make "a reasonable allowance" therefor as the elements entering into such concept appeared from the evidence. The court here did not undertake to order the payment of attorney fees to petitioner as an item of "costs," so manifestly appellant's reference to the In re Estate of Bevelle, 81 Cal.App.2d 720, 185 P.2d 90, 92, for its discussion of the impropriety of such procedure unless "expressly allowed by statute or agreed to by express contract" has no relevancy.

The order subject of this appeal is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

SUNDERLIN v. STATE BAR OF CALIFORNIA.

L. A. 20778.

Supreme Court of California, in Bank.

April 28, 1949.

Rehearing Denied May 26, 1949.

1. Attorney and client ⚿53(2)

Evidence supported charges of unprofessional conduct, in that attorney caused realty to be conveyed to corporation owned by him and family without consideration and without consent of widow while acting as attorney for husband's estate, with result that title was acquired on behalf of attorney, who thereafter caused property to be sold without widow's knowledge and consent and failed to account for proceeds. Business & Professions Code, §§ 6067, 6068, 6103.

2. Attorney and client ⚿44(1, 2), 58

Professional misconduct by attorney in acquiring realty of estate while acting as attorney therefor, selling it without consent of widow of decedent, and failing to account for proceeds, was ground for suspension from practice for two years. Business & Professions Code, §§ 6067, 6068, 6103.

3. Attorney and client ⚿53(1)

Fact that attorney began declaratory judgment action to determine rights to proceeds from sale of property of estate represented by him, which he caused to be conveyed to corporation owned by him without consideration and without knowledge of widow and without accounting for proceeds, could not be considered as evidence of good faith of attorney, in view that action was filed three years after corporation obtained properties and a week after charges had been filed against attorney for professional misconduct. Business & Professions Code, §§ 6067, 6068, 6103.

◆

Original application by Charles A. Sunderlin to review a proceeding in which the Board of Governors of the State Bar of California recommended that petitioner be suspended from the practice of law for a period of two years.

Petitioner ordered suspended in accordance with opinion.

Charles A. Sunderlin, of Los Angeles, in pro. per., for petitioner.

Jerold E. Weil, of Los Angeles, for respondent.

PER CURIAM.

Petitioner has brought before this court for review the proceeding in which the Board of Governors of The State Bar recommended that he be suspended from the practice of the law, for a period of two years.

[1, 2] The notice to show cause, issued on August 29, 1945, charges petitioner with the violation of his oath and duties as an attorney, the commission of acts involving moral turpitude and dishonesty, Business & Professions Code, §§ 6067, 6068, 6103, 6106, and the violation of Rule 9 of the Rules of Professional Conduct of The State Bar. It is charged that petitioner, while acting as attorney for the estate of Jack P. Leonard, deceased, and for his widow, Margaret N. Leonard, administratrix of said estate, caused certain real properties to be conveyed to the Merchants Credit Association of the United States, a corporation formed and owned by him and members of his immediate family; that no consideration was paid for the conveyances and that they were effected without the knowledge and consent of Mrs. Leonard; that as a result thereof, title to the properties was acquired for and on behalf of petitioner and members of his immediate family; that subsequently, petitioner caused the properties to be sold without Mrs. Leonard's knowledge and consent and that neither he nor the Association accounted to her for the proceeds of the sale.

The matter proceeded to a hearing before a local administrative committee of The State Bar, which made findings of fact and conclusions of law therefrom favorable to petitioner and recommended that the disciplinary proceeding be dismissed. Upon transfer of the proceeding to the Board of Governors, the notice to show cause was amended "to conform to proof." As amended, it alleges that Mrs. Leonard owned a beneficial interest in the properties conveyed to the Association subject to the administration of Leonard's estate and charges that petitioner had knowledge of this fact at the time he caused the conveyances to be made. The Board of Governors concluded that petitioner was guilty of unprofessional conduct as charged and recommended that he be suspended from practice for a period of two years.

Jack P. Leonard, an attorney at law, died on March 23, 1942. On that date, his widow, Margaret N. Leonard, employed petitioner to act as her personal attorney to complete the unfinished legal business left by Leonard and to probate his estate. She gave petitioner the keys to Leonard's office, and with her consent, petitioner thereafter moved all of Leonard's files to his own office. Upon examination of these files, petitioner discovered the following facts.

Leonard, as attorney for George N. White, had instituted actions to foreclose three deeds of trust held by the latter. On June 10, 1941, White executed and delivered to Leonard a general power of attorney "for his use and benefit or benefit of said attorney hereby waiving any accounting therefor*e* whatsoever, and irrevocable; by my demise or otherwise." Judgments were obtained in the foreclosure actions, and a court commissioner was appointed to sell the properties. The court awarded Leonard attorney fees in the amount of $500 for services rendered by him in connection with those actions. On July 15, 1941, White wrote to the court commissioner as follows: "In order to secure costs of sale, together with attorneys fees and other moneys expended, in the foreclosures actions * * * you are hereby authorized and instructed to make sales, and give necessary titles, to my attorney Jack P. Leonard; who also holds my general power of attorney; to the mentioned parcels of Real Estate." At the commissioner's sale, held on August 5, 1941, the properties were purchased and the certificates of sale were issued in White's name.

On August 11, 1941, Leonard, as the attorney in fact of White, executed an assignment of the certificates of sale of two of the properties to Don Jose for a recited cash consideration of $300 and a promissory note, made payable to Leonard, in the amount of $2,700. On the following day, Leonard executed an assignment of the certificate of sale of the other property to Mrs. Marie Reighley. These assignments were not recorded by Leonard, and from all that appeared from his files, they were not delivered to the named assignees.

Upon White's death on October 16, 1941, Ben H. Brown, Public Administrator of Los Angeles County, was appointed to administer his estate. In a letter dated January 12, 1942, Brown made request upon Leonard for information concerning the foreclosure actions. In his reply, dated January 21, 1942, Leonard stated that the assignment of the certificates of sale to Jose "was made by Mr. White, although he had me attend to all details under the attached power-of-attorney and authorized the accru*e*ing payments to be made to me * * *." He also stated that he had known White for about twenty-five years and that White "wished to give me complete authority by power of attorney to attend to and dispose of whatever he had or would leave if he passed away * * * that upon his passing I was to settle up all his business, pay all costs and expenses of the foreclosures together with some other confidential matters, and to retain for myself whatever was remaining; and on that latter date [White] executed the attached power of attorney, which he desired for his own reasons; be *irrevokabe* and without any accounting. * * *" Brown's reply of March 2, 1942 was as follows: "After full consideration of your report of your business dealings with the deceased we are obliged to advise that the report is not acceptable as a final disposition of the matter. Demand is therefore made upon you for delivery to Ben H. Brown, as administrator of this estate of the proceeds of sale by you of the commissioner's certificates on the two foreclosures * * * to one Don Jose, being $300.00 in cash and promissory note for $2700.00. You can then file your claim against the estate covering your legal services to the deceased on the two foreclosures. Unless we hear from you within ten days from receipt of this demand we will be obliged to take such action as we deem necessary." The final correspondence between Brown and Leonard was Leonard's letter of March 12, 1942, eleven days before his death, stating: "If you will refer to the certified copy of Power of Attorney, which I left with your office, you will note that the power is made '*for the benefit of said attorney, hereby waiving any accounting therefore whatsoever, and irrevokable in the event of my demise or otherwise.*' Which, as I further explained, was for a definite reason of the deceased White and which he had a right to do. In view of the fact that any accounting whatsoever is expressly waived, I cannot perceive how I could be obliged to do so. I agree that the demise would revoke the power in so far as any further act of agency might be concerned, but this is not the case here. Nothing is left undone thereunder. * * * In other words the Administrator cannot demand anything that the person could not himself demand; by reason of the fact that the power was both for the benefit of the Attorney; and all accounting waived." On August 6, 1942, the court commissioner in the foreclosure actions executed and delivered deeds to the properties to Jose and Mrs. Reighley.

Apprised of the foregoing facts, petitioner called upon Jose on August 7, 1942 and, according to Jose's testimony which is uncontradicted, stated that "he was trying to get some money for Mrs. Leonard, that she was badly in need of help, and that he had all the papers ready there, and asked me if I would assign some property over, and I said certainly, because he was going to dispose of the property and get the money for Mrs. Leonard. So I signed the papers—" He also testified that he told petitioner "exactly what [his] agreement with Jack Leonard was" in connection with the assignment to him of the certificates of sale; that he never paid Leonard the recited cash consideration of $300; that he signed the promissory note at Leonard's request only as an "accommodation"; that he "wasn't to get any interest in the property"; and, that he agreed to reassign the certificates to Leonard upon the latter's request. Grant deeds to two of the properties were thereupon executed and delivered by Jose to the Merchants Credit Association of the United States, a California corporation licensed to conduct a collection agency, of which petitioner's wife is the President and petitioner is the Secretary-Treasurer. On August 10, 1942, petitioner got in touch with Mrs. Reighley and asked her to release the property standing in her name "so that he could clear the [Leonard] estate." This information was the first that Mrs. Reighley had of Leonard's assignment to her of the certificate of sale of the property. She executed and delivered a grant deed to the property to the Association. Neither petitioner nor the Association paid any consideration to Jose or Mrs. Reighley for these conveyances.

On September 4, 1942, the Association executed a deed of trust to one of the properties to the Bank of America as security for a loan of $1,500. Petitioner testified that "We got about $300 out of that [loan]"; that "there was $500.00 they owed until the property met their qualifications for a loan. It never was paid. * * The total expenses amounted to about $700.00 and there was about $300.00 available"; that this amount was deposited to the credit of the account of the Association. On September 17, 1942, the assignments of the certificates of sale of the properties to Jose and Mrs. Reighley were recorded at petitioner's request. In accordance with the escrow instructions in connection with the foregoing loan, these assignments were re-recorded on October 9, 1942, along with the commissioner's deeds to the properties and the grant deeds thereto from Jose and Mrs. Reighley to the Association. There is no evidence that Mrs. Leonard had knowledge of or consented to the foregoing transactions.

In October, 1942, petitioner commenced probate proceedings in Leonard's estate. The inventory of Leonard's assets filed therein did not list any of the properties heretofore mentioned. Upon application of Mrs. Leonard, prepared by petitioner, the court entered its decree that the entire estate, which did not exceed $2,500 in value be set aside to her.

In December, 1942, the Association obtained a loan of $2,250 from J. G. Giebler and executed a deed of trust on a part of these properties as security therefor. Petitioner testified that part of the funds obtained therefrom was used to retire the loan obtained from the Bank of America, and that the balance thereof was deposited to the credit of the Association's account. This loan was also obtained without the knowledge or consent of Mrs. Leonard, and, as in the case of the loan obtained from the Bank of America, neither petitioner nor the Association accounted to her or anyone else for the proceeds obtained therefrom.

On April 20, 1943, the White estate was closed as insolvent, and Brown, the public administrator, was discharged. There is no evidence of any communications between petitioner and Brown relative to these properties. Petitioner did not file a claim with the White estate for the attorney fees awarded to Leonard in the foreclosure actions.

In November and December, 1943, petitioner caused the Association to sell the properties conveyed to it by Jose for approximately $4,100. Neither he nor the Association accounted to Mrs. Leonard or anyone else for the proceeds received therefrom. Mrs. Leonard testified that she had no knowledge of the sale and that she did not consent thereto; that in the first week of April, 1945, "when [she] went to see about paying [her] taxes [she] inquired about this property and they told [her] that it had been sold by the Merchants Credit Association and that was the first time that [she] knew that the property stood in the [name of the] Merchants Credit Association"; that she "went up to Mr. Sunderlin's office" and "asked him about the property and he said 'I haven't done anything with that property because it is so run down that I haven't been able to do a thing with it,' and [she] said 'I beg your pardon, I happen to know that you sold it, the Winslow Street property,' and he said 'Yes, I have but I didn't get a penny out of it.'" She also testified that petitioner offered to give her a check for $250, but that she refused to accept it. This amount, petitioner testified, represented the "attorney's fees tied up in that Reighley lot in Hollywood."

Immediately following the foregoing conversation, Mrs. Leonard filed a complaint against petitioner with The State Bar. After preliminary investigation by a local committee, the notice to show cause herein was issued and was served upon petitioner on September 4, 1945. On September 11, 1945, petitioner filed in the Superior Court for Los Angeles County, an action for declaratory relief joining as defendants, Brown, the public administrator, Jose, Mrs. Reighley, Mrs. Leonard, et al. The theory of the action was that the Association held the properties conveyed to it by Jose and Mrs. Reighley, or the proceeds from the sale thereof, as trustee of an express trust for the benefit of creditors of and possible heirs to the White estate, as assignee to secure payment of various fees alleged to be due the Association and petitioner for services rendered in connection with these properties, and as assignee for "any other legal claimants." The court was asked to define and determine "the rights and interests of the respective parties" in these properties. Mrs. Leonard filed a cross-complaint therein for declaratory relief, alleging that petitioner failed to account for certain fees collected from Leonard's legal business; that he induced Jose and Mrs. Reighley to convey the properties to the Association, and that he and the Association "at all times intended to appropriate to themselves the said parcels." Petitioner's testimony explaining his reason for commencing that action is as follows: "As soon as I had notice from anybody claiming an interest in this property what did I do. I filed this proceeding for declaratory relief. I wasn't charged with any notice until Mrs. Leonard made a demand at that time. I considered that my legal services were probably worth more than all the money involved aside from the property. There was the Hollywood property [that had been conveyed to the Association by Mrs. Reighley] worth probably $7,000.00; there was the demand of Ben

H. Brown for $3,000.00 [in his letter to Leonard dated March 2, 1942], and upon the filing of the suit for declaratory relief I deposited with the Superior Court a check for $3,000.00 to cover the demand of Ben H. Brown representing what they contended was the interest of the White estate in this property." Petitioner has introduced into evidence the minute order of the court in that action, dated June 5, 1946, which reads in part as follows: "The Court adjudges and decrees as follows: The defendant Estate of Jack P. Leonard by Margaret N. Leonard, Administratrix, is entitled under this declaratory relief judgment to have conveyed to it the real property described as Lot 36 [the Reighley lot], and delivered to it cash moneys in the sum of $3,883.42. Defendant Don Jose is entitled to have and the clerk is ordered to deliver to Don Jose for cancellation the $2700.00 note received in evidence as Exhibit 11, for cancellation. Plaintiffs are not entitled to any compensation in these proceedings for any services whatsoever. This court leaves to the probate proceedings of the Estate of Jack P. Leonard, deceased, the question of the disposition of any claim so far as the Estate of George P. White is concerned. * * *"

On the basis of the foregoing evidence, the Board of Governors, on June 25, 1948, made the following findings: That by causing the properties to be conveyed to the Association, petitioner in effect acquired title thereto for and on behalf of himself and members of his immediate family without the payment of any consideration therefor; that by reason of the conveyances, the Association was vested with legal title to the properties as trustee for Leonard's estate and for Mrs. Leonard; that the loans secured on the properties and the sale of a part thereof were effected without authorization of court and without Mrs. Leonard's knowledge and consent; that prior to September 11, 1945, on which date petitioner filed an action for declaratory relief, neither he nor the Association made any effort to have the rights in or ownership of the properties or the proceeds therefrom determined; and that neither he nor the Association accounted to Mrs. Leonard or anyone else for the proceeds of said loans or of said sales. The Board concluded, "That the action of the [petitioner] in causing said property to be conveyed to Merchants' Credit Association of the United States was done in bad faith and for the purpose of defrauding Margaret N. Leonard," whereupon, by vote of 10 members, with one member not voting, it recommended that he be suspended from practice.

Petitioner contends that the findings of fact made by the Board are unsupported by the evidence. From a complete review of the record, however, the conclusion is inescapable that these findings are supported by the evidence, and that the record as a whole justifies fully the recommendation that has been made in this proceeding.

Numerous discrepancies and weaknesses are apparent throughout petitioner's arguments and testimony in which he attempts to vindicate his conduct in connection with the White properties.

Petitioner first contends that upon his employment by Mrs. Leonard as her attorney, she transferred all of Leonard's legal business to him as compensation for his services. This contention is not supported by the evidence, and petitioner, in his own testimony, contradicts it. Mrs. Leonard testified that it was "taken for granted" that petitioner should handle the pending cases left by Leonard and that she knew that her husband was working "to clear up" these "three pieces of property." She denied, however, that she "turned over" Leonard's business to petitioner to keep as his own; rather, she testified, "We agreed that when the property was sold he was to get more than a reasonable share for the work he did for me * * *" and that he was then to return the balance of the proceeds to her. Petitioner's own testimony in this regard was as follows:

"Q. * * * Did Mrs. Leonard at that time agree to sell, assign, deliver or cause to be sold or assigned to you these properties as compensation for your services? A. [By petitioner.] Certainly she did. I wouldn't go that far but I wouldn't do anything with those properties without her consent. I asked her if she would have Jose assign these properties over to me as her lawyer.

"Q. Did you ask her to do that? A. I wanted security of some kind for my legal services. At the same time it was a legal mess.

"Q. Then she said that she would have Mr. Jose assign those properties to you as compensation for your legal services? A. No, no."

Petitioner next contends that neither Mrs. Leonard nor the Leonard estate had any interest in the White properties and that therefore he was under no duty to account to them for the funds received by the Association from loans on the properties and from the sale of a part thereof. Petitioner relies principally upon the argument that Leonard, as attorney in fact of White, defrauded the latter by making dummy assignments of the properties; that the power of attorney given Leonard by White, did not authorize him to deal with the properties as his own. It should be noted, however, that petitioner relies upon this very instrument for authorization of the mortgage and sale of the properties by the Association. He asserts, that the Association "mortgaged and sold such property as was necessary 'in order to secure costs of sale, together with attorney fees and other moneys expended, in the foreclosure actions,' as White had directed. * * *" He thus attempts to justify his conduct on the basis of authorization thereof by White, while at the same time asserting that this very authorization gave Leonard no interest whatever in the properties and no right to sell them. Petitioner's other arguments and his testimony also belie this contention. In response to a question whether he believed "that either Mrs. Leonard or the Leonard estate would have a valid interest [in the properties] at least to the extent of those attorney's fees and those judgments [in the foreclosure actions]" petitioner testified, "I felt there was a contingent interest there." In August, 1942, when petitioner approached Jose and Mrs. Reighley and persuaded them to convey the properties, by grant deeds, to his alter ego, the Merchants Credit Association, he stated that the conveyances were necessary in order that he could "clear the [Leonard] estate" and in order to obtain "some money for Mrs. Leonard." Moreover, in attempting to justify his failure to file a claim with the White estate for the services rendered by Leonard in connection with the foreclosure actions, petitioner asserts that that was the "obvious course for [him] to pursue to protect the interests of Margaret Leonard or the Leonard estate." Furthermore, this contention is inconsistent with his conduct in obtaining loans on the properties and in selling a part thereof, for there is no evidence that anyone consented to these transactions or that he obtained authorization of court therefor. His authority to sell or encumber these properties could arise only from his position as the representative of the Leonard estate. Unless the properties were assets of that estate, he had no authority to sell them or obtain loans thereon. It is thus apparent, that contrary to petitioner's contention, he at all times believed that Mrs. Leonard or the Leonard estate had at least a contingent interest in these properties.

Petitioner next contends that the Merchants Credit Association held the properties as assignee for the benefit of creditors or as trustee of an express trust for the benefit of all possible claimants to the properties; that, "because it was the family corporation of petitioner," it "was in a peculiarly fortunate position" to "protect the interests of the Leonards, or anybody else, even the White estate, if the court should so decree." There is no evidence that the Association was ever constituted trustee of an express trust of these properties. Moreover, its conduct in relation thereto contradicts this contention. Petitioner's own testimony reveals that the purpose underlying the conveyances of the properties to the Association was to obtain security for the legal services rendered by him; that the Association held title to the property and dealt with it as its own intending only to act for the interest of possible claimants thereto if, and only if, a demand were made upon it. The deeds obtained from Jose and Mrs. Reighley were not in the form of trust indentures, but were absolute conveyances. The properties were sold and loans obtained thereon without court approval and without the sanction of possible claimants thereto. No accounting was made of the funds realized from these transactions. The funds were deposited in the Association's bank account and were mingled with other moneys of the Association. Although one of the ledger sheets of the bank account bears the notation, "trustee account," petitioner testified that he "didn't think" that the account was ever designated with the bank as a trustee account. He also stated that "The balance necessarily kept [therein] did not reflect the amount of funds which the [Association] might be holding for anyone as trustee," but that "We all had resources for more than this amount"; that part of the funds was invested in securities "as required by the laws of the State of California." He admitted that the securities to which he referred were purchased and issued in his own name and endorsed by him in blank to the Association.

It is clear from the record that the Association in its assumed role as trustee did not "protect the interests of the Leonards or anybody else, [including] the White estate." As heretofore pointed out, petitioner believed that Mrs. Leonard had an interest in the properties, at least to the extent of the attorney fees awarded her husband in the foreclosure actions. Petitioner made no attempt to file a claim with the White estate, as was suggested in Brown's letter to Leonard, dated March 2, 1942. He attempts to justify his conduct in this regard with the explanation that had he filed a claim with the White estate, Brown would have commenced legal action to obtain the properties to the prejudice of the interests of his client, Mrs. Leonard. The fact remains, however, that he made no effort whatever to protect Mrs. Leonard's interests. Although he had knowledge as early as August, 1942, that Leonard had an interest in these properties, at least to the extent of his attorney fees, petitioner did not list the properties in the inventory of Leonard's assets, which he prepared and filed with the probate court in October, 1942. Instead, he permitted the Leonard estate to be closed and took no action to ascertain Mrs. Leonard's interests in the properties until September, 1945, when he commenced the action for declaratory relief. His testimony in this regard is likewise unconvincing.

"Q. Did you believe that Mrs. Leonard had any interest in this property? A. To the extent of those attorney's fees.

"Q. Why didn't you list that as a part of the estate of Jack Leonard? A. That was intangible and controversial."

Petitioner also contends that since early in August, 1942, he believed that the White estate was the true owner of the property. He did not, however, communicate this information to Brown even though he asserts that the Association was protecting the interests of the White estate. Petitioner thus relies upon his client's interest in the properties, which he says he believed untenable, to justify his conduct as the asserted trustee of the properties in failing to have them paid over (or at least to have the title thereto promptly determined by judicial action) to the party who he believed was the legal owner thereof. The White estate was closed as insolvent on April 20, 1943, without further demand on the properties being made in its behalf; yet petitioner relies on the contingent claim of that estate to justify his conduct for two years thereafter in dealing with the properties as his own and to justify his failure to account to Mrs. Leonard for the proceeds therefrom and his failure to inform her of the conveyances, sales, and loans. Petitioner's explanations of his conduct are so inconsistent with his contention that the Association acted as a disinterested party in this matter that it is doubtful whether the contention is made in good faith.

Throughout his testimony and in his briefs, petitioner refers repeatedly to the action for declaratory relief filed by him as evidencing his good faith in this matter and as proof that he accounted to Mrs. Leonard for the properties and the funds obtained therefrom. The complaint, cross-complaint and minute order of the court in that action were introduced into evidence by petitioner. Petitioner asserts that the action "was filed, in a reasonable length of time from the giving of notice or the making of a demand" by Mrs. Leonard; "That the issues [involved therein] were controversial, to wit: First: The question as to the amount of attorney fees that was payable. Second: The amount of fees due Merchants Credit Association of U. S., a Corporation, for acting as trustee. Third: The question as to who were the legal owners, all of which were controversial, and required a judicial rather than an administrative adjudication." He also contended before the local committee that that action was "a part of [these] proceedings. Everything involved in that case is involved in this case."

[3] Petitioner's contention that he commenced the foregoing action within a "reasonable length of time" is untenable, particularly when viewed in the light of his position as attorney for Mrs. Leonard and his self-assumed role as trustee of the properties for all possible claimants. The Association obtained the properties in August, 1942, but the action for declaratory relief was not filed until September 11, 1945, a week after the notice to show cause herein was served upon petitioner. On appeal from the trial court's judgment in that action in favor of the Leonard estate, the District Court of Appeal held, Merchants Credit Ass'n v. Brown, 1948, 83 Cal.App.2d 296, 300-301, 188 P.2d 558, 561, that there was "substantial evidence to support the trial court's finding" that petitioner "acted in bad faith in the handling of the three George White parcels and with the intent and purpose of disguising the facts with reference thereto from the heirs of the Leonard estate and with intent to defraud such heirs." The court also held that the Association was not a trustee of an express trust of the properties, but that it was a constructive trustee thereof; that therefore, it was barred by section 2275 of the Civil Code from receiving compensation for services rendered in connection with these properties. Petition for hearing in the foregoing case was denied by this court on March 18, 1948.

All of the charges against petitioner are supported by the evidence. It is therefore ordered that petitioner be suspended from the practice of the law in this state for a period of two years, effective thirty days after the filing of this order.

91 Cal.App.2d 463

MALVICH v. ROCKWELL.

Civ. 7575.

District Court of Appeal, Third District, California.

April 26, 1949.

1. Appeal and error 🔑1010(1)

Where there is substantial evidence to support finding that relationship of employer and employee or of principal and agent existed between defendant and plaintiff, such finding is controlling on appeal, even though there may be evidence of elements which would have reasonably supported a contrary decision, and under such circumstances burden is on defendant to rebut that evidence by proof that plaintiff was acting as independent contractor.

2. Master and servant 🔑5

In determining relationship of parties in employment, factors to be considered are payment of wages, right to hire and discharge workman and to direct and control operations, whether alleged contractor is carrying on independent business as such, manner and terms upon which compensation is to be paid, duration and conditions of employment, whether employer may terminate employment without cause at any time, and whether or not parties believe they are creating an employer-employee relationship.

3. Master and servant 🔑5

Evidence was sufficient to show that plaintiff incurred expenses and furnished labor and materials for construction of defendant's wharf as employee and agent of defendant with wages as sole compensation and not as independent contractor, so as to be permitted to recover compensation for such labor and materials without having contractor's license. Business and Professions Code, §§ 7026, 7031.

◆

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action for labor and materials by M. F. Malvich against W. M. Rockwell. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Frank E. Kilpatrick, of Oakland, M. Durrant, of Quincy, and Russell F. King, of Richmond, for appellant.

Pardee & Cady, of Susanville, for respondent.

THOMPSON, Justice.

The defendant has appealed from a judgment of $1,951.96, which was rendered against him for labor and materials furnished pursuant to an oral agreement of employment in the construction of a wharf on Almanor Lake.

The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff. The court found that defendant orally hired plaintiff on March 29, 1947, to engage the necessary workmen, furnish the materials and supervise the construction of a wharf on Almanor Lake at Almanor Inn; that defendant agreed to reimburse plaintiff for all necessary expenses incurred on that account and pay him a reasonable compensation for his services rendered; that plaintiff incurred and paid expenses on that account in the aggregate sum of $1,201.96; that the reasonable value of his services, at the rate of $3 per hour, amounted to the further sum of $741, no part of which was paid, and that defendant was indebted to plaintiff in the sum of $1,951.96. The court also found that plaintiff was not employed as a contractor. Judgment was rendered accordingly.

The appellant contends that the findings and judgment are not supported by the evidence, and that plaintiff is barred from recovering compensation because the evidence shows that plaintiff was employed and furnished labor and materials as an independent contractor, and that he held no license as a contractor as required by Section 7031 of the Business and Professions Code.

We are of the opinion the findings and judgment are adequately supported by substantial evidence. There is no controversy regarding the value of the services performed, the expenses incurred or the materials furnished. Appellant's briefs on appeal are confined to his challenge of the sufficiency of the evidence to support the finding that plaintiff furnished labor and materials as an employee, and not as a contractor. The plaintiff concedes that he is not a contractor, and that he held no license as such. While the evidence is conflicting as to whether plaintiff acted in the capacity of a mere employee, and not as a contractor, we think there is sufficient evidence to support the finding that the services performed and the materials furnished, and the expenses incurred by plaintiff, were rendered as an employee and agent of the defendant, and not as an independent contractor.

Section 7031 of the Business and Professions Code provides:

"No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

The term "contractor" is defined in Section 7026 of that code. In effect, it declares that any person who builds, repairs or constructs any building or structure "in any capacity other than as the employee of another with wages as the sole compensation" therefor is deemed to be a contractor.

At the trial, the plaintiff and his wife were the only witnesses sworn or examined. The defendant adduced no evidence to rebut their testimony. The plaintiff worked in a logging camp near Lake Almanor, felling timber. He was not a contractor. He had never contracted to construct or repair buildings or structures of any character. The defendant owned and operated Almanor Inn on Lake Almanor in Plumas County. He was anxious to build a wharf for the convenience of his patrons. He and his managing agent, Mr. Alexander, talked with plaintiff in March, 1947, about constructing the wharf. They knew the plaintiff was not a contractor. He told them he was not a contractor and that he could not take the job on contract, but finally consented to act as their agent and to supervise the work for reasonable wages per hour. They said "they couldn't find anybody else to do it and [asked him] if he would supervise it", which he agreed to do. They asked him to get the necessary materials and workmen for them, which he did at no additional profit to himself. The plaintiff also agreed to keep the time of the workmen as an accommodation to them. The agent, Mr. Alexander, and the plaintiff prepared a "rough sketch" of the wharf to be built. The plaintiff ordered the materials and procured six or seven workmen who performed the labor. The piers were constructed of cedar logs. Some of the materials were charged to the Almanor Inn, and plaintiff advanced the cost of other materials. He paid for the compensation insurance. He also advanced the wages for some of the workmen in the aggregate sum of $660, which was repaid to him by the defendant. He advanced for materials the sum of $722.21, which was also later repaid. The balance of the money expended by plaintiff in behalf of the defendant was not paid. Plaintiff testified that "I kept the time [of workmen employed] and turned the time in to Mr. Alexander." The plaintiff received no profit or benefit whatever from his purchase of materials or the payment of wages of other workmen. The oral agreement contained no specifications for the construction of the wharf, other than the "rough sketch" supplied, nor of the aggregate cost of the wharf, nor the time within which it was to be completed. The plaintiff was to receive merely a reasonable compensation for his services as an agent, employee and supervisor of the work for the defendant. This suit was based on a quantum meruit for services performed and materials supplied.

Regarding the oral agreement under which the services were performed, and the materials supplied, the plaintiff testified:

> "They wanted to know if I was able to give them a price on the job and I told them I was not; not being a contractor, * * *. They wanted it done very badly and they wanted to know if I could apply some of my time to supervisory work and procuring the necessary materials. * * * I told them if possible I would try to find the time to do it, and I was merely to act as their agent, hire the men and see that it was done. * * * They said they would pay me any way I seen fit. I told them I would strictly take it as a supervisor and whatever was fair was what I would expect as wages on an hourly basis. * * * I was to receive my wages and any money I had to lay out to get the necessary material they would pay me back. * * *"

The plaintiff supervised the construction of about 300 feet of the wharf, but the wharf was not completed. The plaintiff did not perform his services as defendant's contractor. On the contrary, he performed his services and procured workmen and materials as defendant's employee and agent. There was no agreement he would be paid any specified sum except reasonable compensation as wages for services performed. He received no profit whatever on the materials purchased or the wages he paid to other workmen. He kept the time of the workmen's labor performed, and reported it to the defendant. The defendant paid some of the workmen, and a portion of the bills for materials furnished, but failed and refused to pay plaintiff's wages or the balance of expenses necessarily incurred by him. The defendant stopped the work before the wharf was completed and discharged the plaintiff. An itemized statement of the balance due plaintiff was served on the defendant, which he refused to pay. This suit in assumpsit was then commenced.

We are of the opinion the foregoing evidence adequately supports the findings and judgment of the court, based on the determination that defendant hired the plaintiff as an employee, and not as a contractor.

The facts of this case do not bring it within the inhibition of Section 7031 of the Business and Professions Code. Nor do they necessarily fulfill the definition of a contractor as provided by Section 7026 of that code. Fairly construed, the facts indicate that plaintiff was working for the defendant "with wages as the sole compensation" for services performed.

[1] Where there is substantial evidence to support the finding that a relationship of employer and employee, or that of principal and agent, existed between the defendant and the plaintiff, that determination is controlling on appeal, even though there may be evidence of elements which would have reasonably supported a contrary decision. Washko v. Stewart, 20 Cal.App.2d 347, 67 P.2d 144. Under such circumstances, the burden is on the defendant to rebut that evidence by proof that plaintiff was acting as an independent contractor. In the case of Schaller v. Industrial Accident Commission, 11 Cal.2d 46, 77 P.2d 836, 839, in which the issue was whether the claimant's father was an employee or an independent contractor, an award, based on a finding, supported by conflicting evidence, that he was an employee was affirmed. The Supreme Court said that "each case must turn upon its own peculiar facts"; that the burden rested upon the employer to show that the injured person was an independent contractor, and that, where the findings are supported by substantial evidence, or reasonable inferences to be drawn therefrom, "even though the evidence be susceptible of opposing inferences, those findings will not be disturbed by an appellate tribunal."

[2] It is true that various tests are applied in determining the relationship of the parties in the employment, among which are the payment of wages, the right to hire and discharge the workman and to direct and control the operations. Schaller v. Industrial Accident Commission, supra. But many other circumstances may properly be considered in determining the relationship. Perguica v. Industrial Accident Commission, 29 Cal.2d 857, 860, 179 P.2d 812, 814, 56 C.J.S., Master and Servant, § 3(2), page 45. Other factors to be considered include the question as to whether the alleged contractor is carrying on an independent business as such, the manner and terms upon which the compensation is to be paid, the duration and conditions of employment, the question as to whether the employer may terminate the employment without cause at any time, and whether or not the parties believed they were creating a relationship of employer and employee. In the Perguica case, supra, the court said, "'An employee may quit, but an independent contractor is legally obligated to complete his contract.'"

[3] Applying some of the foregoing tests to the present case, we find ample support of the finding that the services were performed and the materials furnished by plaintiff "as an employee of defendant, with wages as his sole compensation." Plaintiff testified that it was so understood by respective parties. Plaintiff was not a contractor, but a mere timber workman. While plaintiff procured the workmen, he reported the time of their employment to the defendant who paid a portion of their wages. The materials which were obtained by plaintiff were partially paid for by the defendant who recognized his liability therefor. After plaintiff had constructed 300 feet of the wharf, but before it was completed, the defendant terminated his employment. While it is true there is a lack of evidence to show that the defendant actually directed the workmen in the manner of their performance, the reasonable inference is that he had a right to do so. The defendant offered no evidence to rebut that inference. We conclude that the evidence is sufficient to support the findings and judgment.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

PEOPLE v. SANCHEZ.

Cr. 671.

District Court of Appeal, Fourth District, California.

April 26, 1949.

Hearing Granted May 23, 1949.*

1. Criminal law 🔑722½, 1186(4)

Prosecuting attorney's statement in argument that defendant had previously been convicted of felony, whereas defendant had merely been convicted of grand theft and placed under control of youth authority and had not been sent to prison but had been paroled and discharged and petition was pending to dismiss grand theft information and thereby release defendant from all penalties resulting from such offense, was misconduct and should have been struck by court and jury should have been admonished to disregard statement, but was not prejudicial error where evidence was uncontroverted as to actual commission of offenses charged and different verdict would not be rendered in case of reversal. Welfare and Institutions Code, § 1772; Const. art. 6, § 4½.

2. Criminal law 🔑824(13)

Trial court is not required of its own volition to give instruction that it is defendant's failure to explain or deny evidence or facts against him, if innocent, and not his mere failure to take witness stand which may be commented on by the prosecutor.

3. Criminal law 🔑824(1)

Defendant cannot complain of failure to give instruction not requested by defendant.

4. Criminal law 🔑824(7)

Whether co-defendant testifying in his own behalf that co-defendant committed offense charged but was forced to do so under defendant's threats and coercion was accomplice was question of fact and not of law, and hence trial court's failure to instruct jury of court's own volition that testimony of co-defendant was testimony of accomplice which must be viewed with distrust was not error.

5. Criminal law 🔑404(3)

In prosecution for assault with a deadly weapon, evidence that defendant cut companion in or near automobile with knife similar to pruning knife "with a hook," and that such a knife was found on floor of automobile when defendant was arrested warranted admission of knife found in automobile.

6. Criminal law 🔑774

In prosecution for assault with a deadly weapon, specific intent is not necessary element of offense, and hence defendant is not entitled to instruction that defendant's intoxication may be considered in determining defendant's motive.

7. Criminal law 🔑774

Defendant's specific intent is element of offenses of robbery and stealing automobile so as to entitle defendant to properly presented instruction as to effect of defendant's intoxication upon his motive. Pen.Code, §§ 20–22; Vehicle Code, § 503.

8. Criminal law 🔑739(1)

Where motive is element of offense charged, question of extent of defendant's intoxication is for jury. Pen. Code, § 22.

9. Criminal law 🔑1186(4)

In prosecution for robbery and stealing automobile, refusal to give instruction concerning defendant's intoxication as bearing on question of defendant's intent was not prejudicial error, where evidence of intoxication was very weak and claimed intoxication did not render defendant incapable of forming specific intent and different verdict would not be rendered in case of reversal. Pen.Code, §§ 20–22; Vehicle Code, § 503; Const. art. 6, § 4½.

◆

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Daniel Canas Sanchez was convicted for assault with a deadly weapon, simple assault, first degree robbery, and for stealing an automobile. From the judgment of conviction and from an order denying a new trial he appeals.

Judgment and order affirmed.

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* Subsequent opinion 219 P.2d 9.

James E. Walker, of Santa Ana, for appellant.

Fred N. Howser, Atty. Gen. and William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and one Noble were jointly charged in several counts of an information with: Count 1, Assault with a deadly weapon upon one Rodriguez; Count 2, Assault with a deadly weapon upon one Maldanado; Count 3, Robbery of Rodriguez; and Count 4, Violating sec. 503 of the Vehicle Code by stealing an automobile belonging to one Ferez. Defendant was found guilty, by a jury, of Count 1; guilty of simple assault included in Count 2; guilty on Count 3, and the degree fixed as robbery of the first degree; and guilty on Count 4. He appeals from the judgment that followed and from an order denying a new trial.

Ferez testified that he owned the automobile mentioned in Count 4 and turned it over to Maldanado for the purpose of having it painted. Maldanado testified he met Rodriguez, Noble and defendant Sanchez. They all had something to eat and drink and then drove to Capistrano, where they had more drinks. On their return to Santa Ana he was driving. Noble and defendant were in the back seat. Some gin was spilled on Maldanado and he and defendant got into an arguement. An altercation ensued.

Maldanado, Noble and the defendant got out of the car. Rodriguez was about to get out when Sanchez cut him across the face and on the arm with a knife similar to a pruning knife "with a hook", and demanded that he give him his wallet. Sanchez took it from him and the $10 contained therein and pulled his wrist watch from his arm. Noble then told defendant that Rodriguez had more money in his pocket. Noble reached in and took $15. Noble was holding Maldanado off with a pocket knife pointed at his neck in a threatening manner. Rodriguez was then ordered out of the car and defendant and Noble jumped in it and drove away. Rodriguez was bleeding profusely. Maldanado assisted him to the police station. Defendant and Noble were later apprehended by the officers in Santa Ana. Sanchez was driving. The car was returned to the owner who testified that he gave defendant and Noble no permission to operate it.

Rodriguez testified that he had a few drinks of beer and a few drinks of gin but he was "all right" and that "all the others were sober too". Maldanado testified that Sanchez told Noble to "take care of me" and that "he was going to take care of" Rodriguez, and about then is when Rodriguez was cut, when Rodriguez was about half way out of the front seat of the car; that Noble "was taking care of me" by putting "a knife on me"; that he "told me not to mess around, not to say anything, so I kept quiet"; that he "asked me if I had any money and I said 'no'"; that Sanchez had a "hooked knife" which was similar to the one placed in evidence and which was found on the floor-board in the front seat of the automobile when defendant and Noble were arrested; that many blood stains were in evidence on the front seat of the car; that both Sanchez and Noble had a knife up against "the front part of his body" on one occasion; that he ran away from Noble and was looking for something with which to defend himself; that he heard Sanchez ask Rodriguez for his wallet; that Rodriguez's face was cut badly and that he was lying on the ground bleeding. When asked if Sanchez was intoxicated he replied "I imagine so, yes", and that he was "a little bit"; that they all had been drinking but he was sober.

The officers testified that Rodriguez and Maldanado "definitely were not intoxicated". A statement of Sanchez was read into evidence in which he denied being with the other boys in the car or going to Capistrano. He stated that he didn't know Rodriguez; that he had had a few drinks at Monte's Cafe in Santa Ana about a half an hour before the officers picked him up. About an hour later another statement was taken in which he admitted taking the trip to Capistrano. He stated that they did drink a half bottle of gin and later stopped for one more and were drinking it with 7-up; that he remembered about "Charlie taking care of Robert and I would take care of the other fellow"; that he did not remember getting mad or spilling gin but he remembered seeing blood on Rodriguez's hand but he didn't remember cutting him; that right after that "it is all a blank * * * because I don't remember". He identified the knife in evidence by the crack in the handle and said that he had it in the car while riding with Maldanado. After the prosecution read these statements in evidence counsel for the defendant offered them as defendant's Exhibits A and B. After the People rested, counsel for Noble called him to the stand and he, in effect, admitted the facts above mentioned but claimed as a defense that Sanchez compelled him to do the things that he did under threat of great bodily harm. He testified that Sanchez gave him the pocket knife and told him to take care of Maldanado if he started any trouble; that Sanchez had the fruit knife in his hand; that after the cutting was over Sanchez made him get in the car and leave with him. He then testified that he had had a few drinks but he was not intoxicated and that "they all were sober". Counsel for defendant recalled the witness Maldanado who testified that he did not think the knife in evidence was the one that was used by Sanchez, "it could be and it couldn't be". Defendant Sanchez failed to take the stand and testify in his own behalf.

Defendant first claims that the district attorney was guilty of prejudicial misconduct in commenting on the failure of the defendant to testify and in asserting that he had been previously convicted of a felony. In his opening argument to the jury, the deputy district attorney, Mr. Gilbert, stated that there was no question in anybody's mind that Rodreguez was assaulted and that Sanchez cut him; that "Sanchez, himself, has failed to deny this in court"; that "I believe Rodriguez' story and, by the way, you will find you have three men here besides Rodriguez who have been convicted of a felony. You have the defendant Sanchez and the defendant Noble, both convicted of a felony * * *" At this point Mr. Walker, counsel for defendant, remarked "What is that again? Mr. Gilbert: I say, you have the defendant Noble who has been convicted of a felony and Maldanado who has been convicted of a felony—Mr. Walker: You witness? Mr. Gilbert: Pardon me, the witness Maldanado has been convicted of a felony and Rodriguez—I mean Noble. I notice there was no conviction of that type against Sanchez, and the court will instruct you in that regard, that you can consider the fact that a witness has been convicted of a felony in judging his credibility". Mr. Gilbert then proceeded in summarizing the evidence and no further comment was made. The court was not asked to strike the statement nor admonish the jury in respect thereto.

Mr. Walker, attorney for defendant, then replied to the opening argument. He claimed that all the parties involved in the fracas, particularly Sanchez, were intoxicated. He referred to Noble as a "felon" and asked the jury to disregard his testimony. He said that it was a weak case, depending on the testimony of two convicted felons. He remarked that Sanchez did not take the stand and "the prosecution are entitled to stand up and comment on that fact and, no doubt, will * * *"; that the statement of Sanchez, in evidence shows that he "blacked out" and did not remember and therefore could not be guilty of robbery. He belittled Maldanado's testimony since he had been convicted of a felony. He then remarked: "Now, I am sure counsel misspoke himself when he made reference to the fact of who had suffered convictions of felony in this case. Apparently there are so many felons convicted of participation in this lawsuit that he loses a little track of which ones of the people have been convicted of a felony. There are two of the prosecution's witnesses, Maldanado and the defendant Noble. I might bring to your mind the fact that there isn't anything in the record to show that the defendant Sanchez has ever been convicted of a felony. He misspoke himself. He didn't make any claim against Noble having been convicted of a felony. He misspoke himself in what he said, and I happened to catch it. The people who have been convicted of a felony in this case are Maldanado and Noble. Now, they are the ones whose testimony is subject to criticism. You don't have to accept their testimony. You can view it in the light of the trouble they have been in before, and I think you will be inclined to do that, so when the prosecution talks about who is in bad company—I have forgotten just what he said—but he said something about somebody being in bad company, and he wasn't talking about Sanchez, but it was very obvious that it was Sanchez he was referring to that was the bad company. I hope there will be no misunderstanding about that."

In the reply argument by Mr. Pool, he stated that "The testimony, whether you want to believe * * * Rodriguez * * * Maldanado, * * * Noble—they are the three people in the story—if you want to eliminate two of them merely because of the previous conviction of a felony, we still have undenied and unimpeached the story of * * * Rodriguez"; that as to the second count "we have two conflicting stories. One man said he was assaulted, the one man was an admitted felon. We have the man who denies that he committed the assault, who is an admitted felon, so we have to choose between which felon, if either, the jury is going to believe * * * you may throw out both their stories and say that the People have failed to show that there was an assault * * * Eliminate, if you can, the testimony of Noble and the failure of Sanchez to testify, and, as Mr. Walker says, there are only three people in this case who have been convicted of a felony. That is what he says. I wonder why his defendant didn't take the stand? Is he in the same group?" At this point Mr. Walker objected: "I don't think counsel correctly quoted my statement. Mr. Pool: The People who have been convicted of a felony in this case are the ones you said, Noble, Maldanado—Mr. Walker: And that is all. Mr. Pool: Is that all? Sanchez is in the case. He is the defendant." At this point Mr. Walker assigned his argument as prejudicial misconduct and asked that the jury be instructed to disregard it. The court replied: "No comments, you went outside the record." Admittedly, Noble and Maldanado had been previously convicted of felonies. During the course of the trial, at a recess in the judge's chambers, it was shown to the judge that the defendant had been convicted of grand theft in 1944, and placed under the control of the Youth Authority. He was not sentenced to prison but was paroled by that body and discharged in 1947. Defendant's counsel petitioned, under sec. 1772 of the Welfare and Institutions Code, to dismiss the information in that case so that the defendant might be released from all penalties resulting from the offense committed. The petition was submitted and not acted upon before the verdict was rendered in this case. Otherwise, it does not appear that Sanchez ever suffered a felony conviction.

[1] In the opening argument the prosecutor did erroneously include the defendant in the group of those having suffered prior convictions. At that point, this error could have been excused upon the charitable conclusion that he "misspoke himself" and because counsel for defendant probably did remove the harmful effect of the erroneous statement. It is quite apparent from the record that we cannot be so charitably inclined as to the final argument made by the prosecutor which in effect was a statement of fact that Sanchez had also been convicted of a felony. This was clearly error and in view of the previous statement, it had no place in a well-ordered argument and was misconduct on the part of the prosecutor and should have been ordered stricken by the court and the jury admonished to disregard it. People v. Delgado, 28 Cal.App.2d 665, 668, 83 P.2d 512; People v. Kruse, 30 Cal.App.2d 559, 86 P.2d 886. The only question is whether or not, under the circumstances, it was prejudicial error requiring a reversal. In People v. Pyler, 91 Cal.App. 516, 267 P. 370, similar misconduct was claimed and found to be entirely uncalled for in legitimate argument. However, the appellate court affirmed the judgment of conviction upon the theory that the evidence in the case amounted to a practical demonstration of defendant's guilt, and from an examination of the entire cause, including the evidence, it concluded that the error did not result in a miscarriage of justice. Whether the evidence in the instant case is equally sus-

ceptible of this interpretation will be discussed later.

[2, 3] It is next claimed that the trial court erred in failing to give, of its own volition, an instruction to the effect that the fact that the prosecutor had the right to comment on the failure of the defendant to take the stand did not relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt and that defendant's failure to deny and explain evidence presented against him did not create a presumption or inference of guilt, and that it is his failure to explain or deny evidence or facts against him, if innocent, and not his mere failure to take the witness stand, which may be commented upon and taken into consideration. Defendant proposed no such instruction and our attention has not been called to any case holding that it is the duty of the trial court, of its own volition, to give such an instruction. No prejudicial error can be claimed in this respect. At defendant's request, the trial court did give an instruction that the burden of proof of defendant's guilt was upon the People and the burden never shifted to defendant, under any circumstances, to prove his innocence. Defendant is in no position to complain of the failure to give such an instruction when he failed to request one. People v. Oliveria, 127 Cal. 376, 59 P. 772; People v. White, 5 Cal.App. 329, 335, 90 P. 471; People v. Greenberg, 73 Cal.App.2d 675, 678, 167 P.2d 214.

[4] The complaint that the trial court failed to instruct the jury, of its own volition, that the testimony of the accomplice, Noble, ought to be viewed with distrust, is untenable. In the first place, he was a defendant testifying in his own behalf. It was his testimony that he committed the offenses charged but was forced to do so under threats and coercion of the defendant. The question whether or not he was an accomplice, under the circumstances, was a factual one and not one of law. People v. Johns, 69 Cal.App.2d 737, 747, 160 P.2d 102; People v. Morgan, 87 Cal.App.2d 674, 197 P.2d 413. No error resulted in this respect.

[5] The next contention is that the knife was improperly received in evidence. The evidence sufficiently supports the foundation for its reception. People v. Cotton, 117 Cal.App. 469, 473, 4 P.2d 247.

[6] The next complaint is more serious. Defendant requested an instruction (No. 25) to the effect that " 'no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition' * * * However, when the existence of any particular motive, purpose or intent is a necessary element to constitute a particular kind or degree of crime, the jury, in determining whether or not such motive, purpose or intent existed in the mind of the accused, must take into consideration the evidence offered to prove that the accused was intoxicated at the time when the crime allegedly was committed." Included in this same instruction, by way of explanation, it was stated that as to Count One, involving the crime of assault with a deadly weapon, that there was involved "the specific intent to commit an assault with a deadly weapon, to wit, a knife", which "is a necessary element of the crime". This same instruction gave the same pronouncement as to Count Two. These two portions of the instruction were clearly erroneous, as to these two particular counts. In People v. Marseiler, 70 Cal. 98, 11 P. 503, it was held that where a defendant was convicted of an assault with a deadly weapon, the exclusion of evidence tending to show his condition as to sobriety or the contrary at the time of the assault is not error as the offense of which the defendant was convicted did not involve the necessity of proof of any specific intent to commit it. See, also, People v. Lim Dum Dong, 26 Cal.App.2d 135, 140, 78 P.2d 1026.

[7] As to Count Three, the crime of robbery, that portion of the same instruction was proper because there was a specific intent involved. People v. Crowl, 28 Cal.App.2d 299, 308, 82 P.2d 507. Likewise, in Count Four, there was a specific intent to permanently or temporarily deprive the owner of the possession of the automobile charged, and if separately presented, such

an instruction should have been given. People v. Crowl, supra; People v. Jordan, 24 Cal.App.2d 39, 54, 74 P.2d 519; People v. Casagranda, 43 Cal.App.2d 818, 111 P.2d 672; People v. Gaytan, 38 Cal.App.2d 83, 100 P.2d 496. The only instruction given by the court on this subject is the additional one offered by the People to the effect that if the evidence did show that the defendant was in a state of voluntary intoxication when he allegedly committed the crimes, it was not of itself a defense but it "may throw light on the occurrence and aid you in determining what took place." And as to assault with a deadly weapon charged, it is not a defense but, may have a bearing on the question of what took place, "whether or not he attempted to commit a violent injury upon the person of another, and whether or not he then had the ability to accomplish such injury. His condition, as affected or not affected by the use of intoxicating liquors, may be considered with all other evidence." It then instructed the jury in the language of Secs. 20, 21 and 22 of the Penal Code, but omitted the last portion of Sec. 22, in regard to intoxication being considered in determining motive and intent. This claimed defense was about the only semblance of a defense defendant had to the charges set forth in the information. While there was no direct testimony by the defendant that he was intoxicated, the evidence shows that there was considerable gin and beer consumed by some one in the party. Rodriguez testified that he "imagined" Sanchez was intoxicated and that they all had been drinking. Sanchez made a statement to the officer. It was offered in evidence by the prosecution, and showed that Sanchez had been drinking before and during the trip and the party had consumed considerable gin and beer; that he did not remember getting mad or cutting Rodriguez and that "everything went blank because I don't remember."

[8] While the evidence would fully support a contrary view, there was evidence indicating defendant's intoxication at the time and he was entitled to an instruction on the subject, if properly presented, as bearing upon his intent at the time of the commission of the alleged offenses mentioned in the Third and Fourth counts. The question of the extent of the intoxication was for the jury to determine. (People v. Gaytan, supra; People v. Griffith, 146 Cal. 339, 80 P. 68; 8 Cal.Jur. 332, sec. 379.)

In People v. Davis, 135 Cal. 162, 67 P. 59, it was held that when a requested proper instruction is coupled with an improper instruction it may be properly refused as a whole and the court is not required to separate the sound principles from those that are unsound but may entirely refuse it. See, also, 8 Cal.Jur. 316, sec. 367, and cases cited.

In fairness to the defendant, the court might well have read section 22 of the Penal Code in toto, or it might have modified the instruction by striking the erroneous portions so that the jury could have been properly instructed on the claimed defense respecting Counts Three and Four.

The evidence of defendant's intoxication was very weak. His actions in cutting the complaining witness, robbing him of his money and watch, and personally driving the car back to Santa Ana, left little doubt that his claimed intoxication did not meet the test specified in People v. Gaytan, supra, i. e., that the voluntary intoxication must be such as to render the defendant incapable of forming the specific intent to commit the crime charged.

[9] In view of the uncontradicted evidence as to the actual commission of the offenses, we perceive no prejudicial error that was committed which would indicate a different verdict would be rendered in case of a reversal. Article VI, sec. 4½ Constitution.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

91 Cal.App.2d 566

DRAPER v. GRANT, City Judge, et al.

Civ. 3786.

District Court of Appeal, Fourth District, California.

April 29, 1949.

1. Criminal law 🔑88

The statute providing for punishment of one who destroys or injures a place of confinement by fine "and" by imprisonment in the state prison makes the offense described therein a felony and not a misdemeanor within jurisdiction of city judge, and the rule that, where a statute provides for a fine "or" a state prison term, the penalty imposed determines whether crime is a misdemeanor or felony, does not apply. Pen.Code, §§ 594, 606.

2. Mandamus 🔑12

Mandamus lies only to compel performance of an act which law specifically enjoins as a duty resulting from an office, trust, or station.

3. Mandamus 🔑100

Where money collected by city judge as a fine was deposited with city treasurer as required by statute and thereafter city judge had no authority to withdraw it from treasury, mandamus would not lie against judge to compel such action. Gen.Laws, Act 5233, § 885.

4. Municipal corporations 🔑880, 883

Funds belonging to a municipality may be withdrawn only in manner prescribed by law, and usually city treasurer is only custodian of city funds, including a fine received as part of city's income.

5. Mandamus 🔑12

Where authority of an officer to do an act must be found in a statute, mandamus does not lie to compel performance of an act which statute does not authorize.

6. Mandamus 🔑105

Where petitioner had been erroneously fined by city judge under a statute providing a penalty for a felony and fine had been paid into city treasury, in view of treasurer's restricted right to pay out money, in the absence of showing that petitioner had presented a claim to city council, that claim had been authorized and a warrant issued thereon directing remission of fine, mandamus would not lie against city treasurer alone to compel him to remit fine. Pen.Code, § 606; Gen.Laws, Act 5233, §§ 864, 876, 885.

7. Mandamus 🔑101

Mandamus is appropriate remedy to require proper officer to examine and audit a claim, but not to interfere with his discretion in approving or rejecting it.

8. Payment 🔑82(1)

Generally, one who voluntarily pays money to a municipality with full knowledge of facts, but under a mistake of law, cannot recover.

9. Mandamus 🔑1, 7

Mandamus is an extraordinary remedy in nature of an equitable interference supplementing the deficiency of the common law, and, although classed as a legal remedy, its issuance is largely controlled by equitable principles and it is a remedy which is awarded, not as a matter of right, but in exercise of a sound judicial discretion.

10. Mandamus 🔑15

Petitioner for mandamus must come into court with clean hands.

11. Mandamus 🔑3(1)

Mandamus may be denied where it appears that petitioner may obtain relief sought without the writ.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Mandamus by Charles Fowler Draper against W. H. Grant, City Judge of the City of Coalinga, and E. M. Hanst, City Treasurer of the City of Coalinga, and others, to compel the refund to petitioner of a fine allegedly imposed upon petitioner by respondent judge while acting in excess of his authority. From an order denying the writ, petitioner appeals.

Affirmed.

Karl F. Kennedy, of Coalinga, and Irvin P. Aten, of Fresno, for petitioner and appellant.

Arthur L. Blank, City Atty., of Coalinga, and Wild, Carlson & Reeve and D. S. Davis, all of Fresno, for respondent.

GRIFFIN, Justice.

Petitioner had been confined in the coalinga City jail on some charge and was subsequently charged in a complaint issued by respondent, W. H. Grant, Judge of the City Court of Coalinga, with the "crime of misdemeanor" in that he "did wilfully and unlawfully destroy and injure certain parts of the Coalinga City Jail, to wit: did break and injure a water basin and 2 water faucets causing water to flood the jail to the extent that 2 mattresses were ruined. Time 11 p. m. All of which is contrary to the form, force and effect of section 606 of the Penal Code * * *."

The docket of the court shows that defendant was also previously charged with disturbing the peace, to which he entered a plea of not guilty; that "after defendant pleads guilty to damaging public property it was requested by Chief Griffith that the case of disturbing the peace be dismissed, etc. So done by the court." Another docket entry shows a charge against the defendant of violating Penal Code Section 606, on the same day. "Defendant was informed of his legal rights, waived time, and pleads guilty as charged. Waives *fore* judgment and by the court given 6 months in the county jail. Commitment rendered. * * * Payment of $2.00 per day fine is paid, case closed." On that same day defendant's wife paid $360 to the court and took its receipt reciting: "Posted in lieu of fine. Order of Judge Grant viol. sec. 606 P.C."

By this writ directed against said judge and the city treasurer only, petitioner now seeks return of the $360 for the claimed reason that said court had no jurisdiction to accept a plea and pronounce judgment against him because the offense as charged was a felony. An alternative writ was issued and made returnable before the Superior Court of Fresno County and after hearing, relief thereunder was denied. Petitioner appealed.

Petitioner proposed a narration of the oral proceedings had before the Superior Court, under Rule 7(a) of the Rules of Appeal, Superior Court, for settlement, together with certain amendments. Respondent proposed a similar narration and amendments which were adopted by the trial judge. Petitioner's narration was, in many respects, found untrue. The adopted narration shows that at the time of the arraignment before the city judge on the charge involved, the judge asked the defendant if he was "guilty or not guilty to the misdemeanor of malicious mischief, that is, the wilful destruction of property not belonging to him as charged in the complaint"; that the defendant pleaded guilty thereto and he was sentenced to six months or pay a fine of $2 per day for each day of said six months; that he paid the fine and was released; that at no time did the judge sentence defendant to 9 months in the county jail; that the figure 9 was inadvertently written in the docket and the figure 6 was immediately written over it; that the city judge considered the complaint, as charged, a misdemeanor. Defendant, according to the statement, admitted destroying the plumbing fixtures but denied it was wilful and claimed that the city judge first sentenced him to 9 months and later in the day changed it to 6 months with the privilege of paying in lieu thereof a $360 fine.

Counsel for petitioner cites People v. Boren, 139 Cal. 210, 72 P. 899, in which it is correctly held that the crime defined by section 606 of the Penal Code is a felony and not a misdemeanor. Petitioner therefore argues that, as a matter of right, he is entitled to the return of the money paid to the court because that court lacked jurisdiction to impose such fine.

Respondent judge justifies the charge and the levy of the fine as follows: That the mere misnomer or inclusion in the charge of the named section of the Penal Code (606) is immaterial, if in the body of the complaint, the charge constitutes a public offense which would sufficiently inform the defendant of the offense of which he is being tried and that if such offense constituted a misdemeanor and defendant pleads guilty thereto, he could not be prejudiced by such misnomer or wrongful inclusion of the section, citing In re Murphy, 190 Cal. 286, 212 P. 30. Section 606 provides that one "who willfully and *intentionally* breaks down, pulls down, or otherwise destroys or injures any place of confinement, is punishable by fine not exceeding ten thousand dollars ($10,000), *and* by imprisonment in the State prison not exceeding five years." It might be here noted that the complaint in the instant case charged that the defendant did wilfully and *unlawfully* commit the act, rather than wilfully and *intentionally*, as provided in said section.

[1] Respondent's argument that the City Judge had jurisdiction and was justified in imposing a misdemeanor fine under the charge is not entirely supported by the authorities cited. Section 594 of the Penal Code defines malicious mischief in general as constituting a misdemeanor and excepts therefrom cases otherwise specified in the Penal Code. Section 606, supra, is one of those sections. The claim that the penalty provided by that section is for imprisonment in the State prison *or* by fine, and therefore whether the crime is a misdemeanor or felony depends on the character of the penalty imposed, is erroneous. In People v. Gray, 137 Cal. 267, 70 P. 20, relied upon by respondent, it was held that where the penalty was for a felony *or* a misdemeanor that the imposition of the penalty for the latter would determine its character. Under Section 606 the penalty reads in the conjunctive rather than the disjunctive and it has been definitely held in People v. Boren, supra, that the violation of that section is a felony and not a misdemeanor.

[2] The reasons for the denial of the writ by the trial court is not stated. Although neither counsel have argued the question in their respective briefs, there appears to be a ground for denying the relief prayed for against the parties to whom the writ is sought to be directed. The writ of mandate does not lie at the suit of every one having a cause of action against a person occupying a public office. It lies only to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. Dufton v. Daniels, 190 Cal. 577, 213 P. 949; 16 Cal.Jur. 804, sec. 27; People v. Turnbull, 184 Ill.App. 151.

[3-7] Under Act 5233, sec. 885, Deering's California General Laws, Vol. 2, p. 2000, all moneys collected by any officer for the use of the City shall immediately be deposited into the city treasury. Apparently the money collected as a fine in the instant case was thus deposited and the city judge had no authority to withdraw it from the treasury and accordingly a writ of mandate would not lie to compel such action. Funds belonging to a municipality may be withdrawn only in the manner prescribed by law and usually the city treasurer is only the custodian of the city funds. City of El Paso v. Two Republics Life Insurance Co., Tex.Civ.App., 278 S.W. 231; City of Princeton v. Baker, 237 Ky. 325, 35 S.W.2d 524. This rule has been applied to a fine received as part of the city's income. In re Becher v. Case, 243 App.Div. 375, 277 N.Y.S. 733; People v. City of Hornell, 256 App.Div. 113, 8 N.Y.S.2d 976. Where the authority of an officer to do an act must be found in the statute, the writ does not lie to compel the performance of the act if the statute does not authorize it. Mattingly v. Nichols, 133 Cal. 332, 65 P. 748; 16 Cal.Jur. 819, sec. 33. It likewise appears that the city treasurer, merely upon demand, had one been made, would not have been authorized under any statute to refund fines paid to that officer, without a proper claim made to the city council and without a warrant having been issued therefor by the proper authority. Sec. 876 of Act 5233, supra, provides that it shall be the duty of the city treasurer to safely keep all money which shall come into his hands as such and pay it out *only* on warrants signed by persons designated by law as proper persons to sign warrants, and not otherwise. Under sec. 864 of the Act, demands against the city shall be presented to and are required to be audited by the city council and upon allowance the mayor shall draw a warrant upon the city treasurer which shall be countersigned by the city clerk. Since none of these officers are parties to this

action and are the only ones authorized under the law to pass upon a claim against the city or draw a warrant on the city treasury the writ may not issue alone against the city treasurer to return the fine thus deposited. Mandamus is the appropriate remedy to require the proper officer to examine and audit a claim but not to interfere with his discretion in approving or rejecting it. Long Beach City School District v. Payne, 219 Cal. 598, 28 P.2d 663; Pipher v. Superior Court of Amador Co., 3 Cal.App. 626, 89 P. 904. Whether plaintiff could recover under a claim properly made to the city council is problematical and unnecessary to determine in this proceeding.

[8] The general rule applicable to the *voluntary* payment of money made by a party to a municipality with full knowledge of the facts but made under a mistake of law is that such party cannot recover. Bank of Woodland v. Webber, 52 Cal. 73; Dillon on Municipal Corporations, 1st Ed., sec. 751, and cases cited; Bucknall v. Story, 46 Cal. 589, 13 Am.Rep. 220; McQuillan, Municipal Corporations, 2d Ed. (Rev. 6) sec. 2671, p. 739; Brush v. Helena, 54 Mont. 254, 169 P. 285.

In Kings County v. Johnson, 104 Cal. 198, 37 P. 870, it was held that the tax collector could not be compelled by mandamus to deliver moneys, even if erroneously collected by him, but such remedy, if any, was by an action for money had and received.

[9-11] In Hutchison v. Reclamation District No. 1619, 81 Cal.App. 427, 254 P. 606, it is definitely held that mandamus is an extraordinary remedy in the nature of an equitable interference supplementing the deficiency of the common law and although classed as a legal remedy its issuance is largely controlled by equitable principles and it is a remedy which is awarded not as a matter of right, but in the exercise of a sound judicial discretion and one who seeks the aid of a court in obtaining the remedy of mandamus must come into court with clean hands; and that the writ of mandamus may be denied where it appears that the petitioner may obtain the relief sought without the writ.

Under the pleadings and facts related the trial court was justified in denying the writ.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

91 Cal.App.2d 443

FIELDS v. MICHAEL et al.

Civ. 16564.

District Court of Appeal, Second District, Division 3, California.

April 26, 1949.

Rehearing Denied May 19, 1949.

Hearing Denied June 23, 1949.

1. Appeal and error 🔑717

District Court of Appeal was entitled to consider written opinion of trial judge on appeal. Rules on Appeal, rule 5(a).

2. Husband and wife 🔑276(9)

Petition of widow, alleging that deceased husband, solely from his personal earnings for services rendered during marriage, secretly made expensive transfers of money by way of gifts with intent to defraud widow of her interest in his estate, was sufficient to bring action within statute authorizing actions by and against executors and administrators based on destruction and waste of property. Probate Code, § 574.

3. Husband and wife 🔑265

A husband, who has fraudulently made unauthorized gifts of a large share of community property, may be held accountable to the offended wife as in the case of any other person who has wrongfully disposed of the property of another. Probate Code, § 574.

4. Husband and wife 🔑265

A husband must be deemed a trustee for his wife in respect to their common property. Civ.Code, §§ 161a, 172, 172a, 2219, 2228–2234, 2228, 2229, 2233, 2234.

5. Husband and wife 🔑265

Expensive transfers to third persons out of community property was a violation of husband's fiduciary obligations as trustee for his wife, and, even if good faith were shown, husband would nevertheless be subject to personal liability for disposing of trust property in an unauthorized manner. Civ.Code, §§ 2228, 2229, 2233.

6. Husband and wife 🔑265

A gift, made by husband in violation of statute providing that a husband cannot make a gift of community property without the written consent of his wife, is as against the donee, voidable by the wife in its entirety during the husband's lifetime, and to the extent of one-half after his death. Civ.Code, § 172

7. Trusts 🔑244, 359(1)

The beneficiary of a trust is not required to pursue the trust property, but may elect to hold trustee, or after his death his estate, personally liable, and the trustee may not escape liability by showing that trust property has been dissipated.

8. Husband and wife 🔑265

A wife, whose community property rights have been violated by gifts made by husband of community property, is entitled to pursue whatever course is best calculated to give her effective relief. Civ.Code, § 172.

9. Husband and wife 🔑276(9)

The dissipation by husband of community assets by means of unauthorized gifts is a conversion of the property of the wife such as will subject the husband's estate to suit under statute authorizing actions by and against executors and administrators based on destruction and waste of property. Probate Code, § 574.

10. Husband and wife 🔑276(9)

Right of widow to relief as against husband's estate extends to gifts made by husband to third persons out of community assets acquired prior to enactment of statute defining interests of husband and wife in community property as present, existing, and equal. Civ.Code, § 161a.

11. Property 🔑1

The word "property" signifies any valuable right or interest protected by law.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Property".

12. Property 🔑1

The meaning to be given the word "property" depends on the sense in which it is used, as gathered from the context and nature of the things which it was intended to refer to and include.

13. Abatement and revival 🔑55(1)

Where a plaintiff has sustained an injury to his estate, whether in being or expectant as distinguished from an injury to his person, such injury is an injury to "property" within statute authorizing actions by and against executors and administrators based on destruction and waste of property. Probate Code, § 574.

14. Limitation of actions 🔑104(1)

Where, because of the fraudulent concealment by husband during his lifetime of gifts of community estate to third persons, widow did not know that a cause of action existed, she was not barred by statute of limitations in action against executrix of deceased husband's estate to recover widow's community interest in such gifts. Probate Code § 574; Civ.Code, § 161a.

15. Husband and wife 🔑205(2)

The policy of the law is to forbid vexatious and unnecessary litigation between spouses.

16. Husband and wife 🔑265, 272(1)

During the existence of marriage, husband has control and management of community property of which he cannot be divested except through procedure authorized by statute, but a wife is not so restricted if she sues for separate maintenance or brings an action for divorce, wherein she may seek enforcement of all her community property rights.

17. Courts 🔑472(4)

Action by widow against executrix of the estate of her deceased husband, to recover her community interest in unauthorized gifts of community property by husband during his lifetime to third persons, was within general jurisdiction of superior court, and widow need not proceed in probate court. Probate Code, § 714.

◆

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Action by Harriet V. Fields against Magda Michael, as executrix of the estate of William C. Fields, also known as W. C. Fields, also known as Bill Fields, deceased, to recover the plaintiff's community interest in unauthorized gifts made by the deceased. From a judgment for defendant after an order sustaining a demurrer to plaintiff's complaint without leave to amend, the plaintiff appeals.

Judgment reversed with directions to overrule demurrer and permit defendant to answer.

Ernest A. Tolin, George A. Bisbee and Joseph D. Taylor, all of Los Angeles, for appellant.

Millsap & Schaumer, of Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal from a judgment in favor of defendant after an order sustaining a demurrer to plaintiff's complaint without leave to amend.

The complaint set forth the following allegations: Defendant is the duly appointed and acting executrix of the estate of W. C. Fields, who died on December 25, 1946. Plaintiff married decedent in California on April 8, 1900, and was his wife at all times thereafter until his death. At the time of the marriage decedent had no assets or estate of any kind whatsoever, and all of the estate which he acquired subsequent to marriage was from compensation for personal services rendered during marriage together with the increment thereon. Several years subsequent to their marriage, decedent deserted plaintiff. He never discussed his financial affairs with her and wilfully withheld from her all information concerning the extent of his assets and any gifts or transfers made by him out of the community property. Solely from his personal earnings for services rendered during marriage, decedent secretly and without plaintiff's knowledge or consent made extensive transfers of money by way of gifts. Ten separate gifts in stated amounts, made to named individuals are set out, all of which "were illusory and were transferred and set over by said decedent wilfully and fraudulently, secretly and clandestinely, from the community property of plaintiff and said decedent with intent to defraud plaintiff of her interest in her and his estate." The total amount of these gifts was $482,450. Upon information and belief, six additional gifts in unknown amounts to fictitiously named defendants are alleged. The complaint states that "plaintiff has not at any time consented to the making of said gifts or to any one or more of them and said gifts and each of them were made without her knowledge and approval and are all disaffirmed by plaintiff"; and alleges that plaintiff did not learn of any of the gifts until after the death of her husband.

On July 23, 1947, plaintiff duly and regularly filed her "Creditor's Claim and Disaffirmance" with defendant as executrix setting forth substantially the same facts related above and claiming the sum of $241,225 due to plaintiff as her community interest in the unauthorized gifts. The claim was rejected.

This action was thereafter brought against the estate for the reason that "many of said donees are deceased and that those remaining alive reside at divers places, some of them away from the State of California, and that they have used up and dissipated the sums of money by way of gift transferred and set over to them as aforesaid, and would not be able to pay a judgment, if one were rendered against them for return to plaintiff of said gifts or of some part thereof. Plaintiff is without any means of collecting in full from said donees those portions of said gifts which she is entitled to." It is also alleged that defendant executrix has possession and control of the financial records and papers of decedent; that she has refused to permit plaintiff to inspect them; and that these records disclose to a large extent detailed information concerning the alleged gifts of money as to which plaintiff is without information. The prayer for relief was twofold: (1) "By reason of plaintiff's disaffirmance of the gifts hereinbefore described, that defendant pay the plaintiff the sum of $241,225.00." (2) An accounting be had to determine the amount of any additional gifts made by decedent from community funds, and upon such accounting judgment be rendered for plaintiff to the extent of her interest therein.

[1] Defendant's demurrer set forth some seven grounds upon which it was claimed the complaint was insufficient. The written opinion of the trial judge, which this court is entitled to consider on appeal (see, Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 750, 47 P.2d 273, and cases cited; cf. Rules on Appeal, rule 5(a), and which is set forth in full in respondent's brief, discloses that the sole ground upon which the demurrer was sustained was that the complaint did not state a cause of action maintainable against defendant as executrix of the estate of W. C. Fields. The paramount issue presented is whether plaintiff may proceed directly against the estate of her husband to secure relief from his dissipation of the community funds through secret and unauthorized inter vivos gifts, or must seek recourse solely against the donees.

Section 574 of the Probate Code provides that "any person, or the personal representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the property of any such person * * *."

[2, 3] The facts alleged in the complaint are in our opinion sufficient to bring the action within these provisions. Even before the husband was forbidden by statute to make a gift of community property without his wife's consent, his power of disposition had never been deemed to include the privilege of acting in fraud of the rights of the wife in the community property. Smith v. Smith, 12 Cal. 216, 225, 73 Am.Dec. 533; Lord v. Hough, 43 Cal. 581, 585. Where actual fraud is alleged, as it is here, it would seem clear that a husband who has made unauthorized gifts of a large share of the community property may be held accountable to the offended wife as in the case of any other person who has wrongfully disposed of the property of another.

[4, 5] The position of the husband, in whom the management and control of the entire community estate is vested by statute, Civ.Code, secs. 161a, 172, 172a, has been frequently analogized to that of a partner, agent, or fiduciary. In re Estate of McNutt, 36 Cal.App.2d 542, 552, 98 P.2d 253; Grolemund v. Cafferata, 17 Cal.2d 679, 684, 111 P.2d 641; Lynam v. Vorwerk, 13 Cal.App. 507, 509, 110 P. 355; 1 de Funiak, Principles of Community Property, sec. 95, p. 263. Section 2219 of the Civil Code provides: "Everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee * * * as to the person who reposes such confidence * * *." It is clear that, being a party to the confidential relationship of marriage, the husband must, for some purposes at least, be deemed a trustee for his wife in respect to their common property. Cf. Vanasek v. Pokorny, 73 Cal.App. 312, 320, 238 P. 798; Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799, 804. Fundamental principles governing trust relationships are set forth in sections 2228 and 2229 of the Civil Code: "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." Section 2234 declares: "Every violation of the provisions of the preceding sections of this article [i.e. sections 2228 through 2233] is a fraud against the beneficiary of a trust." Disregarding the allegations of intent to defraud, it is abundantly clear from those remaining that Fields must be held to have consummated a fraud against plaintiff. Nine years prior to their marriage,

section 172 of the Civil Code was amended to provide that the husband could not make a gift of community property without the written consent of his wife. Stats.1891, p. 425. Fields' disregard of this affirmative duty imposed upon him as manager of the community estate was a violation of his fiduciary obligations as defined in sections 2228 and 2229 of the Civil Code, supra. Even if good faith were to be shown, he would nevertheless be subject to personal liability for disposing of trust property in an unauthorized manner. Civ.Code, sec. 2238.

[6–9] It is well settled, of course, that a gift made in violation of section 172 is, as against the donee, voidable by the wife in its entirety during the husband's lifetime, Matthews v. Hamburger, 36 Cal.App. 2d 182, 97 P.2d 465; Lynn v. Herman, 72 Cal.App.2d 614, 165 P.2d 54, and to the extent of one-half after his death. Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477; Ballinger v. Ballinger, 9 Cal.2d 330, 70 P.2d 629. The beneficiary of a trust, however, is not required to pursue the trust property, but may elect to hold the trustee (or after his death, his estate) personally liable, McElroy v. McElroy, 32 Cal.2d 828, 831, 198 P.2d 683; Lathrop v. Bampton, 31 Cal. 17, 23, 89 Am.Dec. 141; and the latter may not escape such liability by showing that the trust property has been dissipated. 54 Am.Jur., sec. 253, p. 196. Manifestly, a wife whose community property rights have been violated, as plaintiff alleges hers have been, is entitled to pursue whatever course is best calculated to give her effective relief. Where the amount of the gifts and identity of the donees are known, and the property can be readily reached, the former remedy may be decidedly more advantageous to the plaintiff than an action against the husband's estate, since the assets of the latter may be insufficient to satisfy a judgment. On the other hand, where recourse against the donees would be ineffective to give relief, as in the present instance, a denial of the alternative remedy would not only be in disregard of rudimentary principles applicable to persons acting in a fiduciary capacity, insofar as the husband stood in that relation, but would also amount to a concession that the law is powerless to accord to the wife's community interest the full protection which section 172 was evidently designed to ensure. We think the law is not so toothless. Whether the action is viewed as one based upon actual fraud, or as one based upon a violation of a statutory limitation upon the husband's power of control and management, is immaterial, for the dissipation of community assets by means of unauthorized gifts is in either view a conversion of the "property" of the wife such as would subject the husband's estate to suit under section 574 of the Probate Code. The statutory language is sufficiently comprehensive to include any wrongful conduct resulting in a loss of "property" to another.

[10-13] It cannot be successfully contended that the assets given away were not, at least to the extent of one-half, "property" of the wife. Even prior to the enactment in 1927 of section 161a of the Civil Code, which defined the interests of the husband and wife in community property as "present, existing and equal," it was well recognized that the "mere expectancy" which the wife had was a considerably more definite and personal interest than that of an ordinary heir. Stewart v. Stewart, 199 Cal. 318, 342, 249 P. 197; Riley v. Gordon, 137 Cal.App. 311, 30 P.2d 617; Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003. Although not amounting to a vested interest, her property rights were so far recognized that equitable relief was available where necessary to safeguard against threatened wrongful dispositions of community assets by the husband. See Mahl v. E. A. Portal Co., Inc., 81 Cal.App. 494, 497-498, 254 P. 278; Greiner v. Greiner, 58 Cal. 115, 121. The extent to which the wife's interest may have been enlarged by section 161a need not be inquired into here (see Simmons, Interest of Wife in community property, 22 Cal.L.Rev. 404; 3 Cal.Jur.Ten Year Supp., sec 90, p. 597), for we think the plaintiff's right to relief extends to gifts out of community assets acquired prior to its enactment, and hence, a fortiori, out of assets acquired subsequent thereto.

As this court said in the case of Franklin v. Franklin, 67 Cal.App.2d 717, 725, 155 P.2d 637, 641, "the word 'property' may be properly used to signify any valuable right or interest protected by law * * *. But the meaning to be given to the word depends upon the sense in which it is used, as gathered from the context and the nature of the things which it was intended to refer to and include." In construing section 574, the Supreme Court has said that "wherever a plaintiff has sustained an injury to his 'estate,' whether in being or expectant, as distinguished from an injury to his person, such injury is an injury to 'property' within the meaning of that word in the present statute." Hunt v. Authier, 28 Cal.2d 288, 296, 169 P.2d 913, 918, 171 A.L.R. 1379. Although the court in that case was divided on another point, our conclusion that the wife's property was injured, within the meaning of section 574, by the gratuitous transfer of tangible community assets without her knowledge or consent, is fully consistent with the views expressed in both the majority and minority opinions. It also finds support in Vragnizan v. Savings Union Bank & Trust Co., 31 Cal.App. 709, 713, 161 P. 507, where a divorced wife's action, arising out of the fraudulent concealment of assets by her former husband in reaching a property settlement agreement, was held to be an injury to the wife's property which survived the husband's death.

[14] Upon the basis of a suggestion by way of dictum in Hunt v. Authier, supra, that section 574 "assumes, for the purpose of its effective operation, the existence of a cause of action against the tort feasor during his lifetime on behalf of any person authorized by law then to sue him," it is contended that plaintiff may not maintain her suit since no cause of action existed in her as against Fields during his lifetime. Whether the wording of the section justifies such an assumption as a necessary limitation upon its meaning in the absence of express language similar to that contained in its companion section 573, need not be decided here, for we think that a cause of action in favor of plaintiff did exist prior to Fields' death. Because of his fraudulent concealment of the facts concerning his administration of the community estate, she did not know that such a cause of action existed, and accordingly is not barred by the statute of limitations, Pashley v. Pacific Electric R. Co., 25 Cal.2d 226, 153 P.2d 325; but a cause of action nevertheless arose at the time when plaintiff's primary rights were invaded by Fields' wrongful disposition of her property. See Wuifjen v. Dolton, 24 Cal.2d 891, 895–896, 151 P.2d 846, 849, citing Pomeroy, Code Remedies, 5th Ed., sec. 251, p. 536. As noted in the last cited case, the cause of action "may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other."

[15, 16] Accordingly, we need not consider what type of action plaintiff might have prosecuted, or whether she could have maintained any action against the husband during the existence of the marriage which would not have for one of its purposes a division of the community property, such as an action for separate maintenance. The question is not whether plaintiff, during the existence of the marriage, could have prosecuted her cause of action against Fields and have obtained the relief which she now seeks against his estate. It is sufficient that he was guilty of wrongful acts for which she was entitled to redress. If she could not then have maintained an action against him for the value of her interest in the property which he had given away, it would have been due to the policy of the law to forbid vexatious and unnecessary litigation between spouses, and also upon the ground that during the existence of the marriage the husband has the control and management of the community property of which he cannot be divested except through procedure authorized by statute. A wife is not so restricted if she sues for separate maintenance; nor has it ever been questioned that in an action for divorce, or thereafter, she may seek enforcement of all her community property rights. See Gelfand v. Gelfand, 136 Cal. App. 448, 29 P.2d 271; Crossan v. Crossan, 35 Cal.App.2d 39, 94 P.2d 609; Stewart v.

Stewart, 204 Cal. 546, 555, 269 P. 439; Dunn v. Mullen, 211 Cal. 583, 590, 296 P. 604, 77 A.L.R. 1015; Provost v. Provost, 102 Cal.App. 775, 283 P. 842; Wheeland v. Rodgers, 20 Cal.2d 218, 222, 124 P.2d 816; Falk v. Falk, 48 Cal.App.2d 762, 768, 120 P.2d 714. Many of the cited cases involved reimbursement to the wife where community funds had been expended in the improvement of the separate property of the husband. The reasons supporting reimbursement to the wife in such situations clearly support plaintiff's right to redress upon the facts pleaded in her complaint. Cf. Vragnizan v. Savings Union Bank & Trust Co., 31 Cal.App. 709, 713, 161 P. 507. There is, as far as we know, no recorded precedent for the maintenance of an action exactly like the present one, although, as we say, it is not distinguishable in principle from other actions based upon constructive frauds committed by the husband. Rights such as plaintiff asserts have invariably been respected and proper redress has been given. The instant case does not differ in substance, but only in the form of relief sought. It is not all important that the present action in that respect is novel. As said by Chief Justice Bleckley in Fouche' v. Harison, 78 Ga. 359, 3 S.E. 330, 334: "That no direct authority upon it had been produced must be due alone to the fact that legal evolution had not progressed far enough to develop a needless precedent for a necessary conclusion." We conclude that plaintiff was authorized by section 574 of the Probate Code to maintain the present action.

Defendant places much reliance upon the fact that the complaint does not contain an allegation that plaintiff disaffirmed the gifts during her husband's lifetime. Her contention is that the gifts were valid until they were disaffirmed by plaintiff, and as they were not disaffirmed plaintiff had no cause of action for the recovery of the property. This appears to have been the theory upon which the demurrer was sustained. We think it is without merit. Disaffirmance was no part of the right to avoid the gifts. The right to avoid them had to be complete before plaintiff could have exercised her right of election to disaffirm them. Otherwise, repudiation of her husband's actions would have meant nothing. Disaffirmance would have only been one step in a procedure for enforcing the right.

[17] No question was raised either here or in the trial court as to whether plaintiff should have proceeded in the probate court to claim as her share of the community property an amount equal to one-half of all sums previously given away without her consent, in addition to her share in the assets presently remaining in the estate. See McKay, Community Property, 2d Ed., secs. 734, 735, p. 494; 1 de Funiak, ibid., sec. 232, p. 600. We have nevertheless considered the question of jurisdiction and think it is clear that the present action, being one on a rejected claim based upon a personal liability arising out of the breach of a fiduciary duty, is within the general jurisdiction of the superior court. 11a Cal.Jur., secs. 500, 600, pp. 706, 842; Probate Code, sec. 714.

The sole question we decide is that the complaint states a cause of action for compensatory relief. If plaintiff should prevail it will be for the trial court to decide the form the judgment should take and for the court in probate to give proper effect to it in exercising its jurisdiction with relation to claims to the community property.

The judgment is reversed with directions to overrule the demurrer and permit defendant to answer.

WOOD and VALLÉE, JJ., concur.

91 Cal.App.2d 406

STROMAN et ux. v. LYNCH et al.

Civ. 13808.

District Court of Appeal, First District,
Division 2, California.
April 25, 1949.

Rehearing Denied May 25, 1949.
Hearing Denied June 23, 1949.

1. Evidence 🔑474(18)

Owner of property whether generally familiar with such values or not, is competent to estimate its worth, the lack of knowledge going to weight rather than admissibility of testimony.

2. Evidence 🔑113(8, 10)

In action for conversion, owner's testimony as to cost of goods is a circumstance tending to show value, but evidence of cost is not necessarily evidence of market value, and generally when property has been used, evidence of cost of replacing it with new furnishes no measure of value for it. Civ.Code, § 3336.

3. Evidence 🔑113(8)

Where personalty was bid in by licensed auctioneer who examined property and resold it at auction two weeks later, resale price was competent evidence of value in conversion action arising out of original sale, although not conclusive evidence. Civ.Code § 3336.

4. Trover and conversion 🔑40(6)

In action for conversion of household furnishings, plaintiff's testimony as to value of goods was not to be considered as uncontradicted in view of inconsistent claims as to value in complaint and in sworn statement given to tax assessor. Code Civ.Proc. § 2052, Civ.Code. § 3336.

5. Appeal and error 🔑1013

Amount of compensation in action for conversion must be left to sound discretion of trial court, to be ascertained after consideration of all circumstances. Civ.Code, § 3336.

6. Appeal and error 🔑1013

Duty of appellate court on question of damages is to uphold findings if it is possible to do so on any sound theory.

7. Trover and conversion 🔑61

Evidence supported award of $1,000 for conversion of household furnishings. Civ.Code, § 3336.

8. Appeal and error 🔑236(2)

Where owner in conversion action testified that value of property was certain amount and court called attention to verified complaint alleging a lesser amount, and counsel said they would ask leave to amend but no motion was forthcoming then or at end of trial and there was nothing before court on which it could be claimed that court denied any motion to amend, owner could not complain on appeal that court had erred in refusing permission to amend complaint to conform to proof as to value. Civ.Code, § 3336.

◆

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by G. Stroman and Auderiene Stroman, his wife, against Mary Lynch and others, for conversion of household furniture and other property. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

G. K. Burgren and Victor E. Cappa, both of San Francisco, for appellants.

Raymond D. Williamson, of San Francisco, for respondents.

GOODELL, Justice.

Appellants sued for the conversion of household furniture and furnishings and other property, alleging its value to have been $3775.25. They recovered a judgment for $1000, with 7% interest from the date of conversion, but deeming it inadequate they have appealed.

Appellants were tenants of a four-room apartment in San Francisco and when their occupancy terminated on December 23, 1943, the property removed therefrom was stored with respondents who are in the moving and storage business. By January 9, 1946 about $100 in storage charges had accrued and on that day respondents sold the property for

$100. Through an error of respondents the legal notice of this sale was mailed to the wrong address and appellants never received it. The court found a conversion but as respondents have not appealed the only question now presented is as to the size of the award.

The measure of damage is "The value of the property at the time of the conversion, with the interest * * *". Civil Code, sec. 3336.

A furniture dealer, called as an expert by appellants, testified that in general the price of furniture had increased at least 50% since 1940. He had never seen the property, hence he did not fix a valuation on it as a whole. Appellants' counsel simply read to him (from the schedule of articles attached to the complaint) individual items and their cost, as supplied by Mrs. Stroman, and the witness added 50% thereto.

Mrs. Stroman testified that the value of the property was $6700, which figure she obviously arrived at by taking the cost of individual pieces and adding the 50% to which the expert testified.

[1,2] It is contended that "The court was bound by the plaintiffs' testimony as to value since it was uncontradicted and corroborated by independent proof of cost and fair market value and the surrounding circumstances." Mrs. Stroman's testimony was admissible for "It is a recognized rule that the owner of property, whether generally familiar with such values or not, is competent to estimate its worth, the lack of knowledge going to the weight rather than the admissibility of the testimony * * *", 10 Cal.Jur. p. 1023, but it by no means follows that it was conclusive. It was based largely, if not entirely, on cost and on the expert's testimony of a general 50% enhancement since 1940 An owner's "testimony as to the cost of goods is a circumstance tending to show value". 10 Cal.Jur. p. 1023; Kirstein v. Bekins Van & Storage Co., 27 Cal.App. 586, 589, 150 P. 999. "But evidence of cost is not necessarily evidence of market value. And, as a general rule, when property has been used, evidence of the cost of replacing it with new furnishes no measure of value for it". 10 Cal.Jur. p. 846. In Lonergan v. Monroe, 77 Cal. App.2d 223, 225, 175 P.2d 42, 43, it is said "* * * the cost of merchandise does not determine the amount of damages to be awarded in an action for its conversion. *Such evidence is admissible not as showing the value conclusively but only as a circumstance to aid in arriving at the value at the time in question,* [citations]." (Emphasis added.)

[3] When the property was sold on January 9, 1946, it was bid in by a licensed auctioneer who testified for repondents. He examined the property at respondent's warehouse and paid $100 for it; he resold it at auction two weeks later for $263.84. This resale price was competent evidence of value, for it is said in Bagdasarian v. Gragnon, 31 Cal.2d 744, 756, 192 P.2d 935, 942, that "* * * market value of personal property may be shown by the price paid for that identical property or by the price obtained for it at a subsequent sale. [Citations.]" See, also Yukon River Steamboat Co. v. Gratto, 136 Cal. 538, 541, 69 P. 252 and Tatone v. Chin Bing, 12 Cal.App.2d 543, 545, 55 P.2d 933. Such price on resale, however, is not conclusive. Breznikar v. T. J. Topper Co., 46 Cal.App.2d 435, 438, 116 P.2d 176.

[4] With respect to appellants' claim that Mrs. Stroman's valuation of $6700 was uncontradicted, it should be remarked that when she so testified the court immediately checked her by saying "You swore in your complaint that it was $3775.25."

In addition to that she was confronted on cross-examination with a sworn statement given by her to the Assessor in April, 1943 in which she valued the property at $300, a statement inconsistent with her "present testimony". Code Civ.Proc. sec. 2052.

It is argued that that return is too remote since the conversion was on January 9, 1946. In the first place, it was the return for the same tax year as that in which respondents came into possession of the goods, on December 23, 1943. Secondly, between the last-named date and the conversion the goods were not in use, but in storage. Thirdly, in their complaint appellants elected to treat the value as stationary and constant by alleging it was $3775.25 "At all the dates and times herein mentioned" which meant from December 24, 1943 when the goods were stored to January 9, 1946, when they were converted. Fourthly, appellants' position is inconsistent because in their brief they say "Clearly any opinion or appraisal of the value * * * made in 1943, would have no bearing on the value at the time of the established conversion three years later in 1946", while Mrs. Stroman's own testimony is based on valuations, namely cost prices, long antedating 1946.

The trial judge had before him figures ranging all the way from $263.84 up to $6700, although the prayer was for $3775.25 only. With these figures before him, and in the light of the rules of law already discussed (including the rule that cost price is not conclusive) he arrived at the figure of $1000, an amount in between the two outside figures. In Kirstein v. Bekins Van & Storage Co., 27 Cal.App. 586, 150 P. 999, supra, an action, like this, brought against a storage company for loss of goods, a schedule attached to the complaint, showed their value to be $3947.50. The verdict was for $750. The court said, 27 Cal.App. at page 589, 150 P. at page 1001: "It is apparent from the record that the jury, in arriving at its verdict, considered the use to which the articles had been subjected, their condition, and other circumstances which in its opinion justified its conclusion." That case was followed in Hood v. Bekins Van & Storage Co., 178 Cal. 150, 152, 172 P. 594, 595, where the only testimony respecting value was given by the plaintiff. The value of the stored goods was alleged to be upward of $3000. The trial court found it to be $1500 and on appeal the court said: "The value of her [the owner's] evidence and weight thereof was a question for the determination of the trial judge" and "it is not the province of this court * * * to determine otherwise."

[5, 6] The "amount of compensation * * * must be left to the sound discretion of the trial court, to be ascertained and adjudged after consideration of all the facts and circumstances established by the evidence in the case." LeBrun v. Richards, 210 Cal. 308, 320, 291 P. 825, 830, 712 A.L.R. 336. The duty of an appellate court on the question of damages "is to uphold the findings if it is possible to do so upon any sound theory." Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 192, 25 P.2d 839, 842, 91 A.L.R. 1357.

[7] There is ample evidence to support the $1000 award.

[8] The contention that "the court erred in refusing to allow the plaintiff to amend * * * to conform to the proof" cannot be sustained. As we have just seen, the value as found by the court was well within the allegation and prayer of the complaint, of $3775.25. We have also seen that the owner's valuation of $6700 was neither conclusive nor uncontradicted. Hence a motion to amend "to conform to the proof," if made, would have been properly denied. However, no such motion was made. When Mrs. Stroman testified that the value was $6700 and the court confronted her with her verified complaint alleging $3775.25, her counsel said "We will ask leave to amend * * *." The record shows clearly that the court invited an amendment, but no motion was forthcoming either then or, as claimed, at the end of the trial, and there was nothing before the court on which it could be claimed, as it is now, that the court denied any motion to amend. See Philbrook v. Randall, 195 Cal. 95, 105, 231 P. 739.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

91 Cal.App.2d 675

PEOPLE v. STEWART.

Cr. 4312.

District Court of Appeal, Second District,
Division 2, California.
May 4, 1949.

1. **Criminal law** ⚿543(2)

Trial court has discretion to determine whether sufficient diligence has been exercised in endeavoring to locate a witness within the state so as to authorize admission of his testimony given at preliminary hearing. Pen.Code, § 686.

2. **Criminal law** ⚿543(2), 1153(6)

Whether sufficient diligence has been exercised in endeavoring to locate a witness within the state so as to authorize admission of his testimony given at preliminary hearing depends upon the facts of each case, and in absence of showing of abuse of discretion decision of trial court will not be disturbed on appeal. Pen.Code, § 686.

3. **Criminal law** ⚿543(2)

Substantial evidence supported finding that witness could not with due diligence be found within the state so as to authorize admission of his testimony given at preliminary hearing. Pen.Code, § 686.

4. **Criminal law** ⚿1169(1)

Where there was sufficient evidence to sustain conviction exclusive of testimony of witness given at preliminary hearing and his evidence was merely cumulative, alleged error in admitting testimony of such witness without laying a foundation therefor would not require a reversal on appeal. Pen.Code, § 686.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Wilbur Kennedy Stewart was convicted of burglary in the second degree, and he appeals.

Affirmed.

Paul E. Tapley, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Defendant was tried by a jury, was found guilty of burglary in the second degree and was sentenced to the state prison. This appeal is from the judgment of conviction.

As ground for reversal defendant asserts that the court erred in admitting the testimony of the witness Otis Baisley given at the preliminary hearing, no foundation having been laid therefor.

Section 686 of the Penal Code provides that the testimony taken at a preliminary examination may be introduced at the trial upon its being satisfactorily shown to the court that the witness cannot with due diligence be found within the state and provided the defendant cross-examined or had the opportunity to cross-examine the witness.

[1,2] It is within the discretion of the trial court to determine whether or not sufficient diligence has been exercised in endeavoring to locate a witness within the state to authorize the admission of his testimony given at the preliminary hearing. The question depends upon the facts of each particular case and in the absence of a showing of abuse of discretion the decision of the trial court will not be disturbed on appeal. People v. Cavazos, 25 Cal.2d 198, 201, 153 P.2d 177; People v. Centers, 56 Cal.App.2d 631, 634, 133 P.2d 29; 8 Cal.Jur. 129, 130 and cases cited.

[3] In the instant case the process server testified that he called at Baisley's place of employment and the residence of his former employer; that he also called at Baisley's residence, where he resided with his aunt, and that the aunt stated she thought he had left the state; that he inquired of the witness' neighbors and checked the post office for a forwarding address, the jails and the county hospital; that such inquiries produced no information concerning Baisley's whereabouts.

[4] It is obvious that there is substantial evidence to support a finding that the

witness could not with due diligence be found within the state. Moreover, it is apparent from the record that there is sufficient evidence to sustain the judgment of conviction exclusive of the testimony of the witness Baisley and that his evidence was merely cumulative.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

91 Cal.App.2d 341

ENGLEMAN v. MALCHOW.

Civ. 16835.

District Court of Appeal, Second District,
Division 2, California.
April 19, 1949.

As Modified April 27, 1949.

1. Appeal and error 🔑1011(1)

Where defendant when testifying as witness admitted that she had never paid any part of her promised contribution to limited partnership, other evidence tending to prove that defendant's obligation was discharged could serve only to produce a conflict in total proof to be resolved by trial court, whose determination could not be disturbed upon appeal.

2. Partnership 🔑372

Limited partner could not be relieved of her obligation to creditors of partnership who relied upon her compliance with her subscription agreement to pay her agreed contribution to capital of the partnership by reason of failure of her associates to pay their agreed contributions.

3. Partnership 🔑375

In suit by assignee for benefit of creditors of insolvent limited partnership against limited partner to enforce her agreed contribution to capital, defendant's proffered evidence of failure of certain other limited partners to pay in full their capital subscriptions was properly excluded as irrelevant.

4. Appeal and error 🔑1071(1)

In suit by assignee for benefit of creditors of insolvent limited partnership against limited partner to enforce her agreed contribution to capital, where trial court adopted proof that defendant's agreed contribution had not been paid, defendant could not have been prejudiced by a disregard of financial statements taken from books and records of partnership which had been lost.

5. Appeal and error 🔑1072

In suit by assignee for benefit of creditors of insolvent limited partnership against limited partner to enforce her agreed contribution to capital, refusal to grant defendant's motion for a new trial after entry of adverse judgment for purpose of hearing testimony of accountant with reference to what books of partnership showed as to capital contributions was not prejudicial error, where testimony would have been merely cumulative, and it was not probable that testimony would have effected a different result.

6. New trial 🔑97

Where defendant at trial discovered need of witness it was incumbent upon her then promptly to move for recess in order to obtain presence of the witness, and failing so to move, she was not entitled to a new trial after entry of adverse judgment.

7. Appeal and error 🔑933(1), 1032(1)

Order denying defendant's motion for new trial was supported by presumptions of correctness and burden was upon defendant to show affirmatively that order of denial was prejudicially erroneous.

8. Partnership 🔑376

Under statute, an assignment for benefit of creditors did not dissolve limited partnership, so as to preclude assignee from maintaining action on behalf of partnership. Civ.Code, § 2424.

9. Appeal and error 🔑173(2)

Where suit by assignee for benefit of creditors of limited partnership against limited partner for her agreed contribution to the capital was tried on theory that entity involved was a limited partnership, findings were made accordingly without protest, defendant's motion for new trial was based on all statutory grounds, and affidavit in support thereof made no mention of any defect in certificate of limited partnership, presumptively matter was not argued to trial court and defendant could not for first time raise the question of a defective certificate on appeal. Civ.Code, § 2480.

10. Partnership ⚷375

Evidence failed to establish that limited partner's obligation to pay her subscription to capital of the partnership had been paid by another on her behalf, so as to preclude assignee for benefit of creditors of the partnership, after partnership had become insolvent, from enforcing partner's promised contribution.

◆

Appeal from Superior Court, Los Angeles County; R. Morgan Galbreth, Judge.

Suit by M. W. Engleman, as assignee for the benefit of creditors of the Universal Utilities, a limited partnership, against Marie F. Malchow to enforce defendant's agreed contribution to the insolvent limited partnership as a limited partner. From adverse judgment, the defendant appeals.

Affirmed.

Reay, Scharf & Reay and Russell H. Reay, all of Los Angeles, for appellant.

Craig & Weller, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The assignee of Universal Utilities, an insolvent limited partnership, sued a limited partner to enforce her agreed contribution to the capital. From an adverse judgment such limited partner appeals.

[1, 2] The partnership consisted of two general and five limited partners. By her answer and her testimony as a witness, appellant admitted that she had never paid any part of her promised contribution. Such an admission in itself is sufficient to sustain the judgment of the trial court. However, she contends that other evidence tended to prove that her obligation was discharged. Such other evidence no matter how material or relevant, at its best, could serve only to produce a conflict in the total proof to be resolved by the trial court whose determination may not be disturbed on appeal. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183. Her contention that she should be relieved of all obligations to pay her own subscription by reason of the failure of her associates to pay theirs is no defense. Neither her pleading nor her proof avails her. A contract can be satisfied under law by nothing short of a complete compliance. The violation of every section of the Civil Code by any one or by all of the other partners would not relieve appellant from her primary obligation to creditors who relied upon her compliance with her subscription agreement. By it her liabilities are measured and not by res inter alios acta or by the failure of her partners to abide by their obligations.

[3] For the same reason it was not error for the court to exclude evidence of the failure of certain limited partners to pay in full their capital subscriptions. The clear cut issue was whether appellant had paid the sum she had pledged. The proffered evidence was utterly foreign to that subject and could have served no beneficial purpose.

[4] It is asserted that the court disregarded the financial statements taken from the books and records of the partnership which had been lost. There are three answers to such contention. (1) Since the document was received in evidence it is presumed to have been considered. (2) It might properly have been excluded as having had no foundation laid for its admission. (3) But neither its exclusion nor its rejection after admission could have been prejudicial. Since the court adopted the proof that her agreed contribution was not paid, no prejudice could have resulted by a "disregard" of the statement. Hence a reversal on that ground would not be justified. Mullanix v. Basich, 67 Cal.App.2d 675, 681, 155 P.2d 130.

[5-7] Prejudicial error did not result in refusing to grant a new trial for the

purpose of hearing the testimony of an accountant with reference to what the books showed as to capital contributions. The testimony of such a witness would have been merely cumulative of the testimony of appellant who deposed that the lost books disclosed a credit to her capital account. It is not probable that such testimony could have effected a different result. When appellant at the trial discovered the need of the witness it was incumbent upon her then promptly to move for a recess in order to obtain the presence of the witness. Failing so to move she was not entitled to a new trial. Coats v. General Motors Corporation, 3 Cal.App.2d 340, 356, 39 P.2d 838. Not only is the order denying a new trial supported by all presumptions of its correctness but the burden is upon appellant to show affirmatively that an order of denial is prejudicially erroneous.

[8] Appellant maintains that an assignment for the benefit of creditors dissolves a partnership and therefore plaintiff cannot maintain an action on behalf of a partnership which no longer exists. The answer to this contention is found in Civil Code, section 2424, "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

[9] Appellant contends that the certificate of limited partnership in evidence shows that its organization was in contravention of section 2480 of the Civil Code and is therefore unlawful. That section forbids a contribution of "services" as a part of the capital of a limited partnership. While it is true that the certificate shows that one of the limited partners of Universal Utilities contributed "services rendered of the agreed value of $1,000" besides $2,500 cash, appellant is in no position for the first time on appeal to urge that issue. By her pleading she admitted the organization of the limited partnership "under the laws of the state of California" and admitted by name the personnel constituting the partnership and the amount of her own agreed contribution. The case was tried on the theory that the entity involved is a limited partnership; the findings were made accordingly without protest; motion for a new trial was based upon all the statutory grounds; the affidavit in support thereof made no mention of any defect in the certificate; and presumptively the matter was not argued to the court. Appellant cannot for the first time raise the question of a defective certificate without having first submitted the matter to the trial court. Adams v. Petroleum Midway Company, 205 Cal. 221, 225, 270 P. 668; Gerstner v. Scheuer, Cal.App., 204 P.2d 937; Grimes v. Nicholson, 71 Cal.App.2d 538, 543, 162 P.2d 934; Drullinger v. Erskine, 71 Cal.App.2d 492, 497, 163 P.2d 48.

[10] Appellant finally contends that she was not obliged personally to pay her subscription but that it might as well be paid by another on her behalf. In this she is correct but an argument without proof is of no value. Her own testimony is the sum total of her evidence that it was not paid. In consideration of the money loaned by appellant to one of the general partners prior to the formation of the partnership, she received a promissory note secured by a trust deed on real property later transferred to the partnership. Part of the money loaned was subsequently contributed to the partnership by the borrower. However, there is no indication that he contributed it on appellant's behalf. He used it to discharge his own commitment to the partnership.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

91 Cal.App.2d 629

PEOPLE v. GRIMES.

Cr. 2103.

District Court of Appeal, Third District,
California.
May 3, 1949.

Hearing Denied June 2, 1949.

1. Criminal law 🔑406(1), 412(1)

The corpus delicti must be established before extrajudicial statements and admissions of defendants are admissible in and can be considered as tending to establish facts to which they relate.

2. Criminal law 🔑412(1)

While prosecution is not required to establish corpus delicti by proof as clear and convincing as is necessary to establish fact of guilt but can rely on rather slight or prima facie proof, defendant's extrajudicial statement cannot be considered for any purpose until some of that degree of proof has been introduced tending to show commission of crime charged.

3. Criminal law 🔑238

Evidence before committing magistrate that accused as executor of estate had received $300 belonging to estate and that such money was not deposited by accused in a certain bank and that legatee inquired of accused as to when estate would be distributed did not afford even slight proof that crime had been committed or that accused had committed it, and hence was insufficient to warrant commitment of defendant to answer grand theft charge. Pen.Code, § 872.

4. Embezzlement 🔑36

An inference that estate money was stolen or embezzled by executor cannot be drawn from fact that executor has not deposited the money in a particular bank, and evidence of delay in distribution of estate cannot serve as a foundation for inferring that moneys belonging to estate have been embezzled.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Leslie E. Grimes was charged with grand theft. From an order dismissing the information, the People appeal.

Order affirmed.

Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for appellant.

Wallace Shepard, of Sacramento, for respondent.

PEEK, Justice.

By an information filed on May 27, 1948 the defendant was charged with the commission of the crime of grand theft in that on or about November 27, 1946 he unlawfully and feloniously took the sum of $300.00, which sum was the property of the Estate of Joseph C. Beaudry, deceased. At the time of the alleged theft the defendant was the duly qualified and acting executor of said estate. After a preliminary hearing the defendant was held to answer in the Superior Court. Upon his arraignment he moved to set aside the information upon the ground that he was committed without reasonable and probable cause, which motion was granted and the information ordered dismissed. The People have taken this appeal from said order of dismissal.

The record of the proceedings before the committing magistrate discloses that the People offered into evidence the entire file of the probate action in the matter of the Estate of Joseph C. Beaudry, deceased, which was admitted without objection. It appears therefrom that the petition of the defendant for the probate of the will and issuance of letters testamentary was granted on May 10, 1943; that he thereupon entered upon his duties as such executor; that an inventory of the assets of the estate was made and filed; that the estate was appraised by the Inheritance Tax Appraiser which showed no tax due; that creditors' claims were allowed and paid in 1943 and 1944; that on April 2, 1948 the defendant, as executor, moved the probate court for an order to sell certain bonds in order to distribute the estate under the terms of the will and that on April 12, 1948 the first and final account of the respondent as executor was filed, settled and approved. It further appears that the value of the estate had increased from $3,296.59 as of the date of the inventory and appraisement to $5,462.42 as of the date of the first and final account.

In addition to the foregoing record of the probate proceeding the People produced as a witness a certified public accountant who had acted as the agent of the Sacramento Riverside Bath and Park Company during the course of liquidation proceedings. His testimony was that as such agent he prepared liquidation checks payable to the stockholders therein; that a check in the sum of $300.00 was issued to Joseph C. Beaudry and that this check had been endorsed and cashed by the respondent as executor of the estate, as was a subsequent check in the sum of $62.50.

The second witness called by the state had served as secretary of the above mentioned corporation prior to its liquidation. His testimony related only to the identification of certain records of said company, which showed the decedent to have been a stockholder therein and that he had not transferred his stock prior to the dissolution.

The third witness for the state, one of the legatees under the will, testified that he had contacted the respondent several times in regard to his legacy; that respondent told him that the reason the estate had not been closed was that some of the bonds were in companies in the process of liquidation, and that he had not received any part of his legacy. On cross-examination the witness admitted that he had not asked for an accounting.

The last witness for the prosecution was an official of a Sacramento bank who testified that in May 1943 the account of J. C. Beaudry in the sum of $745.09 was transferred to another account with respondent as executor of the estate; that no deposits were made in said account from that date until December 27, 1947, and that the last withdrawals occurred in the year 1944. The witness stated on cross-examination that he did not know whether or not the respondent, as executor of the estate, maintained any other accounts with any other bank or banks.

The People then offered into evidence a signed confession by respondent wherein he admitted cashing the $300.00 check mentioned supra and appropriating the money to his own use. Said confession was admitted into evidence over the objection of respondent's counsel that the corpus delicti had not been established and that the confession was therefore inadmissible. The $300.00 was included in the first and final account mentioned supra which also was rendered prior to the filing of the information herein.

Appellant first contends that the corpus delicti had been sufficiently established and therefore the confession was properly admitted in evidence by the committing magistrate, and second that independent of the extrajudicial statement of the defendant the facts and the reasonable inferences deducible therefrom are sufficient to sustain the commitment.

[1, 2] It is the settled rule "that the corpus delicti must be established before extrajudicial statements and admissions of a defendant are admissible in evidence and can be considered as tending to establish the fact to which they relate." People v. Simonsen, 107 Cal. 345, 40 P. 440. And although the "prosecution is not required to establish the corpus delicti by proof as clear and convincing as is necessary to establish the fact of guilt; rather slight or prima facie proof is sufficient for such purpose", People v. Mehaffey, 32 Cal.2d 535, 545, 197 P.2d 12, 17, nevertheless until *some* of that degree of proof has been introduced tending to show the commission of the crime charged, a defendant's extra judicial statement cannot be considered for any purpose. People v. Kaye, 43 Cal.App.2d 802, 111 P.2d 679; see also People v. Vicencio, 71 Cal.App.2d 361, 162 P.2d 650.

[3, 4] The evidence which we have summarized constituted the entire case before the committing magistrate and discloses nothing more than that the respondent was the executor of the Estate of Joseph C. Beaudry; that as such executor he received $300.00 which belonged to the estate; that said sum of money was not deposited by respondent in a certain bank and that one of the legatees inquired of re-

spondent as to when the estate would be distributed. Obviously such evidence does not afford even slight proof either that a crime had been committed or that respondent had committed it and therefore was not sufficient under the provisions of section 872 of the Penal Code. An inference that the money was stolen or embezzled cannot be drawn from the fact that respondent did not deposit the money in a particular bank since the Probate Code does not impose upon an executor the duty of depositing funds which come into his possession during the course of administration. Nor does evidence of delay in distribution of the estate serve as a foundation for inferring that moneys belonging to the estate have been embezzled. Thus, "In no way does it appear from such testimony that 'a public offense has been committed,' and without some showing in that regard it cannot be said that there was 'sufficient cause to believe the defendant guilty thereof' for no crime has been proved." In re Schuber, 68 Cal.App.2d 424, 425, 156 P.2d 944, 945.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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91 Cal.App.2d 578

PEOPLE v. BAILEY.

Cr. 2121.

District Court of Appeal, Third District, California.
May 2, 1949.

1. Witnesses 🔑2(1)

Public officials have no duty to locate or assist a defendant in locating a witness whose whereabouts is unknown to them or to the defendant.

2. Criminal law 🔑997

In rape prosecution that trial court allegedly refused to issue a subpoena for a witness for defendant did not justify setting aside judgment of conviction on writ of error coram nobis where defendant did not seek a continuance for the witness who did appear at the hearing in the coram nobis proceeding and his testimony was not favorable to defendant.

3. Criminal law 🔑997

In rape prosecution evidence did not establish that defendant was denied right to cross-examine the complaining witness fully so as to justify setting the conviction aside on writ of error coram nobis.

4. Criminal law 🔑742(1), 747

Conflicts in evidence and credibility of witnesses are for jury.

5. Criminal law 🔑997

In rape prosecution whether prosecutrix resisted was solely a matter for jury and presented nothing reviewable in a writ of error coram nobis proceeding to set aside judgment of conviction.

6. Criminal law 🔑997

In rape prosecution asserted misconduct of district attorney that defendant neither denied nor admitted the charge constituted no ground for setting aside judgment of conviction on writ of error coram nobis.

7. Criminal law 🔑997

In rape prosecution, instruction that when defendant stands mute in fact of an accusation, his silence might be considered by jury as tending to show an admission of the truth of the charge, was not prejudicial error so as to justify review on writ of error coram nobis.

8. Criminal law 🔑997

In rape prosecution evidence did not establish incompetency and negligence of attorney of defendant so as to justify review in a coram nobis proceeding.

9. Criminal law 🔑997

In rape prosecution, record did not indicate that defendant was denied due process of law so as to justify setting aside conviction on writ of error coram nobis proceeding.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Ted Bailey was convicted of forcible rape and he appeals from a judgment denying a petition for a writ of error coram nobis.

Affirmed.

Ted Bailey, pro per.

Fred N. Howser, Atty. Gen. and Doris H. Maier, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

This is an appeal from a judgment rendered by the Superior Court of Stanislaus County, denying a petition for a writ of error coram nobis filed by appellant in which proceeding petitioner sought an order setting aside a judgment convicting him of forcible rape, on October 16, 1945, alleging that at his trial he had been "deprived of substantial rights and due process of law," and that the judgment was void on its face for uncertainty.

The record shows that on the trial for rape petitioner was represented by Mr. Brack, counsel appointed by the court, and that no appeal was taken from the judgment, nor any motion for a new trial made. At the proceeding for writ of error coram nobis, filed a year later, petitioner was represented by counsel of his own choosing. On this appeal he appears in propria persona, asserting, as grounds for reversal, that at his trial on the rape charge he was denied equal protection of the law because the court refused to subpoena witnesses on his behalf, and because he was denied the right to question further the complaining witness; that he was convicted on inconsistent testimony; that the district attorney was guilty of prejudicial misconduct; that the jury was prejudiced by an erroneous instruction; and that his counsel was negligent and incompetent.

Regarding the first of these contentions the record of the trial on the rape charge (which record was introduced in evidence in the coram nobis proceeding) shows that the complaining witness was a "hitchhiker" who was picked up by Bailey when he and a friend by the name of Dow Pierce were driving in Bailey's car from Stockton to Modesto in the nighttime; that while Pierce was asleep in the back seat Bailey stopped the car, dragged the woman to an orchard and there raped her. At the trial on that charge defendant did not produce Pierce as a witness, and he contends that his inability to do so was because the trial court refused to issue a subpoena for him. However, on the coram nobis proceeding the testimony in this connection given by Mr. Brack, defendant's counsel at the rape trial, was, not that they were refused a subpoena for Pierce, but that the sheriff's office and the district attorney's office refused to assist him in locating Pierce.

[1, 2] While a defendant's right to have process to compel the attendance of witnesses in his behalf is conceded, it is not the duty of public officials to locate or assist a defendant in locating a witness whose whereabouts is unknown to them or to the defendant himself. See People v. Talman, 26 Cal.App. 348, 350, 146 P. 1063; People v. Sheridan, 136 Cal.App. 675, 684, 29 P.2d 464. No continuance was requested to secure Pierce's attendance; and when he did appear at the hearing in the coram nobis proceeding he testified that he was drunk and asleep in the back seat of the car and remembered nothing after they left Stockton, until they arrived in Modesto.

[3] As for appellant's contention that he was denied the right to cross-examine the complaining witness fully, the record shows that she was questioned at length by defendant's counsel, and that the defense rested without any request for her return. Apparently both parties expected that she would appear to rebut testimony given by defendant, and the prosecution had provided for her return from Los Angeles; but it was agreed that her non-appearance was probably due to a bus strike; and counsel for the respective parties then agreed that if she were present she would "deny all of the portions of the testimony of Mr. Bailey that were inconsistent with hers, and save a lot of time in that way." Also, it might be added, the prosecution was not compelled to put in any rebuttal testimony at all; so it cannot be said that defendant was deprived of any right to examine the prosecutrix further when the

prosecution was satisfied to dispense with her presence.

[4] Appellant's next complaint—that he was convicted on "inconsistent testimony"—presents nothing for consideration by an appellate court, for the resolution of conflicts of evidence, and the credibility of witnesses, are matters for a jury.

[5] Appellant also asserts that the evidence does not show that the prosecuting witness resisted the alleged rape. But not only was this solely a matter for the jury to determine, but it presents nothing reviewable in a coram nobis proceeding. In passing it may be said, however, that there was ample evidence of resistance furnished not only by complainant, but by a farmer who resided near the scene of the rape who testified that he heard the screams of the victim which he described as "hollering as loud as any human being could," and who telephoned for the police.

[6] The asserted prejudicial misconduct of the district attorney is that he "instructed" the jury that "the defendant remained mute neither denying nor admitting the charge." This refers to a statement made during the prosecutor's argument to the jury when he referred to the testimony of a deputy sheriff that when defendant, in his presence, was accused by prosecutrix, he did not say anything but stood there mute. Such reference to the testimony by the prosecutor did not constitute misconduct; if it had it should have been raised on appeal. It constitutes no ground for review on writ of error coram nobis.

[7] Appellant's complaint about an instruction given by the trial court is that there was prejudicial error in charging the jury that "when a defendant in a criminal case stands mute in the face of an accusation, his silence may be considered by you as tending to show an admission on his part of the truth of the charge." A comparable instruction was given approval in People v. Willmurth, 77 Cal.App.2d 605, 615, 176 P.2d 102, and hearing in the Supreme Court was denied. Also see People v. Richardson, 83 Cal.App. 302, 306, 256 P. 616.

[8] As regards the alleged incompetency and negligence of defendant's attorney, the record refutes this charge, as it shows that Mr. Brack defended his client valiantly and efficiently. Furthermore, such a charge, also, is not reviewable in a coram nobis proceeding. People v. Martinez, 88 Cal.App.2d 767, 199 P.2d 375.

[9] Finally, it may well be said that in this case petitioner was granted considerable latitude in his coram nobis proceeding in view of the limitations upon the relief which may be given in such a proceeding. See People v. Tuthill, 32 Cal.2d. 819, 821–822; In re Lindley, 29 Cal.2d 709, 724–726, 177 P.2d 918; People v. Mendez, 28 Cal.2d 686, 688, 171 P.2d 425; People v. Gilbert, 25 Cal.2d 422, 442, 154 P.2d 657; People v. Reid, 195 Cal. 249, 258, 232 P. 457, 36 A.L.R. 1435; People v. Martinez, supra, 88 Cal.App.2d at page 774, 199 P.2d 375; People v. Coyle, 88 Cal.App.2d 967, 200 P.2d 546; People v. O'Malley, 63 Cal.App.2d 646, 648, 147 P.2d 422. We find no error.

The judgment, denying defendant's petition for a writ of error coram nobis and denying his motion to vacate the judgment of conviction, is affirmed.

PEEK and THOMPSON, JJ., **concur.**

91 Cal.App.2d 684

HICKSON et al. v. GRAY et al.

Civ. 16889, 16890.

District Court of Appeal, Second District, Division 2, California.

May 6, 1949.

Rehearing Denied May 31, 1949.

Hearing Denied June 30, 1949.

1. Appeal and error 🔑931(1)

On defendants' appeal the evidence must be viewed in the light most favorable to plaintiffs.

2. Principal and agent 🔑14(2)

An agency may be implied from the conduct of the parties.

3. Principal and agent 🔑48

If the evidence establishes a fiduciary relationship between the plaintiff and defendant wherein defendant is agent for plaintiff the same obligation of undivided service and loyalty devolves upon the defendant that is imposed upon a trustee in favor of his beneficiary.

4. Conspiracy ⊂⊃13

If through fraud and conspiracy another person assists a real estate broker in violating his fiduciary obligation to his principal by making a secret profit and retaining the proceeds therefrom, he as well as the fiduciary is equally liable for all consequences of the fraud and conspiracy regardless of the extent of his participation or the share of the profits he has obtained.

5. Brokers ⊂⊃8(3), 31, 37
Conspiracy ⊂⊃13

Evidence showed that one defendant was the agent of the plaintiffs for the sale of their properties and that such defendant assisted by the other defendant violated her fiduciary obligation to plaintiffs in not disclosing to them that their properties could be sold and were in fact being sold for a price largely in excess of that stated to plaintiffs, and both defendants were liable to plaintiffs for secret profits obtained.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Vincent C. Hickson and another against Mrs. L. B. Gray and Grace Tate to recover secret profits obtained by defendants while acting as agents for the sale of property of plaintiffs. From a judgment for plaintiffs, the defendants appeal.

Judgment affirmed.

Louis C. Spiess, Jr., of Los Angeles, for respondents.

William Ellis Lady, of Los Angeles, for appellant Grace Tate.

John D. Gray, of Los Angeles, for appellant Mrs. L. B. Gray.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to recover secret profits obtained by defendants while acting as agents for the sale of property of plaintiffs, defendants appeal.

[1] The evidence being viewed in the light most favorable to plaintiffs (respondents) the essential facts are these:

In November, 1945, plaintiffs were the owners of certain parcels of real property known as 602 and 608 South New Hampshire Street, Los Angeles, hereinafter designated as parcels 1 and 2, respectively. All the plaintiffs were represented by Mr. Vincent C. Hickson.

On or about the 18th of November, 1945, Ruth Denmead became interested in the purchase of parcel 1, and made this fact known to defendants. Defendant Gray, a licensed real estate broker, immediately procured a listing of the property from Mr. Hickson as the representative of all the owners. Shortly before November 22, 1945, Mrs. Gray called upon Mr. Hickson at his office relative to parcel 1, at which time she learned that plaintiffs owned parcel 2 and the properties had been listed with two brokers, parcel 1 being listed for $23,500 and parcel 2 for $17,500.

Mrs. Gray requested a listing of both parcels which was refused by Mr. Hickson as the previous listing had not expired. He told her that if she had a purchaser she might submit an offer and he would consider it, although he was satisfied that the properties should bring more than $41,000.

On November 26, 1945, Mrs. Gray telephoned Mr. Hickson to say she had the property sold for $41,000 which was the best offer she could get, and requested the privilege of coming to see him the next day and bringing with her Mrs. Tate who worked with her on real estate deals. On November 27, 1945, defendants called at Mr. Hickson's office, informing him they had the properties sold for $41,000 to a "May D. Corson," and such sum was the best that could be obtained. Mr. Hickson expressed his disappointment that the properties could not be sold for a larger sum. He gave Mrs. Gray a listing of parcel 1 for $24,000 and parcel 2 for $17,000, the name of May D. Corson, 440 South Ardmore, being inserted as purchaser according to instructions given by Mrs. Gray in the presence of Mrs. Tate.

Mr. Hickson handed the listings to Mrs. Gray, instructing her to get May D. Corson to sign them. On November 28, 1945, Mrs. Gray telephoned Mr. Hickson from the Wilshire Escrow Company office stating that May D. Corson would not be the purchaser as she could not get the money together, but Mrs. Kelley would be the purchaser on the same terms. Mr. Hickson voiced his disappointment at not getting more for the property but agreed that it might be sold to Mrs. Kelley. He made an adjustment however on the prices, asking $22,000 for parcel 1, and $19,000 for parcel 2. Mrs. Tate assured him that this would not make any difference to the purchaser.

About 5 p. m. the same afternoon Mrs. Gray and Mrs. Tate returned to Mr. Hickson with the listings. On each of the listings a line had been drawn through the name of May D. Corson, and in lieu thereof had been inserted "Emma Virginia Kelley," and the address 153 South Irving Boulevard, which was signed by Emma Mary Kelley as the purchaser and Louise B. Gray as agent.

Again Mr. Hickson stated that he was disappointed he could not get more than $41,000 for the property. He was reassured by Mrs. Gray and Mrs. Tate that it was a good deal; that no more could be obtained; to which Mr. Hickson replied, "All right, I am relying on your judgment in the matter." They did not tell him that parcel 1 had been sold to Ruth Denmead for $28,000, and parcel 2 to Mrs. Umber for $21,500.

At the close of the escrow Mr. Hickson received a statement showing that the properties had been sold for $41,000 and an agent's commission paid thereon of $2,050; $1,300 of which was paid to Mrs. Gray and $750 to Mrs. Tate. Emma Mary Kelley who signed the listings as purchaser was in fact the daughter of Mrs. Gray whose married name was Mrs. Spencer Smilie.

This is the sole question presented for our determination:

Did defendants while acting in a fiduciary capacity toward plaintiffs make and receive a secret profit by perpetrating a fraud upon them?

[2-4] This question must be answered in the affirmative and is governed by these rules:

1. An agency may be implied from the conduct of the parties. (Anderson v. Thatcher, 76 Cal.App.2d 50, 65, 172 P.2d 533.)

2. If the evidence establishes a fiduciary relationship between plaintiff and defendant wherein defendant is agent for plaintiff the same obligation devolves upon defendant of undivided service and loyalty that is imposed upon a trustee in favor of his beneficiary. (Rattray v. Scudder, 28 Cal.2d 214, 222, 169 P.2d 371, 164 A.L.R. 1356.)

3. If through fraud and conspiracy another person assists a real estate broker in violating his fiduciary obligation to his principal by making a secret profit and retaining the proceeds therefrom, he, as well as the fiduciary, is equally liable for all consequences of the fraud and conspiracy regardless of the extent of his participation or the share of the profits he has obtained. (Anderson v. Thatcher, supra, 76 Cal.App.2d at page 72, 172 P.2d 533.)

[5] Applying the above stated rules to the facts of the present case it is evident that Mrs. Gray was the agent of plaintiffs for the sale of their properties, and that she, assisted by Mrs. Tate, violated her fiduciary obligation to plaintiffs in not disclosing to them that their properties could be sold and in fact were being sold by her for a price in excess of $41,000. Therefore Mrs. Gray was liable to plaintiffs for the amount of the secret profits which she had obtained in the transaction, and Mrs. Tate, under rule 3, supra, was also liable since she had assisted Mrs. Gray in perpetrating the fraud.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

91 Cal.App.2d 590

TURNER v. SIMPSON.

Civ. 13847.

District Court of Appeal, First District,
Division 2, California.
May 3, 1949.

1. Venue 🔑7, 68

Fact entitling a party to try action on a contract in county other than defendant's residence where complaint is silent on the subject may be shown by affidavit, and where it appears that contract was entered into in county in which action was filed, plaintiff is entitled to have action upon it tried there despite defendant's residence in another county. Code Civ.Proc. § 395.

2. Venue 🔑70

Where defendant moved for change of venue in action for breach of contract, supporting motion by affidavit alleging that removal was sought to county of defendant's residence, and plaintiff's opposing affidavit swore that contract was entered into in county wherein action was brought, trial court was without discretion to grant defendant's motion since plaintiff was entitled to bring action in county where contract was made. Code Civ.Proc. § 395.

◆

Appeal from Superior Court, City and County of San Francisco; Geo. W. Schonfeld, Judge.

Action by C. P. Turner against L. M. Simpson for alleged breach of a contract for sale of shares of stock. From an order granting defendant's motion for a change of venue, plaintiff appeals..

Order reversed.

Roy A. Sharff and Howard Iverson, both of San Francisco, for appellant.

George Bouchard, of Los Angeles, for respondent.

DOOLING, Justice.

The plaintiff commenced this action for the alleged breach by defendant of a contract for the sale of shares of stock by filing a complaint in the City and County of San Francisco. Defendant moved for a change of venue to Los Angeles County, supporting his motion by an affidavit alleging that county to be his place of residence. Plaintiff filed an affidavit in opposition to the motion in which he swore that the contract sued upon was made and entered into in San Francisco, plaintiff and defendant both being present in San Francisco at the time the contract was made. No counter proof of this latter fact was offered. The trial court granted the motion and plaintiff appeals.

Under Code of Civil Procedure section 395 "the county * * * in which the contract in fact was entered into * * * shall be a proper county for the trial of an action founded on such obligation * * *."

[1] The fact entitling a party to try the action in a county other than defendant's residence where the complaint is silent on the subject may be shown by affidavit, Mills v. Dickson, 129 Cal.App. 728, 19 P.2d 278, and where it appears that the contract was entered into in the county in which the action was filed plaintiff is entitled to have the action upon it tried there despite defendant's residence in another county. Peterson v. Sherman, 68 Cal.App.2d 706, 711–712, 157 P.2d 863; Carnation Co. v. El Rey Cheese Co., 88 Cal.App.2d 857, 200 P.2d 19; Atwater v. Argonne Van & Storage Co., 74 Cal.App.2d 410, 168 P.2d 776.

[2] Respondent's claim that the county of defendant's residence is a preferred place of trial and that the court may in its discretion grant the motion for change to that county even where it appears that the contract was entered into or to be performed in the county where the action was commenced is not borne out by the language of Code Civ.Proc. sec. 395, which states in the alternative "either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial * * *."

It appearing without contradiction that the contract was entered into in San Francisco the court erred in granting the change of venue.

The order appealed from is reversed.

NOURSE, P. J., and GOODELL, J., concur.

91 Cal.App.2d 603

FARVOUR et al. v. GELTIS et al.

Civ. 13940.

District Court of Appeal, First District,
Division 2, California.
May 3, 1949.

1. Pleading 🔑64(2)

Under code, allegations of tort damage to both person and property were properly joined in one count. Code Civ. Proc. § 427.

2. Landlord and tenant 🔑130(4)

Evidence sustained award of $500 actual damages against landlord and another for discomfort, inconvenience and mental and physical suffering of tenants resulting from removal of windows and doors from their apartment and refusal to return them for more than two weeks.

3. Appeal and error 🔑1073(7)

Where evidence of personal injuries was ample to sustain award of actual damages, any error in including in award damage to books, the amount of which was not established, was not prejudicial.

4. Landlord and tenant 🔑130(4)

Evidence sustained award of punitive damages against landlord on ground of ratification of removal by another of windows and doors from plaintiffs' apartment and refusal to return them for more than two weeks, though evidence failed to show that landlord directed or was responsible for their removal.

5. Damages 🔑92

A defendant may become liable for punitive damages by subsequent ratification of the act of another as well as by precedent direction of such act.

6. Landlord and tenant 🔑130(4)

Award of $2,000 punitive damages against landlord for removal by another of windows and doors from plaintiffs' apartment and refusal to return them for more than two weeks was not out of reasonable proportion to award of actual damages in the amount of $500.

7. Damages 🔑94

The excessiveness of exemplary damages in relation to actual damages allowed cannot be measured by any fixed ratio.

◆

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Action by Raymond Farvour and another against Peter Geltis and another to recover for damage to person and property resulting from removal of windows and doors from apartment rented by plaintiffs from named defendant. Judgment for plaintiffs and defendants appeal.

Judgment affirmed.

Charles M. Weile, of San Francisco, for appellants.

Joseph A. Brown and Reed M. Clarke, both of San Francisco, for respondents.

DOOLING, Justice.

This case arises out of a particularly aggravated tort. Plaintiffs, husband and wife, were tenants of defendant Geltis, living with their three children in an apartment rented from Geltis. Geltis and his wife lived in the same apartment building. On or about July 30, 1945 defendant Ernstan appeared at the plaintiffs' apartment and removed nine windows and several doors from the apartment, stating that Mrs. Geltis had sent him.

On August 2 a supervisor and inspector from the San Francisco Health Department gave notice in writing to defendant Geltis ordering him to replace the windows within twenty-four hours. Geltis ignored this notice and on August 10 this action was filed. Not until August 16 were the windows finally replaced.

The case was tried without a jury and the court gave judgment against defendants Ernstan and Geltis for $500 actual damages and against defendant Geltis alone for $2,000 exemplary damages. Both defendants appeal.

[1] The complaint joined in one count allegations of damage to person and property. This was proper under the last clause of Code of Civil Procedure section 427. Phillips v. Gonzales, 44 Cal.App.2d 267, 270, 112 P.2d 272.

[2] The evidence was ample to sustain the award of $500 for actual damages. There is evidence that while the windows were out it was foggy, the apartment was windswept and everything was damp and wet. The plaintiffs both caught colds and were rendered "nervous and jittery." The discomfort and inconvenience to which plaintiffs were subjected and the nervousness and mental and physical suffering attendant thereon are sufficient to support the award of $500 without possibility of question.

[3] The fact that no damage to property was proved with sufficient certainty to support an award for that item is unimportant in this case. The only damage to property alleged was to certain books and the proof in this regard failed to establish the amount of such damage. Although the finding of damage was a blanket one by reference to the complaint and may be deemed erroneous insofar as it purported to include damage to the books, the error is not prejudicial. We must assume that the trial judge made the award primarily for the injuries to the persons of the plaintiffs and any amount which might conceivably have been included for damage to the books would necessarily be so small as to be disregarded under the rule of de minimis.

[4,5] As to the punitive damages against appellant Geltis it is argued that there is no evidence that he directed or was responsible for the removal of the windows. Conceding this, the evidence that he lived in the same building, was given notice to replace the windows on August 2 and did not in fact do so until August 16, two weeks later and six days after action filed, is overwhelming to support a finding of full ratification. It shows a particularly heartless and aggravated desire on his part to oppress and inconvenience his tenants after notice clearly brought home to him of all the facts. It is Hornbook law that a defendant may become liable for punitive damages by subsequent ratification of the act of another as well as by precedent direction of that act. Deevy v. Tassi, 21 Cal.2d 109, 125, 130 P.2d 389; 4 Restatement of the Law of Torts, sec. 909(d).

[6] The claim that the punitive damages are out of reasonable proportion to the actual damages awarded is untenable. The conduct of appellant Geltis after knowledge of the facts in failing to replace the windows was almost unbelievably wanton and brutal. Of the cases cited by appellant Geltis to support the claim of unreasonableness we note that in two of them, while the appellate court reduced the punitive damages allowed, even after reduction their ratio to the actual damages was greater than in the case here presented. In Plotnik v. Rosenberg, 55 Cal.App. 408, 203 P. 438 where the actual damages were only $15.60 the exemplary damages were reduced on appeal to $284.40. In Wilkinson v. Singh, 93 Cal.App. 337, 269 P. 705 the actual damages were $70 and on appeal the exemplary damages were reduced to $300.

[7] The law establishes no fixed ratio by which the excessiveness of exemplary damages in relation to the actual damage allowed is to be measured. 8 Cal.Jur., Damages, sec. 109, pp. 866–867. On the facts of this case we cannot find the allowance of $2,000 unreasonable.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

91 Cal.App.2d 687

DENMEAD v. GRAY et al

Civ. 16893.

District Court of Appeal, Second District, Division 2, California.

May 6, 1949.

1. Appeal and error ⚷989

When a finding of fact is attacked on ground that there is not any substantial evidence to sustain it, power of an appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support finding of fact.

2. Joint adventures ⚷1.15
Principal and agent ⚷23(5)

Evidence sustained finding that defendants did not enter into any agreement with plaintiff whereby they were to purchase any property with her jointly or as her agent, and plaintiff was not entitled to recover alleged secret profits made by defendants in purchasing property and reselling it to plaintiff for a greater amount.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Ruth Denmead against Mrs. L. B. Gray and Grace Tate to recover secret profits. From a judgment for the defendants, plaintiff appeals.

Affirmed.

Louis C. Spiess, Jr., of Los Angeles, for appellant.

John D. Gray, of Los Angeles, for respondent Mrs. L. B. Gray.

William Ellis Lady, of Los Angeles, for respondent Grace Tate.

McCOMB, Justice.

This is an appeal by plaintiff from a judgment in favor of defendants after trial before the court without a jury in an action to recover secret profits made by defendants while allegedly acting as agents for plaintiff.

Facts

Plaintiff purchased a piece of property known as 602 South New Hampshire Street, Los Angeles, for the sum of $28,000. She contended at the time of the trial that defendants were acting as her agents to purchase the property and that they in effect knew that the property could be purchased from the owner for $22,000, and purchased it at the latter price and resold it to plaintiff for the sum of $28,000, thereby making a secret profit. Defendants denied that they were acting as agent for plaintiff and the trial court found as follows: "That it is untrue that defendants Mrs. L. B. Gray and Grace Tate were the agents of plaintiff during the times mentioned in plaintiff's complaint."

Question

Was there substantial evidence to sustain the trial court's finding that defendants were not the agents of plaintiff at the time she purchased the real property above mentioned?

[1] This question must be answered in the affirmative. When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. Estate of Isenberg, 63 Cal. App.2d 214, 217, 146 P.2d 424.

[2] Applying this rule to the facts of the present case, an examination of the record discloses testimony of each of the defendants that they did not enter into any agreement with plaintiff whereby they were to purchase the property jointly with her or as her agent. Such testimony sustains the above questioned finding of fact. Therefore, plaintiff failed to establish one of the essential allegations of her complaint and the judgment was properly entered in favor of defendants.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

91 Cal.App.2d 434

ORTON et al. v. EMBASSY REALTY ASSOCIATES, Inc.

Civ. 16506.

District Court of Appeal, Second District, Division 1, California.

April 26, 1949.

Rehearing Denied May 13, 1949.

As Modified May 18, 1949.

Hearing Denied June 23, 1949.

1. Corporations 🔑118

Under contract for sale of capital stock providing that sellers were to be entitled to additional purchase price if sellers secured before stated date an acceptable lessee, buyer impliedly agreed to hold property available for lease until stated date, and upon leasing property buyer became liable for damages by preventing performance by sellers. Civ.Code, § 1641.

2. Contracts 🔑168, 314

Each party to a contract impliedly agrees not to prevent the other party from performing or to render performance impossible by any act of his own, and prevention of performance is equivalent to repudiation, and party who prevents fulfillment of condition of his own obligation commits a breach and cannot rely on such condition to defeat his liability.

3. Evidence 🔑461(1)

Where contract for sale of capital stock provided that buyer would pay installments if no "liabilities" undisclosed by attached balance sheet had developed by deferred payment dates, and sellers warranted that balance sheet was true, parol evidence as to intention of parties to explain meaning of quoted word was inadmissible, since attachment of balance sheet indicated intent that sheet would represent corporation's condition according to standard accounting practice.

4. Evidence 🔑448

When words of doubtful meaning are used in a writing, parol testimony is admissible to show common meaning of words used, but it is not admissible to show private understanding of parties as to meaning of such words.

5. Corporations 🔑116

Under contract for sale of capital stock providing buyer would pay installments if no liability undisclosed by corporation balance sheet had developed by deferred payment dates and seller warranted that attached balance sheet was true, buyer could deduct from deferred payment undisclosed unearned rents collected in advance by sellers for property of the corporation prior to the sale.

◆

Appeals from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Hubert E. Orton and G. N. Ponnay against the Embassy Realty Associates, Inc., a corporation, for damages for breach of a contract for sale of stock and for money alleged due as payment under the contract. From an order granting a nonsuit, plaintiffs appeal, and, from the judgment, both plaintiffs and defendant appeal.

Attempted appeal from order dismissed, and judgment reversed.

Harvey A. Harkness, of Los Angeles, for appellants and respondents Hubert E. Orton and G. N. Ponnay.

Gibson, Dunn & Crutcher, of Los Angeles (Gerold C. Dunn, of Los Angeles, of counsel), for appellant and respondent Embassy Realty Associates, Inc.

WHITE, Presiding Justice.

Plaintiffs' complaint herein contained two causes of action: The first, for damages, alleged a breach of contract by the defendants which made it impossible for plaintiffs to perform thereunder, and the second sought a sum of money alleged to be due as payments under the same contract. As to the first cause of action a nonsuit was granted, and on the second, judgment was entered in favor of plaintiffs for the sum of $952.75. Plaintiffs have appealed from the judgment against them pursuant to the nonsuit on the first cause of action, and defendants have appealed from the judgment against them on the second cause of action.

It appears that in October, 1945, plaintiffs were the owners of all the issued capital stock of Orlando Realty Company, the assets of which consisted almost entirely of real estate. On or about October 4, 1945, the parties entered into a written contract for the sale of all the stock to Embassy Realty Associates. Because of a difference of opinion as to the value of one of the Orlando properties known as 1501-25 East First Street, there was added to the contract a provision entitled "Contingent Addition to Purchase Price," the full text of which appears below.* In substance, it provided that should the sellers, on or before September 1, 1946, secure an acceptable lessee for a term of ten years or more at a rental of $10,000 or more per year, the purchase price would be increased by certain stated amounts depending on the amount of the annual rental under the lease.

In their first cause of action plaintiffs set forth the contract and alleged that in June, 1946, defendant sold the real property known as 1501-25 East First Street and thereby prevented plaintiffs from leasing said property and becoming entitled to the additional payment; that defendant, by rendering performance by plaintiffs impossible, damaged plaintiffs in the sum of $6,000.

The answer admitted the making of the contract and the unconditional sale of the property, but denied the remaining allegations of the complaint, and set up as an affirmative defense that the plaintiffs were real estate brokers; that the property was sold through one Max Jolles, a broker associated with plaintiffs; that plaintiffs intentionally or by want of ordinary care led defendant to believe that Jolles was acting as plaintiffs' agent in proposing the sale; that upon information and belief plaintiffs profited from the transaction through Jolles, and were estopped to claim a breach of the contract by defendant. As a second defense it was alleged that plaintiffs conferred actual authority upon Jolles to act as their agent in proposing the sale.

As to the first cause of action, appellants assign error "in refusing to accept testimony on intention; in rejecting offers of proof of value; in interpretation of the contract; and in granting a nonsuit." As to the first point, the record discloses that the trial court did accept evidence of the conversations of the parties in the negotiations which led up to the insertion of the provisions in the contract which are here under discussion. In connection with its assignment of errors appellants assert that the intention of the parties was that if the sellers could "demonstrate" greater value of the property by procuring a suitable lease, then they would be entitled to the added consideration.

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* "(19) The parties hereto have agreed that in case the property known as 1501-25 East First Street is leased on or before September 1, 1946, for a term of ten (10) years or longer and for a rental of Ten Thousand Dollars ($10,000) or more per year, the purchase price hereunder shall be increased as follows:

"If the annual rental is Ten Thousand Dollars ($10,000) or more per year, and if no leasing brokerage is involved, Thirty-five Hundred Dollars ($3500.00) additional shall be paid the Sellers; or if the annual rental is Eleven Thousand Dollars ($11,000) or more per year, and if no leasing brokerage is involved, Five Thousand ($5,000) additional shall be paid the Sellers; if the annual rental is Twelve Thousand Dollars ($12,000) or more per year, and if no lease brokerage is involved, Six Thousand Dollars ($6,000) additional shall be paid the Sellers. In all three cases the amount stated to be paid to Sellers shall be in addition to the purchase price of $115,000 herein provided. If another broker than Embassy Realty Associates, Inc., is paid a leasing commission, an amount equal to one-half of Realty Board rate of commission for such lease shall be deducted from the aforesaid addition to purchase price.

"The sellers are to have the right as the agents of the Buyer until September 1, 1946 to negotiate but not to conclude a new lease for the aforesaid property and to submit such lease for the approval and execution of Orlando. If the terms of the lease so submitted are acceptable to Orlando and if the annual rental is $10,000 or more and if the lessee is either the Kansas City Macaroni and Importing Company or its subsidiary, Pacific Macaroni Company, with the guarantee of the parent company attached, or if the lessee is some other concern of equal responsibility or if in lieu thereof the lessee is a less responsible concern acceptable to the Buyer with a deposit of six (6) months rent in advance as security, then such lease submitted by the Sellers shall either be accepted and executed by Orlando or the Sellers shall be entitled to the additional purchase price which they would have been entitled to had it been so accepted and executed.

"In any case payment for the contingent addition to the purchase price aforementioned, if any, shall be made promptly upon execution of lease but in no case unless such lease is either executed or submitted for execution on or before September 1, 1946."

The foundation of appellants' case on the first cause of action is that by their act in selling unconditionally the property prior to September 1, 1946, the defendants effecually prevented performance by the plaintiffs of the condition, to-wit, securing a satisfactory lessee at $10,000 per year, which would entitle them to the additional "contingent addition to purchase price."

The defense position is that all that plaintiffs had was an agency, as brokers, to negotiate a lease, and that such an agency, unless accompanied by an exclusive right to sell or lease in the agent, leaves the owner free to make a sale or lease himself, without liability for a commission. Merkeley v. Fisk, 179 Cal. 748, 178 P. 945; Snook v. Page, 29 Cal.App. 246, 155 P. 107. Defendants contend that "to become entitled to what was, in effect, a commission, plaintiffs must first have presented to the defendant a lessee meeting the requirements of Paragraph 19, or there must have been an acceptance of a lessee produced by either another agent or by the defendant, itself." In other words, the plaintiffs must allege and prove that prior to the sale by defendant they had produced an acceptable lessee ready and willing to enter into a lease.

[1] It is our view that the analogy drawn by defendant between the contract situation here presented and that of a simple agency where a broker may not recover unless he procures a purchaser or lessee before the property is disposed of by the principal, is not well founded. It is true that the plaintiffs here were authorized as agents to negotiate a lease. They were not, however, to receive a commission as such agents for procuring a lessee, but were to receive an *addition to the purchase price* if a suitable lease was entered into or tendered before September 1, 1946, regardless of who negotiated it. The contract recites that the consideration for the sale of the stock of Orlando is $115,000 "plus such amounts as contingent additions to said purchase price as are hereinafter provided and minus such amounts as contingent deductions from said purchase price as are hereinafter provided." From a consideration of the contract itself and the intention of the parties as indicated by its terms, without resort to extrinsic evidence, it must be held that the buyer impliedly agreed to hold the property available for lease until September 1, 1946. To hold otherwise would be to do violence to the expressed intention of the parties that the sellers were to have until September 1, 1946, in which to bring about the contingency upon which the enhancement of the purchase price depended. A contract should be construed so as to give effect to all its provisions, if reasonably practicable. Civ. Code, sec. 1641. If defendant's position is correct, then it could with impunity have sold the property immediately upon acquiring it, thus giving plaintiffs no opportunity at all to perform.

[2] By putting it out of its power to enter into a lease, the defendant effectively prevented performance by plaintiffs. Obviously, the plaintiffs could not, without being guilty of misrepresentation, secure from a responsible party a bona fide offer to lease property which the defendant no longer owned.

"Each party to a contract impliedly agrees not to prevent the other party from performing or to render performance impossible by any act of his own." 17 C.J.S., Contracts, § 468, page 967. Prevention of performance is equivalent to repudiation. Woodruff v. Adams, 134 Cal.App. 490, 25 P.2d 529. In Bewick v. Mecham, 26 Cal.2d 92, 99, 156 P.2d 757, 761, 157 A.L.R. 1277, the court said:

"Each party to a contract has a duty to do everything that the contract presupposes that he will do to accomplish its purpose, Epstein v. Gradowitz, 76 Cal.App. 29, 32, 243 P. 877; see Williston, Contracts, 1937 rev. ed., sec. 1293, and a duty not to prevent or hinder performance by the other party. Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 825, 129 P.2d 383; see Williston, op.

cit., sec. 1293 A; 4 Cal.Jur. 10-Yr. Supp., 1943 rev., 142. * * * A party who prevents fulfillment of a condition of his own obligation commits a breach of contract, Alderson v. Houston, 154 Cal. 1, 13, 96 P. 884; Pacific Venture Corp. v. Huey, 15 Cal.2d 711, 717, 104 P.2d 641; Carl v. Eade, 81 Cal.App. 356, 358, 253 P. 750; Rest., Contracts, § 315, and cannot rely on such condition to defeat his liability. Pacific Venture Corp. v. Huey, supra; Carl v. Eade, supra, 13 C.J. 647; 17 C.J.S., Contracts, § 468, page 966; 12 Am.Jur. 885."

We come now to a consideration of the appeal taken by defendant from the judgment on the second cause of action. Paragraph 17(f) of the contract of sale contained the provision that the buyer will pay to the sellers the deferred sum of $24,400 owing on the purchase price in two equal yearly installments "provided no liabilities undisclosed by the Balance Sheet have developed by said deferred payment dates." It appears that among the properties owned by the Orlando company were two business properties occupied by lessees under written leases which provided for prepayment of a portion of the rent. That is, at the time of the sale the Orlando company had already received from one lessee the rent for the last three months of one lease, or $675, and the rent for the last month of the other lease, in the sum of $250. The fact that the sellers had received in advance rent which ordinarily would be payable near the end of the term of the leases and thus be received by the buyer was not disclosed by the balance sheet. The balance sheet was attached as an exhibit to the contract of sale, and the sellers warranted its correctness. Upon discovering, shortly after the sale, which was consummated as of November 15, 1945, that these prepayments had been made, defendant buyer claimed the right to deduct them from the next installment due on the purchase price and did in fact deduct the sum of $925 from the purchase price installment due May 15, 1946. The trial court found only that under this provision of the contract defendants were indebted to plaintiffs in the sum of $952.75, with interest, and rendered judgment accordingly

Defendant contends that the prepayments should have been shown on the balance sheet, according to good accounting practice, as "liabilities," and further that the phrase "liabilities undisclosed by the balance sheet" is not ambiguous and the court erred in admitting parol evidence concerning it. Plaintiffs argue that the prepayments should not appear on the balance sheet because the books of the Orlando Realty Company were kept on a "cash" basis; that the meaning of "liabilities" must be determined "not by looking in the dictionaries, but by reading the context, reviewing the transaction, and taking note of the subsequent conduct of the parties who used the equivocal words." Erickson v. Grande Ronde Lumber Co., 162 Or. 556, 92 P.2d 170, 174, 94 P.2d 139. Defendant introduced expert testimony that a proper balance sheet taken from books kept on the "accrual" basis would show unearned rent as a liability, and that in a balance sheet based on books kept on a "cash" basis the fact that the assets included cash received as rent but not yet earned should be shown by a footnote.

Plaintiffs urge that the provisions of the contract clearly show that the items of unearned rent were not intended to be included in the phrase "liabilities undisclosed by the balance sheet"; that the terms of the contract show that what was meant was liabilities or claims of creditors or third parties against Orlando Realty Company; and that the trial court properly admitted parol evidence to determine the meaning of the phrase. In Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, at page 770, 128 P.2d 665, at page 676, it was said: "'Liability' is a term which is frequently construed in the light of the surrounding circumstances to determine if it refers to all obligations accrued and contingent or only to some particular liability which the parties had in mind. * * * Relevant to the consideration of the parties' purpose in thus incorporating in their contract a provision manifestly susceptible of varied shades of meaning is the apt observation of Mr. Justice Holmes: 'A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.' " The trial court admitted evidence that Mr. Maddock, president of defendant buyer, examined the two leases in question before the contract was executed and then discovered the prepayments of rent, and also admitted testimony by plaintiffs' bookkeeper that shortly after the contract was signed she advised an officer of defendant that the prepayments did not appear on the balance sheet.

[3-5] We are in accord with defendant's contentions. The parties to this contract used the device of a balance sheet to show the financial condition of the corporation the stock of which was being transferred. It cannot be disputed that proper accounting practice requires that unearned rent be shown as a liability on the balance sheet or be indicated in some way. The buyer was not taking over the corporation "as is," but in reliance upon warranties contained in the contract of sale, whereby the sellers warranted that all the facts, figures and statements in the documents attached to the contract were true; that the liabilities, exclusive of capital and surplus, shown by the balance sheet represented "the entire liabilities except capital liabilities of Orlando as at August 31, 1945" (with exceptions not here pertinent); and "that the financial condition of Orlando at November 15, 1945, the date of settlement hereinafter stated, *will not be less favorable* than that reflected in the Balance Sheet." In warranting the correctness of the balance sheet, the sellers must be held to have warranted its correctness as a statement of condition according to proper accounting practice. The fact that the sellers' books were kept on a "cash" rather than an "accrual" basis is of slight importance. The balance sheet itself purports to reflect the condition of the corporation on an "accrual" basis. It carries as an asset the item "prepaid insurance," and as liabilities "employee deductions," "deferred income," and "accrued taxes." We find nothing in the contract to indicate that the parties meant the word "liabilities" to mean something different from its usual accounting meaning. On the contrary, the use of the accounting device of a balance sheet attached as an exhibit to the contract indicates that the parties intended the balance sheet to represent truly the condition of the corporation according to standard accounting practice. There being no ambiguity or uncertainty to be explained, admission of parol evidence as to the intention of the parties was error. The language used in Watson v. Fisher, 79 Cal.App. 621, 250 P. 577, 578, is here applicable:

"The rule regarding the admission of parol testimony covering the prior negotiations and understandings of the parties to a written contract is also well settled. When words of a doubtful meaning are used in a writing, parol testimony is admissible to show the common meaning of the words used, but it is not admissible to show the private understandings of the parties as to the meaning of such words. This rule is aptly stated by Mr. Justice Holmes in Goode v. Riley, 153 Mass. 585, 586, 28 N.E. 228, as follows: 'You cannot prove a mere private convention between the two parties to give language a different meaning from its common one. * * * It would open too great risks if evidence were admissible to show that when they said five hundred feet they agreed it should mean one hunderd inches, or that Bunker Hill Monument should signify the Old South Church * * * and artificial construction cannot be given to plain words by express agreement. * * *.' "

So here, where the contract shows that the word "liabilities" was used in an accounting sense, parol evidence may not be admitted to show that the parties to a contract, carefully drawn after prolonged negotiations, used the word in a sense wholly inconsistent with the aim of showing the financial condition of the corporation by means of a balance sheet.

The attempted appeal from the order granting defendant's motion for a nonsuit is dismissed. The judgment for defendant entered upon the order granting a nonsuit on the first cause of action is reversed. The judgment for plaintiff on the second cause of action is reversed. The parties to bear their own costs on appeal.

DORAN, J., concurs.

DRAPEAU, J., did not participate.

POWELL et al. v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 16666.

District Court of Appeal, Second District, Division 1, California.

April 25, 1949.

Rehearing Denied May 13, 1949.

Hearing Granted June 23, 1949.*

1. Automobiles 🔑224(7)

Statute prohibiting persons from riding on any portion of vehicle not designed or intended for use of passengers was primarily intended to prevent persons from hanging on outside portions of vehicles or from riding in positions which would add to the hazards which might normally be expected in the ordinary operation of vehicles, or in event vehicle was struck by other vehicles. Vehicle Code, § 596.5.

2. Railroads 🔑327(12)

Where decedent was an employee of driver of truck which collided with train, and decedent was riding in truck at time of collision in space intended for merchandise, decedent was not contributorily negligent so as to preclude recovery for his death under statute prohibiting persons from riding on any portion of vehicle not designated or intended for use of passengers, but providing that prohibition is not applicable to persons riding within vehicle within space intended for merchandise. Vehicle Code, § 596.5.

3. Negligence 🔑93(6)

The negligence of the driver of an automobile is not imputable to passenger where the passenger had nothing to do with control or management of automobile, as where victim of fatal collision was riding with his employer who drove the automobile.

4. Negligence 🔑93(6)

In action for death of decedent arising from collision between train and truck in which decedent was riding and which was driven by decedent's employer, alleged contributory negligence of employer would not be imputable to decedent so as to preclude recovery for decedent's death.

5. Railroads 🔑312(4), 327(2)

In action for injuries arising out of collision between vehicle and train, the question as to whether railway company or driver of vehicle was responsible for collision is to be determined by reference to facts which disclose opportunity that the actors had, respectively, to see and avert the collision, and responsibility is attributable to the one who was in the better situation to anticipate and prevent its occurrence.

6. Railroads 🔑309
Street railroads 🔑90(1)

Where driver or passenger of automobile contends that collision between automobile and train or streetcar was caused by mode of operation of train or streetcar, railway company can be held liable for plaintiff's resulting injuries only on a showing that engineer or motorman was responsible for happening of calamity, that is, he ought to have foreseen and averted it.

7. Railroads 🔑350(6)

In action for death of decedent arising out of collision between train and truck in which decedent was a passenger, violation by motorman of defendant's train of operating rules of defendant railway company was not negligence per se, but was a circumstance which could be considered in determining negligence of motorman.

8. Railroads 🔑320, 337(1)

Motorman of interurban train who violated operating rule by releasing air when train was 150 feet from crossing and starting to coast at speed of 25 miles per hour notwithstanding motorman saw truck enter right of way without stopping not less than 10 feet from first rail of track as required by statute, and by failing to apply brakes until train was 75 feet from crossing, was negligent as a matter of law and his negligence was the proximate cause of the collision with truck which failed to stop because of defective brakes. Vehicle Code, § 575.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by William S. Powell and Zada M. Powell against Pacific Electric Railway Company, a corporation, and Wilmer I. Kivett, for death of plaintiffs' son arising out of collision between truck in which plaintiffs' son was riding and one of defendant's trains. From an adverse judgment, plaintiffs appeal.

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* Subsequent opinion 216 P.2d 448.

Judgment reversed and cause remanded.

Charles A. Thomasset, of Los Angeles, for appellants.

C. W. Cornell, O. O. Collins, Malcolm Archbald, John R. Allport, and John H. Gordon, all of Los Angeles, for respondent.

PER CURIAM.

This is an appeal by plaintiffs from a judgment on the verdict in open court, in an action brought by them to recover damages for the alleged wrongful death of their minor son, Robert H. Powell.

The record consists of the judgment roll and a settled statement from which it appears that the death of said minor resulted from a collision between a train of respondent railway company and a truck operated by one Lester D. Dewey under the following circumstances:

At the time of the accident, the minor decedent was employed by Mr. Dewey and was being transported from his home to the employer's place of business.

The collision occurred at 92nd Street in the City of Los Angeles where it crosses the private right of way of respondent. At that point 92nd Street is 30 feet wide; the right of way is more than 100 feet wide, and is bordered on the east by Graham Avenue which is 32 feet wide with curbs on both sides. The right of way has six sets of rails. At the trial the first four sets were designated from east to west as A, B, C and D. The accident occurred when a southbound through train traveling on track C collided with the truck which was crossing the right of way from east to west on 92nd Street.

The easterly rail of track C is 55 feet from the westerly curb of Graham Avenue. The truck made a boulevard stop on the easterly side of Graham Avenue, crossed that street, and entered the right of way, crossing A and B tracks without stopping until it reached track C where it was struck by the train. The accident occurred at 1 p. m. on August 28, 1945. The weather was clear.

The truck was a 1936 Diamond T, two-ton, flat bed, open body model with no stakes, sides or roof, and was regularly used to transport merchandise by the owner, who was in the furniture business. At the time in question, decedent and two other boys were riding on the truck platform behind the cab; decedent sitting near the left-hand side of the platform with his back to the cab, the other two boys sitting between him and the right edge of the platform. The impact of the collision hurled decedent from the left edge of the platform over his companions and the right edge of the platform in such a fashion that he was struck by the train and sustained injuries from which he subsequently died. The point of impact was established as seven feet south of the north curb of 92nd Street and 54 feet west of the west curb of Graham Avenue.

The motorman, defendant Wilmer I. Kivett, testified in substance that, as he approached 92nd Street, he was operating two cars; that it was shortly after noon and the sun was shining, and for a distance of 2,000 feet north of the scene of the accident, his view of the intersection was unobstructed; that there was no traffic ahead of him and none crossing the intersection; that when he was about 600 feet away from the scene of the accident he started braking and continued braking for a distance of 400 feet, thus reducing his speed to 25 miles per hour; that he released his air and started coasting when he first saw the truck, and continued to coast until he was about 75 feet from the scene of the actual collision where he applied his emergency brake; that he was not braking at all for a distance beginning at a point 200 feet north of the intersection to a point approximately 75 feet from the intersection; that when he first saw the truck it was on the first rail of the tracks denominated A; that while he was approaching he saw the truck cross Tracks A and B without stopping; that at 25 miles per hour he could have stopped his train within 250 feet and that he did bring it to a stop about 20 feet south of the south curb of 92nd Street.

It was stipulated that this witness testified as follows at the Coroner's Inquest held seven days after the accident: "I was southbound and had pinched down to the company speed of 25 miles an hour or less for the crossing and about 150 feet from the crossing I saw the truck enter the right-of-way. I thought the truck was going to stop and I released my air and at that time I was going about 25 miles an hour. Then, I saw the truck wasn't going to stop so I put my train into emergency about 75 feet from 92nd Street and the truck rolled onto the private right-of-way and the left front corner of the car caught the right front wheel and fender of the truck throwing it around and off the right-of-way." That when this witness first saw the truck it was at the west curb line of Graham Avenue just entering the right-of-way and his train was 150 feet north of 92nd Street; that he thought the driver of the truck was going to stop, but was unable to tell if the driver had applied the brakes.

Lester D. Dewey, the driver of the truck, testified that his son and the two Powell boys were "in the frame of the truck behind the cab, sitting on the truck"; that he was travelling west on 92nd Street; that he made the boulevard stop at Graham, continued going straight across Graham and was "headed into the Pacific Electric right-of-way" at the 92nd Street crossing; that he was approximately halfway across Graham Avenue when he first saw the train which was then about 900 feet away, traveling at a speed of 50 miles per hour; that when he made the boulevard stop at Graham his brakes were operating all right; that he could not see the train from the boulevard stop because his view was cut off by a building. In answer to the question: "And at the seeing of the train the first time until the collision, did you stop?" the witness stated: "I didn't come to a flat stop. I tried to make a stop and I seen I couldn't beat the train across because my brakes failed me.

"Q. You kept right on going? A. Yes, very slowly. I had the emergency back. That didn't stop the truck. My cylinder on the right back wheel failed. * * *

"Q. On this occasion, after making the boulevard stop, and in making the stop, did you apply your brakes? A. Yes, after I saw the train coming, and saw I didn't have a chance to beat it, I applied the brakes.

"Q. What happened? A. Nothing. I kept rolling. I pulled the emergency back, but the emergency wasn't good enough to stop it before it got on the track. It got up there a little ways, just enough to catch the right front wheel of the front end of the truck.

"Q. As you approached the point of collision, did you make an estimate of the speed of the train at any time? A. Well, at the time the train actually hit the truck, he probably wasn't going over fifteen miles an hour because he had already used his brakes. That would slow the train down.

"The Court: How fast were you going then. The witness: I was already stopped. * * * I had already come to a stop at the time the train hit, he was slowing down. * * * When I first saw him, the train was rolling a pretty good rate of speed. I don't know how fast. I would say—I guess it was around fifty miles an hour when I first saw the train. That is the reason I began to stop. * * *

"Q. Now, had you had occasion to use your brakes before you made your boulevard stop there? A. Yes. * * * I backed out of my driveway, and when I turned West off of Grandee, out of Elm.

"Q. You all started together? A. That is right.

"Q. From your yard, with the children? A. Yes, sir; that is right.

"Q. Then the first stop you made after that, you backed out and had to stop and your brakes worked all right? A. Yes.

"Q. Your foot and your hydraulic brakes worked; you didn't have to use your emergency brake? A. No, they worked perfect."

That he used his footbrakes three times in the distance of three blocks and they worked, but beyond the boulevard stop the brake had no effect at all; that when he put his foot on the pedal, the pedal went clear to the floor. "The cylinder busted. It only takes an instant for it to go off. You can have brakes one minute and the next minute you don't. * * * That is a feature of hydraulic brakes." That when he came to a complete stop the back wheels of the truck were on Track A and he realized that the impact was inevitable.

At the time of the accident respondent had in full force and effect certain train operating rules and regulations reading in part as follows: "720 (b) In complying with speed regulations at highway crossing, speed of train will be reduced to speed applying a sufficient distance in advance so that train will be allowed to coast on approach to crossing, to enable full braking power being obtained in emergencies. (c) After speed of train has been reduced to speed applying and there is no vehicle or other conveyance seen approaching that will conflict, brakes may then be released and train allowed to coast not to exceed speed applying at crossing, and except where the speed applies over the crossing when traffic conditions make it safe to do so power may be applied entering the crossing. (d) The purpose of this procedure is to have train under such control that stop can be made before reaching crossing in case of possible obstruction and to have brake pipe and auxiliary reservoir fully charged so that the highest degree of brake efficiency can be obtained if an emergency arises."

These rules were admitted in evidence over the objection of respondent that they were incompetent.

With reference to damages suffered by appellants by reason of the death of their son, it was testified that they incurred or paid medical and funeral expenses approximating $1200; also that deceased was affectionate toward them, participated in discharging household duties, was endowed with promising musical talent and was an outstanding student.

Appellants here urge that they are entitled to a judgment as a matter of law, for the reasons that:

(a) There is no evidence of any contributory negligence on the part of appellants or of the decedent;

(b) That respondent railway company is liable, because its motorman was negligent and his negligence contributed to the happening of the accident and the death of appellants' son;

(c) That the testimony of the motorman is an admission of liability.

[1] On the question of contributory negligence of decedent, respondent calls attention to section 596.5 of the Vehicle Code providing that "No person shall ride on any vehicle upon any portion thereof not designed or intended for the use of passengers. This provision shall not apply to an employee engaged in the necessary discharge of a duty or to persons riding within vehicle bodies in space intended for merchandise." In construing this section in Albania v. Kovacevich, 44 Cal.App.2d 925, 928, 113 P.2d 251, 253, the court stated: "Doubtless this section was primarily intended to prevent persons from hanging on the outside portions of vehicles or from riding in positions which would add to the hazards which might normally be expected in the ordinary operation of such vehicles, or in the event such vehicles were struck by other vehicles."

[2] In the instant cause it was shown that the truck was customarily used for the delivery of merchandise which was placed on the truck bed, and also that decedent was riding "in the frame of the truck behind the cab, sitting on the truck." It was not disputed that decedent was an employee of the driver of the truck, and it is obvious from the testimony of the latter that said decedent was riding in the space intended for merchandise.

[3, 4] Moreover, as stated in 2 Cal.Jur. Supp. 657, sec. 427: "* * * the 'negligence' of the driver is not 'attributable' or 'imputable' to the plaintiff. This is the accepted rule, apparently, where it appears that the plaintiff had nothing to do with the control or management of the vehicle * * * as where it appears that the victim of a fatal collision was riding with his employer who drove the vehicle." The settled statement herein recites that "there was no evidence that the decedent ever saw the train."

Each of the opposing parties charges that the negligence of the adversary operator was the sole proximate cause of the accident.

[5, 6] In collisions between vehicles and trains, the "question as to whether the defendant company or the driver of the vehicle was responsible for the collision is

to be determined by reference to the facts which disclose the opportunity that the actors had, respectively, to foresee and avert the collision. Responsibility is attributable to the one who was in the better situation to anticipate and prevent its occurrence. Where the plaintiff contends that the collision was caused by the mode of operation of the train or street car, the defendant railroad company can be held liable only on a showing that the engineer or motorman was responsible for the happening of the calamity—that is, that he ought to have foreseen and averted it." 2 Cal.Jur.Supp. 638, sec. 414.

Again in the same work (2 Cal.Jur. Supp.), p. 649, sec. 421, it is stated: "A recovery is sustainable where the evidence shows that the plaintiff's vehicle was stopped or stalled on or adjacent to the street car tracks, and the defendant may be held liable where it is shown that the plaintiff turned his vehicle upon the tracks in advance of the street car—and even in case of a head-on collision."

It is established by the record herein that the driver of the truck stopped at the boulevard stop on the east side of Graham Boulevard where his view of the tracks was obstructed by a building; that he shifted into second gear and was proceeding at a speed of eight miles an hour across Graham; that when he reached the center thereof he first noticed the approaching train which was then 900 feet to the north of the intersection; that when he first saw the train he thought he "might have time to beat the train across" but he then "saw it was traveling pretty fast" and that he had better stop; that with the front of the truck on track "A" he applied his brakes, but because of failure thereof he was unable to stop and the front of the truck rolled onto track "C" before he could control it with the emergency brake.

In an annotation in 14 A.L.R. 1339, reference is made to a similar situation: "It will be observed that in the reported case, Puhr v. Chicago & N. W. R. Co. (171 Wis. 154, 176 N.W. 767) [14 A.L.R. 1334], it was decided that if one, knowing of an approaching train, drives his automobile toward a railroad crossing with the intention of stopping to let the train pass, he would not be guilty of any negligence if, upon making a reasonable effort to stop, he discovered too late that his brakes failed to work, so that the machine went upon the track in front of the train; but that if the driver had prior knowledge of the imperfect condition of the stopping mechanism of his car, it was his duty to approach the track cautiously, and at a rate of speed that would enable him to bring the car to a stop in its then condition, as known to him, before reaching the zone of danger; and that if, with knowledge of such defective condition, he failed to approach the track with that degree of caution, he was guilty of more than a slight want of ordinary care."

As hereinabove recited, the motorman testified that he had a clear and unobstructed view of the intersection for a distance of 2,000 feet to the north thereof; that when he was about 600 feet from the scene he started braking and continued to do so for a distance of 400 feet, thus reducing his speed to 25 miles an hour; that when he was about 150 feet from the crossing he saw the truck enter the right-of-way; that he then released his air and started coasting and did not again apply his brakes until he was about 75 feet from the north curb of 92nd Street; that he stopped the train about 20 feet south of the south curb of 92nd Street, to-wit, within a distance of approximately 125 feet.

The situation which confronted the motorman of respondent railway was one anticipated by operating rule 720, above recited, to the effect that the motorman may not release his brakes on approaching an intersection where there is another vehicle seen approaching which may cause a conflict. Had he continued to brake his train instead of releasing the air when he saw the truck enter the right-of-way, the accident could have been avoided.

Appellants also point out that under section 575 of the Vehicle Code, the truck was required to stop not less than 10 feet from the first rail of the tracks; and that in full view of the motorman and to his knowledge and admitted observation, the truck did not stop, but continued to cross the tracks A and B to the point of collision. In other words, when the motorman released the air and started to coast, the truck was in violation of section 575, supra, which should have been a warning to the motorman to exercise due caution to prevent a collision.

[7] With respect to appellants' complaint that the court erred in instructing the jury on the legal effect of respondent's operating rule 720, such instruction was not prejudicial to appellants' cause. The violation of such rules, while not negligence per se, is a circumstance to be considered. Gett v. Pacific G. & E. Co., 192 Cal. 621, 221 P. 376.

[8] In the circumstances presented by the record herein, it is clear that the motorman of respondent's train was in a better position than the driver of the truck to foresee and avert the collision, and his act of releasing the air and failing to apply the brakes until he was within 75 feet of the intersection constituted negligence as a matter of law and the proximate cause of the accident.

For the reasons stated, the judgment is reversed and the cause remanded for a determination of the amount of damages sustained by appellants.

DRAPEAU, J., did not participate.

WEST KEY NUMBER SYSTEM

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91 Cal.App.2d 501

PEOPLE v. JONES.

Cr. 4289.

District Court of Appeal, Second District, Division 3, California.
April 27, 1949.

1. Criminal law 🔑1037(1, 2)

Where no objection was made when district attorney in his argument to jury referred to defendant as a pervert, and references were not assigned as misconduct, and court was not requested to instruct jury to disregard references, defendant waived objection that the references constituted misconduct.

2. Criminal law 🔑1171(1)

In prosecution for committing an act denounced by statute on a female child 11 years of age, district attorney, by referring to defendant in his argument to jury as a pervert, did not commit misconduct warranting reversal of conviction. Pen. Code, § 288.

3. Infants 🔑20

Evidence justified conviction for committing an act denounced by statute on a female child 11 years of age. Pen.Code, § 288.

4. Criminal law 🔑741(1), 742(1)

The weight and credibility of the witnesses are matters solely for the trier of fact.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Walter C. Jones was convicted of committing an act denounced by statute on a female child 11 years of age, and he appeals from order denying his motion for a new trial.

Order affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was convicted by a jury of a violation of section 288 of the Penal Code for committing an act therein denounced on a female child 11 years of age. He appeals from the order denying his motion for a new trial.

[1, 2] Appellant first says that the District Attorney was guilty of prejudicial misconduct in his argument to the jury. In the course of his argument the District Attorney referred to appellant as a pervert. No objection was made to the argument. It was not assigned as misconduct. The court was not requested to instruct the jury to disregard it. Under

these circumstances, appellant waived his objection to the challenged statements, People v. Hunter, 49 Cal.App.2d 243, 250, 121 P.2d 529, and the misconduct, if any, will not warrant a reversal. People v. Buttulia, 70 Cal.App. 444, 448, 233 P. 401. The facts do not bring this case within the line of cases exemplified in our decision in People v. Ford, 89 Cal.App.2d 467, 200 P.2d 867. It is not, therefore, necessary to decide whether the argument was inappropriate or improper.

[3, 4] Appellant next says that the evidence is insufficient to sustain the jury's finding of guilt. His argument in this behalf is one which should have been, and no doubt was, addressed to the jury and to the trial judge on the motion for a new trial. It is not necessary and would serve no useful purpose to blot these pages with a recital of the offensive and unsavory details of the evidence. We have examined the record and are of the opinion that there was substantial evidence to sustain the finding of the jury. The weight and credibility of the witnesses are matters solely for the trier of fact. People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732; People v. Showers, 90 Cal.App.2d 248, 202 P.2d 814.

Order affirmed.

SHINN, P. J., and WOOD, J., concur.

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91 Cal.App.2d 484

McNULTY v. COPP et al.

Civ. 13852.

District Court of Appeal, First District,
Division 2, California.

April 27, 1949.

As Corrected on Denial of Rehearing
May 27, 1949.

Hearing Denied June 23, 1949.

1. Appeal and error 🔑989

On appeal, the District Court of Appeal is to consider only the evidence most favorable to judgment.

2. Evidence 🔑269(2)

In suit against executor of deceased grantor's will and others, to reform deed, wherein cross-complaint alleged fraud in execution of deed and in execution of a second deed as part of same transaction, evidence of declarations and conduct of grantor after delivery was admissible on question of delivery and intent, even if self-serving.

3. Evidence 🔑269(2)

In suit to reform deed wherein cross-complaint alleged fraud in execution of deed and in execution of second deed as part of same transaction, declarations of grantor, since deceased, were only admissible on question of intent and delivery and were not evidence of the truth of the matters stated therein.

4. Evidence 🔑588

In determining disputed questions of fact, jury may disbelieve any testimony which appears to them to lack verity, as they are the exclusive judges of the credibility of the witnesses and the weight to be given their testimony.

5. Evidence 🔑586(3), 587

Direct evidence may be disbelieved and contrary circumstantial evidence relied upon to support a verdict or finding, and jury may reject positive testimony and accept circumstantial evidence as proof of the facts.

6. Fraud 🔑58(1)

Fraud may be inferred from circumstantial evidence.

7. Evidence 🔑53

"Evidence" is indirect as well as direct, consisting of inferences and presumptions, and evidence may be given of any facts from which the facts in issue are presumed or are logically inferable.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Evidence".

8. Appeal and error 🔑989

In determining whether jury's findings of fraud and of intent not to deliver deeds were logically inferable from the facts, District Court of Appeal would disregard evidence in conflict with the supporting facts.

9. Deeds ⚷196(2, 3)

Where father was practically blind, and daughter who lived with him kept his account books, wrote checks for him to sign and performed many other services of a highly confidential nature, the relationship itself cast upon daughter the duty of exercising highest good faith in dealings with father, and in absence of showing to contrary, would itself support an inference of undue advantage and constructive fraud in procuring execution of deed by father in daughter's favor.

10. Deeds ⚷208(1), 211(3)

In suit to reform deed wherein cross-complaint alleged fraud in procuring execution of deed and of a second deed as part of same transaction, evidence supported finding that transaction was result of fraudulent misrepresentations to grantor as to nature of documents which he executed and purpose of signing them, as well as finding of intent not to deliver.

11. Appeal and error ⚷931(1)

Rule that proof of fraud must be clear and convincing is for guidance of trial court in weighing evidence and Court of Appeal must presume on appeal that trial court applied it, and on the whole case, where deed was annulled for fraud, found evidence of fraud clear and convincing to his mind.

12. Appeal and error ⚷1010(1)

Rule that proof of fraud must be clear and convincing is satisfied on appeal if findings of trial court find substantial support in the evidence.

13. Deeds ⚷70(1)

Where execution of deed by grantor to third party and of deed by third party to grantor and grantee as joint tenants were all one unified transaction, grantor was not divested of his title nor was grantee vested with title in joint tenancy if transaction was induced by fraud which deceived grantor as to the nature thereof, regardless of fact that the apparent joint tenancy was established by two purported deeds.

14. Deeds ⚷75

Ratification by grantor of deed alleged to have been procured by fraud can only occur where grantor has full knowledge of the facts. Civ.Code, § 2314.

15. Deeds ⚷211(3)

In suit to reform deed wherein heir of deceased grantor by cross complaint alleged that joint tenancy deed was procured by fraud, evidence warranted finding that, because grantor was not in possession of all material facts, he had not ratified transaction.

16. Limitation of actions ⚷60(10)

Cause of action in cross-complaint charging fraud in procuring execution of deeds, and seeking to have title quieted, was not barred by limitations, where grantor at all times was in possession of the one piece of property by personal occupancy and of the other through his tenants.

17. Courts ⚷476

Superior Court judgment annulling deeds which created apparent joint tenancy, because of fraud practiced on grantor, since deceased, properly left for determination by probate court the question of whether grantee was entitled to take the property under will or whether she had forfeited that right under noncontestation clause.

Appeal from Superior Court, City and County of San Francisco; James D. Conlan, Judge.

Action by Anita McNulty, also known as Anita Ahern, against Herbert Copp, as executor of the last will and testament of Henry W. Copp, deceased, and others to reform a deed, wherein Olive Copp Eldridge filed a cross-complaint alleging fraud. Judgment for defendants and plaintiff appeals.

Affirmed.

Leo R. Friedman and Frank J. Fontes, both of San Francisco, for appellant.

George Herrington, George H. Johnston, Willard S. Johnston and Orrick, Dahlquist, Neff & Herrington, all of San Francisco, for respondent Olive Copp Eldridge.

J. J. Lermen and Geo. Devine Jr., both of San Francisco, for respondent executor.

DOOLING, Justice.

Plaintiff and appellant appeals from a judgment denying her relief in a suit to reform a deed to certain real property in St. Francis Wood, San Francisco, hereinafter referred to as the home, annulling a deed to her from her deceased father of the home and a joint tenancy deed to another parcel of real property in San Francisco, hereinafter referred to as the Shipley Street property, quieting cross-complainant's title to the home subject to administration and quieting title to the Shipley Street property in the executor of decedent's will subject to distribution by the probate court.

Henry W. Copp died at the age of 79, January 1945, survived by four children, Anita Copp McNulty, alias Anita Copp Ahern, plaintiff, cross-defendant and appellant herein; Olive Copp Eldridge, one of defendants, cross-complainant and a respondent; and two other children. By his last will Mr. Copp left his home known as 52 San Leandro Way in St. Francis Wood to respondent Mrs. Eldridge. The residence was on Lot 6 and the adjoining lot appurtenant thereto as a garden was Lot 5 of Block 9 of the subdivision.

A few hours after Mr. Copp's death, appellant recorded a deed from her father dated and purportedly executed September 8, 1933, which deed covered Lot 5 and Lot 4 which was not owned by decedent. It did not cover Lot 6. Appellant asserted ownership of the residence and adjacent lot, claiming that the deed was intended to cover both, and mistakenly recited Lots 4 and 5 instead of Lots 5 and 6. She brought this suit in equity against the executor and Mrs. Eldridge to reform the deed so as to include the residence and to quiet title thereto.

Mrs. Ahern's original complaint alleged no consideration for this deed. After demurrer was sustained on the ground that equity will not reform a voluntary deed, she amended her complaint to allege that said deed was executed in consideration of her promise to live with and take care of her father. At the trial Mrs. Ahern gave different versions of the alleged agreement, one version being that she was to receive the entire estate to the exclusion of the other children.

Defendants and respondents defended on the grounds of non-execution of the deed alleging lack of intent to transfer title, fraud, lack of consideration, unclean hands and the statute of limitations. Mrs. Eldridge also filed a cross-complaint charging fraud by Mrs. Ahern and an attorney M, who prepared the deed, in obtaining Mr. Copp's signature to the deed sued on and in the same transaction obtaining his signature to a deed of the Shipley Street property to a third person who in turn executed a deed to appellant and her father as joint tenants. Under this latter deed appellant claimed the Shipley Street property after her father's death as surviving joint tenant. The cross-complaint alleged and the trial court found that this transfer was never intended by Mr. Copp and that both deeds were obtained by fraud. There was evidence that in 1932, at the time of the death of his wife, Mr. Copp, then 68, was healthy and of sound mind, but his vision was greatly impaired and he was practically blind. He perhaps could read ordinary type with the aid of his jeweler's glass although this was disputed.

Appellant moved into her father's home with her young daughter in December 1932 after her stepmother's death. Mr. Copp had been supporting them, and continued to support them thereafter. No agreement between Mrs. Ahern and her father for the father's care was mentioned to M, the attorney who prepared the deeds in 1933. No agreement was mentioned to attorney John Lermen in 1939 when the deeds to the Shipley Street property came to light and were challenged by Mr. Copp as fraudulent. There was testimony that in October 1933, attorney M advised Mr. Copp of a defect in title to the Shipley Street property which necessitated the execution of certain deeds to correct. It was at this time that the deeds here involved were signed by Mr. Copp. In an interview with attorney Lermen, M and Mrs. Ahern stated that the Shipley Street joint tenancy deed was executed because Mr. Copp wanted to save taxes. In this interview M did not tell Lermen of the home property deed because, as he testified, he felt that it was confidential. This deed, was of course, then unrecorded. Numerous wills and codicils executed by Mr. Copp were introduced which consistently showed that the home property was never devised to Mrs. Ahern, but rather to Mrs. Eldridge or to Mrs. Eldridge and her sister. Mr. Lermen testified that Mr. Copp told him about signing the Shipley Street deed, that it was contrary to what he had intended, but he had taken care of the matter by devising the Shipley Street property to Mrs. Ahern in his will. Mrs. Eldridge who lived near her father in St. Francis Wood and usually spent some time each day with him, stated that her father told her that he had learned that Anita's name was on the deed and it was a very serious thing that she had done in obtaining the joint tenancy deed of the Shipley Street property.

[1] The evidence further showed that in 1939 decedent was advised by a real estate agent that the Shipley Street property was held in joint tenancy by appellant and himself and for that reason appellant should join as lessor in a proposed lease of the property, that decedent thereupon became indignant and told many people that he had not intended to create a joint tenancy but had signed the deed to the Shipley Street property under the belief induced by the representations of appellant and attorney M that this was necessary to correct a defect in title. Decedent thereafter executed the several wills leaving the Shipley Street property to appellant, saying that he did not want to make trouble with appellant and his will would cure what had been done without his knowledge. There is conflicting evidence as to declarations made over the years by decedent to various witnesses, some acknowledging and some denying an intent to transfer title to appellant. The trial court's findings resolved these conflicts against the appellant. The last will of decedent devised the home to respondent Mrs. Eldridge and the Shipley Street property to appellant. It contained a clause that in case of contest the contestant should take nothing and it appears that because of appellant's prosecution of this litigation the claim has been advanced in the probate court that she has forfeited her rights under the will. Other evidence is hereafter referred to, although much of the evidence favorable to appellant need not be stated because of the settled rule that on appeal we are to consider only the evidence most favorable to the judgment.

[2] One of the issues in the case was whether the deeds to the two parcels in question were validly delivered by her father so as to vest title in appellant as joint tenant with her father in the Shipley Street property and in fee simple in the home. On the question of delivery and intent evidence of the subsequent declarations and conduct of the deceased, even if self-serving, was admissible. Williams v. Kidd, 170 Cal. 631, 648 et seq., 151 P. 1, Ann.Cas. 1916E, 703; Donahue v. Sweeney, 171 Cal. 388, 391, 392, 153 P. 708; De Cou v. Howell, 190 Cal. 741, 214 P. 444; Whitlow v. Durst, 20 Cal. 2d 523, 127 P.2d 530; Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, 168 P.2d 946. In De Cou v. Howell, supra, at page 750 of 190 Cal. at page 448 of 214 P. the court said: "The issue in this class of cases is whether or not the grantor delivered his deed with the intent that it should convey title. In such cases the acts and declarations, in short, the conduct of a deceased grantor, may be given in evidence either in confirmance of delivery or in disproof thereof."

In Hansen v. Bear Film Company, Inc., supra, 28 Cal.2d at page 174, 168 P.2d at page 959, the court quoted with approval the following from Whitlow v. Durst, supra, 20 Cal.2d at pages 524, 525, 127 P.2d at page 531: "When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is immaterial that such declarations are in the interest of the party producing them."

The evidence of the subsequent declarations and conduct of the decedent Copp was therefore properly admitted by the trial court and was to be weighed by the court in determining whether the decedent delivered the deeds to the two parcels of property with intent to vest title in appellant.

[3-5] It is true, as pointed out by appellant, that the declarations of decedent were only admissible on the question of intent and delivery and were not evidence of the truth of the matters stated therein by decedent. In re Estate of Snowball, 157 Cal. 301, 307, 107 P. 598; Dinneen v. Younger, 57 Cal.App.2d 200, 205 et seq., 134 P.2d 323. Basing her argument upon this latter principle of law appellant insists that there is no substantial evidence to support the findings that the two transactions were the result of fraudulent misrepresentations to the decedent as to the nature of the documents which he executed and the purpose of signing them. There is no direct evidence to contradict the testimony of appellant and the attorney M that the decedent knowingly and without any deception practiced upon him conveyed to appellant a joint tenancy interest in the Shipley Street property and a fee title in the home; but there is an abundance of circumstantial evidence to support the inference of the trial court that the decedent was induced to sign the two deeds which divested him of his title under the belief fraudulently induced that he was clearing the title to the Shipley Street property. It is not the law that a finding based solely upon circumstantial evidence cannot stand against direct and positive testimony to the contrary. The true rule is stated in Gray v. Southern Pacific Co., 23 Cal.2d 632, 640-641, 145 P.2d 561, 566: "In determining the disputed questions of fact presented at the trial of the case it was the province of the jury to disbelieve any testimony which appeared to them to lack verity. They were the exclusive judges of the credibility of the witnesses and the weight to be given their testimony. They could reject positive testimony and accept circumstantial evidence as proof of the facts, as it is elementary that direct evidence may be disbelieved and contrary circumstantial evidence relied upon to support a verdict or finding."

[6-10] Fraud, like any other fact, may be inferred from circumstantial evidence. 10 Cal.Jur. 809-810; 12 Cal.Jur. 829. "From the secrecy with which unlawful undertakings are adopted, it would be generally impossible to make such proof by direct testimony. Evidence is indirect as well as direct, consisting of inferences and presumptions, and it is code law that upon the trial of a case evidence may be given of any facts from which the facts in issue are presumed or are logically inferable." State of California v. Day, 76 Cal.App.2d 536, 549, 173 P.2d 399, 406, quoting People v. Donnolly, 143 Cal. 394, 398, 77 P. 177. Some of the additional facts from which the findings of fraud and intent not to deliver are logically inferable are here briefly recited, disregarding conflicting evidence as we are bound to do on appeal. The decedent was blind in one eye and so nearly blind in the other that he could only decipher large newspaper headlines or, perhaps, with the aid of a jeweler's glass read ordinary print. Appellant lived with him in his home, kept his account books, wrote checks for him to sign and performed many other services of a highly confidential nature. She was in fact his eyes. Parenthetically, this highly confidential relationship itself cast upon her the exercise of the highest good faith in her dealings with her father, and in the absence of a showing to the contrary, would itself support an inference of undue advantage and constructive fraud. Johnson v. Clark, 7 Cal.2d 529, 534-535, 61 P.2d 767; Campbell v. Genshlea, 180 Cal. 213, 180 P. 336. In 1939 when the decedent was informed by a real estate agent that appellant should sign a lease with decedent to the Shipley Street property because it stood in their two names as joint tenants he made the claim that he had been induced to sign the deed to the grantor in the joint tenancy deed under the misrepresentations that it was a step necessary to clear the title. This may not be taken as evidence of the fact claimed but the conduct of appellant and attorney M in her presence in the face of this claim may be so considered. Despite her denial of the decedent's claim appellant permitted her father to sign the lease to the Shipley Street property as sole lessor. She and M went to John Lermen, decedent's

attorney, to endeavor to get decedent to withdraw his claim of fraud. They did not disclose to Mr. Lermen that as a part of the same transaction decedent had signed a deed to the home which was not recorded. Mr. Eldridge, appellant's brother-in-law, at the request of decedent searched the records after the 1939 disclosure of the joint tenancy deed to discover if the title to the home property was also affected. Appellant learned of this fact, upbraided her sister for her husband's action, but made no disclosure of the unrecorded deed to the home which she held in her possession. In 1944 appellant learned that her father had executed a will in which decedent had left the home to her sister Mrs. Eldridge. She communicated her discovery to the witness, Mrs. Campbell, and seemed to be much disturbed by the incident. Again, however, she made no disclosure of the unrecorded deed. After her father's death appellant telephoned to Mr. Lermen, informed him of the deed of the home to her and that she had recorded it, but denied that she knew her father had left the home by will to Mrs. Eldridge although she had previously communicated that fact to Mrs. Campbell. Add to these facts that appellant's testimony was in many respects inconsistent and that her testimony and that of attorney M as to what occurred in their interview with Mr. Lermen was impeached by Lermen's contradictory testimony in many particulars and that much of appellant's other testimony was contradicted by other witnesses and we cannot say that from the whole evidence the inferences of fraud and lack of delivery were not reasonably drawn.

[11, 12] Appellant cites the rule, frequently reiterated, that proof of fraud must be clear and convincing. This is a rule for the guidance of the trial court in weighing the evidence and we must presume on appeal that the trial judge applied it and on the whole case found the evidence of fraud clear and convincing to his mind. It is now well settled that the clear and convincing evidence rule is satisfied on appeal if the findings of the trial court find substantial support in the evidence. Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3; Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732.

[13] The fact that the apparent joint tenancy in the Shipley Street property was established by two purported deeds, one from decedent to a third party and the second from the third party to decedent and appellant as joint tenants, does not change the character of the transaction. It was all one unified transaction and if induced by fraud which deceived decedent as to the nature of the transaction as found by the trial court it did not operate to divest decedent of his title or to vest appellant with a title in joint tenancy. The evidence is also clear that the deed to the home property was part of the same transaction and it is subject to the same inference of fraud.

[14, 15] It is claimed that as to the Shipley Street property decedent ratified the joint tenancy deed to appellant by devising the property to her in his several wills including the last one and by his failure to take any steps during his lifetime to clear the title. Ratification can only occur where the person ratifying has full knowledge of the facts. Mazuran v. Stefanich, 95 Cal.App. 327, 334, 272 P. 772; Brown v. Rouse, 104 Cal. 672, 38 P. 507; Ellis v. Jones, 121 Cal.App. 325, 329, 8 P.2d 933; Civ.Code, sec. 2314. Here it appears that after his discovery of the joint tenancy deed to the Shipley Street property no disclosure was made to decedent of the existence of the unrecorded deed to the home and his inquiries through his son-in-law disclosed that there was no such deed of record. The trial court was entitled to find that decedent did not ratify the Shipley Street transaction because he was not in possession of all the material facts.

[16] The cause of action on the cross-complaint was not barred by the statute of limitations. Decedent at all times was in possession of the home property by his personal occupancy and of the Shipley Street property through his tenants. "The right of the plaintiffs to have their title to the land quieted, as against a claim asserted by the defendant under this deed, was not barred, and could not be while the plaintiffs and their grantors remained in the actual possession of the land, claiming to be the owners thereof, and the actual owners,

as against the defendant, of all interest therein except the mere naked title." Smith v. Matthews, 81 Cal. 120, 121, 22 P. 409, 410; South Tule etc. Ditch Co. v. King, 144 Cal. 450, 455, 77 P. 1032; Secret Valley Land Co. v. Perry, 187 Cal. 420, 426, 427, 202 P. 449; 16 Cal.Jur. 442; 22 Cal.Jur. 123.

[17] The decree appealed from annuls the deed to the home property and quiets the title of Mrs. Eldridge therein subject to administration. As to the Shipley Street property, which was devised to appellant, it annuls the deeds which created the apparent joint tenancy and quiets title in the executor subject to the determination of the probate court as to the proper distributee. It thus properly leaves for determination by the probate court the question whether appellant is entitled to take that property under her father's will or whether she has forfeited that right under the noncontestation clause.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

PEOPLE v. SMITH.

Cr. 2576.

District Court of Appeal, First District, Division 1, California.

April 29, 1949.

Hearing Granted May 26, 1949.*

1. Criminal law 🔑1098

An "agreed" or "settled statement" is a narration of oral proceedings, and in part it may contain certain questions and answers that would ordinarily appear in a reporter's transcript. Rules of Appeal, rule 7.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Agreed Statement" and "Settled Statement".

2. Costs 🔑317

The general purpose of statute which formerly governed preparation of record on appeal was to give convicted defendant right of appeal without being charged with costs, except that such costs should be subject to approval of trial court. Code Civ.Proc. § 274.

3. Criminal law 🔑1077

Under former procedure, where transcription of shorthand notes was necessary to attorney in preparation of a bill of exceptions, it was necessary to pay for such transcription, but if defendant was unable to pay, judge was permitted to use his discretion and designate portions of testimony that might be transcribed without charge, which procedure was similar to that under present rules of appeal pertaining to agreed or settled statement. Code Civ.Proc. § 274; Rules on Appeal, rule 7.

4. Costs 🔑292

The former rule that when the statutes are silent, costs are thrown upon a defendant in a criminal case, as well as upon a defendant in a civil case, no longer applies.

5. Costs 🔑284

Costs are purely statutory and measure of statute is measure of right.

6. Costs 🔑284

The term "costs" means those fees and charges which are required by law to be paid to the courts, or some of their officers, or amount of which is expressly fixed by law.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Costs".

7. Courts 🔑80(1)

Under statute giving judicial council power to prescribe by rules for practice and procedure on appeal, a rule which takes away a vested right or which creates a right, such as right to appeal, is "substantive" not "procedural", but one which operates as a means of implementing an existing right is valid as a procedural rule. Pen. Code, § 1247k.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Procedural Rule".

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* Subsequent opinion 211 P.2d 561.

8. Courts ⚷80(5)

Code section 274 dealing with fees of reporters is not inconsistent with judicial council rules on appeal so as to be inoperative under the terms of Penal Code, section 1247k, but is in harmony therewith, particularly with agreed and settled statement form of criminal appeal. Code Civ. Proc. § 274; Pen.Code, § 1247k; Rules on Appeal, rule 7; Const. art. 6, § 1a(5).

9. Criminal law ⚷1077

A convicted defendant, who has the right of appeal, is entitled to a transcript of evidence without charge and, where proper, to an additional record, also without charge, as procedural implements of a review on appeal. Rules of Appeal, rules 7, 35, 36; Code Civ.Proc. § 274; Pen.Code, §§ 1235, 1247k; Const. art. 6, §§ 1a(5), 4½.

BRAY, J., dissenting.

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Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

William Charles Smith was convicted of bringing a drug into a place of confinement of prisoners without authority and he appeals. On defendant's motion for an order to direct the shorthand reporter to prepare a transcript on appeal.

Motion granted.

William E. Ferriter and S. Lee Vavuris, both of San Francisco, for appellant.

Fred N. Howser, Atty. Gen. and Clarence A. Linn, Deputy Atty. Gen., for respondent.

WARD, Justice.

This is a motion for an order to direct a shorthand reporter of the superior court to prepare a transcript on appeal in a criminal case in accordance with Rule 35 of the "Rules on Appeal" adopted by the Judicial Council.

The defendant, Smith, was convicted of violating the provisions of Penal Code section 4573.5 and was granted probation for five years. The probation order provided that Smith should be imprisoned in the county jail for one year of the probationary period. Notice of appeal from the judgment and from an order denying defendant's motion for a new trial were filed. The defendant has requested a reporter's transcript of the oral proceedings and an additional record including "all instructions given" and the "opening and closing arguments of the district attorney to the jury". The reporter has neglected and refuses to supply the transcript unless the defendant pays fees for its preparation, and it has been represented to this court that the judge of the superior court of Marin County will not direct the reporter to prepare the transcription of his shorthand notes.

Judicial Council Rule 35 provides that, "On the filing of the notice of appeal the clerk shall prepare an original and 3 clearly legible typewritten copies of the clerk's transcript, in the manner and form required by Rule 9, and shall append to the original and each copy a certificate that it is correct." Rule 9 is not pertinent to the question presented. In Rule 33 a distinction is made between "normal" and "additional" records. If an additional record is desired an application therefor shall be filed with the clerk who shall present such application to the judge and, "Except as to instructions given, which shall be included in the record if the defendant urges error as hereinabove provided, the judge, within 3 days after the filing of such application, shall make an order directing the inclusion in the record of as much of the additional material as, in his opinion, may be proper to present fairly and fully the points relied on by appellant in his application. If the judge fails to make any order within 3 days after the application is filed, the material requested, with the exception of exhibits, shall be included in the clerk's and reporter's transcripts without such order." Rule 33(b), subd. (3). In the present case the trial court did not make an order within three days and, hence, if the defendant is entitled to any record without cost, he is entitled to the "additional" record.

The district attorney of the County of Marin states that, "The sole question raised here is whether or not the defendant is entitled to the preparation of a reporter's transcript without cost to himself." The attorney general presents the issue as follows: "The cost of a Reporter's Transcript on Appeal to be furnished a defendant not having been made a county charge in the absence of a court order the county cannot be forced to pay the reporter therefor."

The Penal Code provides that, "Either party in the prosecution by indictment, information, or complaint may appeal on questions of law alone, as prescribed in this chapter and in rules adopted by the Judicial Council." § 1235. The legislature has conferred upon the Judicial Council the power to make rules relating to appeals, but such power is confined to "practice and procedure." Pen.Code, § 1247k.

Where a reporter's transcript is required the rules provide that the clerk shall immediately notify the reporter who shall prepare the necessary transcription of his notes, attach a certificate that it is correct and deliver the original and copies to the clerk. The clerk shall deliver one copy to the respective attorneys. The original is eventually delivered to the judge. Unless corrections are proposed the judge shall certify the original and redeliver to the clerk with a certificate that corrections have been made or that no objections have been filed, whereupon the original transcript shall be transmitted to the reviewing court and the copies made available to the parties. Rule 35. It may be noted that in the foregoing rule no mention is made of the cost or the payment of a fee for preparation of the transcript.

[1] If a transcription of the oral proceedings may not be obtained "for any reason" the appellant may file an application for permission "to prepare a settled statement" to be used in lieu of a reporter's transcript. The judge may use his discretion in ruling upon the application. Rule 36. An agreed or settled statement is a narration of oral proceedings, and in part it may contain certain questions and answers that would ordinarily appear in a reporter's transcript. Rule 7.

Respondent relies upon Richards v. Superior Court, 145 Cal. 38, 78 P. 244, wherein the words "costs" and "fees" are used with the same reference and implication. In that case a request was made for a transcription of the oral proceedings to be used in preparing the record upon an appeal in a criminal case. Richards v. Superior Court is not an authority controlling the form or procedure sought in the present case. The Richards case was decided in 1904. People v. Ruiz, 144 Cal. 251, 77 P. 907, decided in the same year, refers to the rules of the court as requiring an authenticated bill of exceptions, the then prescribed method of presenting the oral evidentiary record. A bill of exceptions is the result of the work of attorneys and is not prepared by state or county clerical help. The court in the Richards case saw no reason why the state should pay for the legal work performed by the defendant's attorney. The county clerk, however, did prepare and file his part of the record (the Clerk's Transcript) as a county charge and without cost to the appellant.

[2, 3] When the judge ordered the whole or a part of the proceedings transcribed the fees of the shorthand reporter became a charge against the county treasury, but if the request was made by either party the shorthand reporter was paid by such party. Code Civ.Proc. § 274; Richards v. Superior Court, supra, 145 Cal. at pages 40-41, 78 P. 244. A careful reading of the Richards case indicates that the general purpose of the statute was to give the convicted defendant the right of appeal without being charged with costs, except that such costs should be subject to the approval of the trial court. If the transcription of shorthand notes was necessary to the attorney in preparation of a bill of exceptions then it was necessary to pay for such transcription, but if the defendant was unable to pay the judge was permitted to use his discretion and designate portions of the testimony that might be transcribed without charge. The procedure under the former bill of exceptions is similar to that under the present agreed or settled statement. The bill of exceptions or agreed or settled statement of appeal is not, of course, the typical present method of preparing a record on appeal in a criminal case.

In People v. Fleming, 166 Cal. 357, 136 P. 291, Ann.Cas.1915B, 881, the one point involved was the propriety of making certain affidavits part of the record on appeal. Changes in rules covering records on appeal are noted by the court, 166 Cal. on pages 374 and 375, 136 P. at page 299, Ann. Cas.1915B, 881: "The District Court of Appeal concluded that under the law none of these affidavits was a properly authenticated part of the record on appeal, and therefore that it could not consider any of them. This conclusion was based upon the well-established rule under the statutes as they existed prior to the change in our laws relating to records on appeal in criminal cases made in the year 1909, to the effect that affidavits presented on a motion for a new trial and the minutes of proceedings on such a motion constitute no part of the judgment roll, that the clerk cannot make them a part thereof, and that they can be considered by an appellate court only when contained in a properly authenticated bill of exceptions. At that time, section 1246 provided for the transmission by the clerk to the appellate court of copies only 'of the notice of appeal, the record (the judgment roll, section 1207, Penal Code), and of all bills of exceptions,' and sections 1171, 1174, 1175, and 1177, Penal Code, provided for the making up and settlement of bills of exceptions. In 1909, sections 1171, 1174, 1175, and 1177, Penal Code, were repealed, leaving us without any statutory provision whatever for a bill of exceptions in a criminal case. * * * Sections 1247, 1247a, 1247b, 1247c, and 1247d were added, providing for the transcription, certification by the reporter and by the trial judge, and forwarding of 'the phonographic reporter's notes.' It was evidently the design of the Legislature to have the record provided for in section 1246, as amended, and the new section, cover wholly the matter of the record on appeal, and dispense entirely with bills of exceptions."

In subsequent years the rules controlling the procedure in filing records in criminal cases on appeal have been changed, but such changes do not appear pertinent to the present problem. The general tendency has been to require payment for records and reports to be used by the legal staff representing the appellant in the preparation of a legal document such as a bill of exceptions, but to make no charge if the record is merely an original or a transcription of a document or of notes and does not require legal interpretation or amplification by a clerk or other court officer.

In some jurisdictions costs of the prosecution are imposed upon a convicted person either upon the theory that costs are proper to reimburse the state for expenses such as the attendance of witnesses, or that they are a part of the punishment. In a few states costs of prosecution are assumed to be debts to the officers of the court. 1 Archbold's Criminal Practice and Pleading, 8th Ed. 1902, p. 596–597. The addition of costs as part of punishment need not be mentioned further in this case except to say that California has progressed to the point of not imposing costs on a defendant in a criminal case for the preparation of a record containing merely the reporter's transcription of the oral proceedings.

[4-6] The statement in the Richards case, supra, that, "Where the Codes are silent, the costs are still thrown upon a defendant in a criminal case, as well as upon a defendant in a civil case", 145 Cal. at page 41, 78 P. at page 245, does not constitute the present rule. Costs are based upon statutory provisions. 7 Cal.Jur. 254-255. "He who would claim costs must put his finger on a statute which awards the same. The measure of the statute is the measure of the right." Sime v. Hunter, 55 Cal.App. 157, 159, 202 P. 967, 968. "The term 'costs', it has been said, means 'those fees and charges which are required by law to be paid to the courts, or some of their officers, or the amount of which is expressly fixed by law.' Blair v. Brownstone Oil & Refining Co., 20 Cal.App. 316, 128 P. 1022." Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 274, 83 P.2d 503, 507; see also Estate of Bevelle, 81 Cal.App.2d 720, 185 P.2d 90.

If a particular county suffers financially because of offenses which arise out of or are connected with the presence of state institutions then the remedy is by application to the legislature to be relieved of a burden which is a substantive matter; namely the right of a county to be reimbursed by the state for expenses incurred which only nominally are local.

[7] This leads us to the real question in this case, whether the designation of the scope of the transcript on appeal in a criminal case is a procedural or substantive matter. If a rule takes away a vested right it is not procedural. If the rule creates a right such as the right to appeal it may be classified as a substantive matter, but if it operates as a means of implementing an existing right then the rule deals merely with procedure.

The question presented in this case might be answered by simply citing In re Paiva, 31 Cal.2d 503, 190 P.2d 604. The gist of that decision is that when a writ of error coram nobis is sought in a criminal case "upon appeal from the order disposing of such motion the right of the defendant to be furnished a legal record on appeal, insofar as the payment of costs is concerned, is the same as upon any other appeal allowed by law to a defendant in a criminal case." Supra, 31 Cal.2d at page 510, 190 P.2d 609. The court concluded that the costs and expenses of a transcription of testimony and procedings should not be at the expense of the accused. Respondents herein contend that the conclusion in the Paiva case was reached without reference to the Richards case. However, the Richards case is not authority for denying a transcript of the evidence to an appealing defendant.

The Constitution of California, Article VI, section 1a, subdivision 5, authorizes the Judicial Council to "Adopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force." Penal Code, section 1247k provides that, "The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeal shall be made up and filed, in all criminal cases in all courts of this State. The Judicial Council shall report the rules prescribed by it to the Legislature on or before March 31, 1943. The rules reported as aforesaid shall take effect on July 1, 1943, and thereafter all laws in conflict therewith shall be of no further force or effect." The Code of Civil Procedure, section 274, provides that, "In criminal cases in which the court specifically so directs the fee for reporting and for a transcript ordered by the court to be made must be paid out of the county treasury on the order of the court, except that when a daily transcript is ordered as provided in Section 269 of this code then said section shall be applicable." The mentioned section, 269, deals with filing a transcript known as a daily transcript. Section 274 of the Code of Civil Procedure primarily covers the fee for reporting additional matters. The quoted portion of section 274 was a part of that section prior to the decision in the Paiva case. In that case the court refused to follow the philosophy of denying to a defendant who had a right of appeal "the right to the record * * * to implement that appeal". It was further stated that, "There is no question but that on appeal from the judgment or from the order denying a new trial the defendant is entitled, on timely application, to have the record on appeal furnished by the state. (See § 274, Code of Civil Procedure.)" 31 Cal.2d at page 508, 190 P.2d at page 607.

Although respondent contends that its interpretation of section 274 was not called to the attention of the Supreme Court in the Paiva case, mere reading of the section indicates that the real purpose of that section was to fix fees for court reporters. It is found in the Code of Civil Procedure chapter entitled "Phonographic Reporters". It permits the court in criminal cases in its discretion to specifically direct certain reporting and transcribing and further directs that the fees therefor must be paid "out of the county treasury on the order of the court". It has reference to matters that may be needed in the conduct of a trial, or in some motion subsequent to trial.

[8] Code of Civil Procedure, section 274, as it now reads, when considered with the present methods on appeal, is not inconsistent with the Judicial Council rules on appeal. On the contrary, it is in harmony therewith, particularly with the agreed and settled statement form of criminal appeal. In the Paiva case the Supreme Court cited section 274, but it did so only in emphasizing its view that

costs and expenses of a transcript of testimony in a criminal case to be used on appeal should be furnished by the county in a proceeding in the nature of a writ of error coram nobis just the same as in a direct appeal from a judgment of conviction or from the denial of a motion for a new trial.

[9] The attorney general's brief expresses its fear of dire results if it should be decided that a convicted defendant, in a criminal case, who has the right of appeal, is to be given a transcript of the evidence without charge. It is suggested that great injury will accrue to the state or the county if the whole of the evidence is transcribed and the convicted defendant is not forced to pay the reporter's fees, and attention is called to the fact that some persons accused of crime are able to pay for a transcript of the evidence. These objections are mere trifles in considering the effort of the People of the State of California to see that all convicted persons, rich or poor, may be given as a matter of right and justice the procedural "implements" of a review on appeal.

The elimination of the burden from the trial court of determining whether a convicted defendant has sufficient financial means to pay for a transcript of evidence is a step toward fairness in giving every one the first essential of an adequate appeal. The fact that a defendant has an attorney of known ability or that the defendant is out on bail or that he or a relative is reputed to be one of financial means are tests that may result in an injustice to an appellant.

It must be assumed that the Judicial Council investigated the necessity of supplying all appealing defendants with a transcript of the evidence in consonance with the provisions of Article VI, section 1a of the California Constitution and the wisdom of the legislature as expressed in Penal Code section 1247k. In addition, the Judicial Council must have realized that reviewing courts should have a complete transcript of the evidence and, under certain circumstances, of the instructions and other proceedings. Augmentation of the record often results in delayed justice to the People of the State or to the accused. Though error may appear in a partial transcript of the record, a new trial may not be granted "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Constitution of California, Art. VI, § 4½.

The Court Reporter of the Superior Court of Marin County is hereby ordered to forthwith prepare and file the reporter's transcript of the oral proceedings of the trial of the defendant herein together with all instructions given upon the trial of said cause, which cannot be copied by the clerk, and the opening and closing arguments of the district attorney to the jury at and upon the trial of said cause, without requiring the payment by the appellant of any fees or costs for the transcription or preparation of the reporter's transcript. It is further ordered that the Judge of the Superior Court of Marin County is authorized and directed to make such orders as may be necessary to fulfill the foregoing order.

PETERS, P. J., concurs.

BRAY, Justice.

I dissent. I agree with the majority opinion (1) that all convicted persons should be given, on appeal, a transcript of the testimony without charge "as a matter of right and justice" and (2) that the Judicial Council, by the enactment of the new Rules on Appeal, intended to require the reporter, immediately upon the taking of the appeal by the defendant, to prepare and file the transcript, *at county cost.* However, I do not believe that the Judicial Council had the power to saddle that cost on a particular county.

The payment of the cost of the reporter's transcript is a substantive matter and not a matter of procedure or practice. It is different, too, than the assessing of costs in a civil case. As pointed out in the brief of the district attorney, appeals in a large percentage of criminal cases are never perfected and are abandoned, and yet the Judicial Council, under its power to provide rules of procedure, has attempted to place the cost of the transcripts in such cases on the particular county in which the notice of appeal is filed.

The majority opinion, in effect, admits that making the requirement that a free transcript be given every appellant in a criminal case would be, in the first instance, a matter of substantive law, but holds that in California the defendant has always had such right; hence the new rules merely change the procedure. The basic question involved here, then, is whether prior to July 1, 1943, the effective date of these rules, such right existed. If it did not, the Judicial Council had no power to establish such right.

Surprisingly enough, there is no inherent right in a defendant to a free transcript on appeal.[1] At common law the defendant in general, bore all costs. As late as 1902, in North Carolina, South Carolina, Indiana, Alabama, Illinois, New Jersey, Georgia, Mississippi, Pennsylvania, and Massachusetts, the defendant could be required to pay costs. 1 Archbold's Criminal Practice and Pleading, 8th ed., notes, pp. 595–597. In 1930 there were only seven states which furnished the transcript on appeal free to the defendant. Under federal jurisdiction and in twenty-eight of the states the defendant was required either to pay or give bond. American Law Institute, Code of Criminal Procedure, pp. 1266–1270. California is included in the category of those requiring defendant to pay, although questioned. Page 1267. Apparently only seventeen states provided for free transcripts in cases where application is made in forma pauperis. Pages 1270–1273.

As said in Irwin v. County of Yuba, 119 Cal. 686, 52 P. 35, concerning claims of members of the board of supervisors for per diem mileage and services, "It may be safely stated as a rule that one who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which itself finds authority of law. It is not sufficient that the services performed, for which payment is claimed, were beneficial." 119 Cal. at page 690, 52 P. at page 37. The only provision for the payment for transcripts in criminal cases in 1943 and now, is that contained in section 274 of the Code of Civil Procedure. It provides: "In criminal cases in which the court specifically so directs the fee for reporting and for a transcript ordered by the court to be made must be paid out of the county treasury on the order of the court * * *; provided, however, that in any case, the court shall not order to be transcribed and paid for out of the county treasury any matter or material other than that reported by said reporter as prescribed in paragraph one of Section 269 of this code; * * *."

Section 269, after setting forth the duties of the reporter at the trial, provides: "* * * and if directed by the court, or requested by either party, [the reporter] must, within such reasonable time after the trial of such case as the court may designate, write out the same, or such specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing-machine, and certify to the same as being correctly reported and transcribed, and when directed by the court, file the same with the clerk of the court."

Thus it appears that the Legislature at no time provided that a defendant should be entitled to a free transcript. It left the matter entirely in the discretion of the court, and then only when the court had directed the reporter to prepare such transcript, and such transcript must contain nothing more than what the court ordered to be included therein. The Legislature emphasized this fact, because in several places it refers to the necessity for the court order, "in which the court specifically so directs"—"for a transcript ordered by the court to be made"—"paid out of the county treasury on the order of the court"—provided that "the court shall not order to be transcribed and paid for out of the county treasury * * *."

The majority opinion construes Richards v. Superior Court, 145 Cal. 38, 78 P. 244, to hold that the general purpose of section 274 of the Code of Civil Procedure "was to give the convicted defendant the right of appeal without being charged with costs, except that such costs should be subject to the approval of the trial court." But the case does not so hold. There the petitioner took the position that, as a defendant in a criminal case, he was entitled to a free transcript on appeal, and asked that the Supreme Court mandamus the superior court reporter to make a transcript and the judge to designate a reasonable time within which it should be made. The court denied the petition, saying: "* * * to sum up, we hold that it is the duty of the phonographic reporter to comply with the request made by either of the parties litigant, only upon payment to him of his fees; that it is his duty, *when ordered by the court,* to furnish transcripts, his fees being then a charge upon the county treasury." Emphasis added; 145 Cal. at pages 41-42, 78 P. at page 245. If, as now claimed by the majority opinion, a defendant was entitled to a free transcript, the court would have granted the writ. The case holds in so many words that the defendant had no such right, for the court said, 145 Cal. at pages 40-41, 78 P. at page 245: "A defendant in a criminal case, like a defendant in a civil case, is chargeable with fees as to all matters, saving those from the payment of which he is especially exempted by law. He is so especially exempted as to certain matters. He is exempted from bearing all or any part of the costs of his trial. Upon his appeal the state, in its liberality, requires the county clerk to prepare and print, as a county charge, his transcript. By express enactment of law, no fee is exacted for the filing of his papers upon appeal in this court. But each and all of these exemptions are matters of express statutory enactment. Where the Codes are silent, the costs are still thrown upon a defendant in a criminal case, as well as upon a defendant in a civil case. Thus the defendant must himself pay for the printing of the brief which he presents to this court. The same holds true when a demand is made directly upon the phonographic reporter for a transcript of all or any part of the proceedings upon his trial. If he orders it himself he must pay for it himself, and until he pays the phonographic reporter is not compelled to do the work." As pointed out in the opinion, there is express authority for giving defendant a free clerk's transcript. The very fact that there is no such authority for a reporter's transcript is significant. The court then goes on to discuss the situation in which a defendant is entitled to a transcript at county expense. "If he is unable to pay, an appeal may always be made to the judge, who will thus have an opportunity to review the request, and to designate the transcription of such portions of the record as may be fit and necessary for the purpose intended, and in such cases the rights of the county are preserved, in that the expenses of an excessive transcript are not cast upon it, and, upon the other hand, the defendant's rights are fully protected, since, without cost to him, he has obtained all that he is entitled to present upon his appeal." 145 Cal. at page 41, 78 P. at page 245.

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[1] (Except of course, where a showing is made in forma pauperis. The question presented here does not concern applications of that type, and hence they will not be mentioned further in this opinion.)

Assuming that the construction given in the majority opinion is correct, namely, that section 274 gives the defendant the right to a transcript without cost "except that such costs should be subject to the approval of the trial court," we would have the anomolous situation that the approval of the trial court would be a mere idle act as the defendant was entitled to the free transcript anyhow—or the converse, that if the court had any power to disapprove, the defendant would be denied the free transcript to which the majority opinion says he is entitled. In any event, the majority agree that the Richards case holds that the defendant's right to a transcript, whatever that right might be, was subject to the approval of the court. It, then, was a limited right. The Judicial Council had no power to change that limited right into an unlimited one, because such a change is a matter of substantive law, not merely of procedure or practice.

If the Judicial Council, under its rule making power, can thus change a limited right to an unlimited one, they could require the payment of fees in the cases where the court appoints an attorney to represent a defendant. It was held in Rowe v. Yuba County, 17 Cal. 61, that the court had the power to appoint members of the Bar to defend "pauper prisoners" but that the court had no authority to create a charge against the county for the services of the attorneys so appointed. By analogy, if the Judicial Council can make the rule questioned here, it can provide that the services of attorneys when appointed by the court to represent defendants in criminal cases, may be made a charge against the county treasury.

The majority's construction is the same as that of the petitioner in the Richards case, concerning which the court said, 145 Cal. at page 41, 78 P. at page 245: "The construction contended for by petitioner would lead to unbearable abuses and untold extravagance. It would result that in every criminal case in which a conviction was had, by the mere request of the defendant, he could cause every word of the proceedings to be transcribed, and the cost of the transcription made a burden upon the county. Under such a system it would, at least, be a question whether or not the state could not better permit the depredations of felons to go unpunished, as causing the community less loss than would their successful prosecution to conviction."

Apparently the majority opinion makes some differentiation between the Richards case and ours, on the fact that there, the defendant wanted the transcript to enable him to prepare a bill of exceptions, the opinion thereby indicating that his method of appeal had something to do with the denial of a transcript. But the case does not differentiate between an appeal by a bill of exceptions and one on the record. It is obvious that the court's denial to him of a free transcript had nothing to do with the *method* of appeal.

In re Paiva, 31 Cal.2d 503, 190 P.2d 604, is not necessarily in conflict with my views. In that case the court was concerned primarily with the nature of a proceeding in coram nobis. Having determined that it was "a part of the proceedings in the case to which it refers", 31 Cal.2d at page 509, 190 P.2d at page 608, which case was a criminal one, the court said that "upon appeal from the order disposing of such motion the right of the defendant to be furnished a legal record on appeal, insofar as the payment of costs is concerned, is the same as upon any other appeal allowed by law to a defendant in a criminal case." 31 Cal.2d at page 510, 190 P.2d at page 609.

The dissenting opinion took the position that defendant was not entitled to a free transcript in what it called a special proceeding, unless he made an application in forma pauperis. However, it is obvious that the court assumed that a defendant in a criminal case is entitled to a free transcript on appeal, and then went on to determine whether on coram nobis the defendant was in the same position as on appeal. The matter was determined in the one sentence above quoted, plus one other sentence referring to section 274 of the Code of Civil Procedure. The ruling in the Richards case was not considered, nor was there any analysis of section 274.

If the Legislature desires to provide a free transcript in all cases (and I believe that it should) it can also provide some safeguards against the situation mentioned in the Richards case, supra. The Judicial Council did not have the power to take away from the judge the right of approval set forth in section 274. Particularly is this so when it is remembered that, while the Judicial Council Rules provide that the reporter must prepare and file the transcript immediately after the notice of appeal is filed, there is no way in which he can be paid for it out of county funds unless on the order of the court. Sec. 274, Code Civ.Proc.

I cannot agree that the new rules are not inconsistent with that section. If the court reporter, on the filing of the notice of appeal, is automatically required to furnish a transcript at county expense, how does that jibe with the provision, first, that the reporter cannot be paid except on court order, and secondly, that the court order for payment of reporter's fees must be predicated upon a previous order of the court for the transcript? And what becomes of the provisions in section 269 which give the court or counsel the right to designate "such specific portions" as they may request? Under the Judicial Council Rules, automatically the reporter must prepare a transcript "of the oral proceedings" at the trial and on the motion for new trial, excluding certain matter. Provision is made for the appellant to request the inclusion of additional matters. But there is no provision for either the court or counsel to designate that *only* a portion of the oral proceedings need be written up, to present the appellant's points on appeal. Even though the appellant might want to present on appeal some question of law, which would require a very short transcript, the reporter must prepare at county expense the entire transcript.

The Judicial Council is authorized by section 1(a) of article VI of the Constitution to "(5) Adopt or amend rules of practice and procedure for the several courts *not inconsistent with laws that are now or that may hereafter be in force.*" (Emphasis added.)

The Judicial Council's Rules attempting automatically to cause the filing of the reporter's transcript, making it a charge on the county, are inconsistent with section 274 of the Code of Civil Procedure, which provides: "In criminal cases *in which the court specifically so directs* the fee for reporting and for a *transcript ordered by the court to be made* must be paid out of the county treasury *on the order of the court.*" (Emphasis added.) The motion should be denied.

91 Cal.App.2d 669

PEOPLE v. TODD.

Cr. 4268.

District Court of Appeal, Second District,
Division 2, California.
May 4, 1949.

1. Criminal law 🔑1159(2)

In testing the validity of a judgment the sufficiency of the proof is not determinable from the testimony adduced by the appellant or by a balancing of the evidence presented by him against that introduced by the People, but it is sufficient on appeal if that of the prosecution is substantial under any reasonable hypothesis.

2. Infants 🔑20

In prosecutions under section 288 corroboration of the prosecuting witness is not essential. Pen.Code, § 288.

3. Infants 🔑20

Evidence sustained conviction under two counts of violating section 288. Pen. Code, § 288.

4. Criminal law 🔑829(16)

In prosecution for violation of section 288, requested instruction that jury should treat with great care and caution the testimony of the complaining witness, etc., was properly refused because court adequately covered the matter in instructions given. Pen.Code, § 288.

5. Criminal law 🔑1172(1)

In prosecution for violation of section 288, an instruction that the jury should view with caution the testimony of any witness which purported to relate an oral admission of the defendant or an oral confession by him was not prejudicial to defendant. Pen.Code, § 288.

6. Criminal law 🔑822(6)

In prosecution for violating section 288 criticism of an instruction undertaking to define the offense because of failure to inform the jury that the act must be lewd or lascivious could not be sustained where the element omitted was contained in the next preceding instruction, and the charge as a whole disclosed that the jury were correctly advised as to the law pertaining to all issues. Pen.Code, § 288.

◆

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Edward A. Todd was convicted under two counts of violating section 288 of the Penal Code, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and James A. Doherty, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant having been convicted under two counts for violating section 288 of the Penal Code, demands a reversal of both judgments upon two grounds, to wit, (1) insufficiency of the evidence and (2) errors in the instructions.

[1] The sufficiency of the proof in testing the validity of a judgment is not determinable from the testimony adduced by appellant or by a balancing of the evidence presented by him against that introduced by the people. It is sufficient on appeal if that of the prosecution is substantial under any reasonable hypothesis. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. The trial court is still the arbiter of factual disputes and its reasonable findings, express or implicit, will not be disturbed when based upon substantial evidence.

Evidence Sufficient

Appellant is a gardener 66 years of age. He lived in a residential section of Long Beach. He had two daughters who with three of his grandchildren resided in his home. He worked in his own community and was known among the children as "grandpa." On January 31, 1948, while he was at home his grandchildren played dolls on the porch. About 11:30 a. m. while the complaining witness, a girl of 10½ years, herein referred to as Alma, was among them, he called her into his house. After he had conversed with her for a while as they sat on the couch and talked, he asked her into a bedroom to get some candy; he there laid her on the bed, and did acts clearly in violation of section 288, fully detailed by the child. After having kissed her on the neck he admonished her not to tell anyone.

Two weeks later on Valentine day while Alma was at her own home alone and her mother and grandmother were at their places of employment, appellant called in the afternoon and accompanied by his two grandsons raked the lawn. She invited him in for a drink of water. He entered the house with the two boys and received his water in the kitchen. After the boys had departed appellant helped Alma clean the house and dishes. He served himself to a drink from a bottle labeled "Black and White" and to a lemon which he ate as they visited in the living room. He then took the girl by the shoulders and "started bumping her form against himself." After repeating this performance he led her into a bedroom, removed one of her legs from her slacks, laid her on the bed, kissed her mouth, neck and breast, and did other acts violative of section 288. They returned to the living room where appellant again sucked the girl's breast, kissed a "monkey bite" on her neck and resumed the eating of the lemon. At that juncture the mother drove up the driveway and entered the rear door where she passed appellant who still held his lemon.

Although corroboration is not required the child's testimony was corroborated as will herein appear. While the majority of the convictions under the section were based upon the defendant's having touched the more intimate part of the child's anatomy a number of judgments have been upheld based upon the acts of the accused in lewdly touching the child's hand, People v. Anthony, 20 Cal.App. 586, 129 P. 968; his pinching the child's breast, People v. Epperson, 7 Cal.App.2d 125, 45 P.2d 359; his being alone with her for 12 minutes when they danced together, permitting her to hug his neck, causing his head to come in contact with her legs, People v. Campbell, 80 Cal.App.2d 798, 182 P.2d 626; his placing his tongue in the child's mouth, People v. Ash, 70 Cal.App.2d 583, 161 P.2d 415; his biting and kissing her on the chest. People v. Bronson, 69 Cal.App. 83, 230 P. 213.

[2, 3] Since corroboration in such prosecutions is not essential to a valid judgment, People v. Westek, 31 Cal.2d 469, 473, 190 P.2d 9, appellant has but slight basis for complaint on the ground of insufficiency of the evidence. While Alma was a childish, inexperienced witness, she unfolded an intelligible story in a manner and in language calculated to convince the disinterested and which from its setting and its author, her age and environment, is not only inherently probable, but contains the substance which, if believed, left no escape for appellant. It contained no serious contradictions, and displayed no inherent weaknesses. In no material respect did it depart

from her narrative detailed at the examining trial.

That other witnesses gave testimony favorable to appellant is not a novelty and that their reports may be perfectly accurate and truthful is not impossible. But what they said was rejected by the jury which instead believed the recitals of the girl. The testimony of the prosecutrix' young friend that she and Alma spent the entire afternoon of February 14 at a theater is of a pattern with the rejected evidence of many alibis. The jury may have wholly disbelieved it or may have determined that the young lady was honestly mistaken as to the day. From a conviction based upon the proof of the prosecution contradicted only by denials and a rejected alibi there is no relief by appeal unless it be demonstrated that the trial court erred in the matters of law assigned as error by appellant.

No Prejudicial Instructions.

[4] Appellant assigns as prejudicial the court's refusal to read the following instruction to the jury: "By reason of the fact that charges of the nature involved in this case can easily be made and are often not easy to disprove, I instruct you that it is your duty to treat with great care and caution the testimony of the complaining witness. The fact that the charges here made, however, are ones not easy to disprove should not deter you from rendering a verdict of guilty in the event you are convinced by the evidence beyond a reasonable doubt that the defendant is guilty as charged. On the other hand, you are not to be moved by passion, sympathy, or prejudice to find a verdict of guilty on the charge contained in the information, and unless you are convinced beyond a reasonable doubt from the evidence that the defendant is guilty as charged in the information, you should find the defendant not guilty." This instruction was not necessary as the following had already been read to the jury: "The Court instructs the jury that the evidence of children must be scrutinized with great care and in determining the credibility of such evidence, you may take into consideration the probability of such evidence, whether the children testifying tell a straight story or contradict themselves, whether their testimony is corroborated or otherwise, whether their testimony is consistent with the physical facts as shown by the evidence, whether such witnesses have been coached or otherwise, whether their testimony shows a knowledge of things and the use of words beyond the knowledge of children of such tender years, and from these, together with all the other rules laid down in these instructions for your guidance, determine the weight, if any, you will give to such testimony."

Appellant asserts (1) that the latter instruction is only one of the cautionary instructions offered and that standing alone it does not fully state the law as announced in People v. Putnam, 20 Cal.2d 885, 129 P.2d 367, 369, to wit, "that such charge is easily made and difficult to disprove"; (2) that it attempts to limit the rule of the Putnam case to the particular instances mentioned in the instruction given and says nothing about the true reason for the rule, namely, that such a case should not go to a jury upon the sole testimony of the prosecutrix without a warning of the danger of a conviction on such uncorroborated testimony. People v. Adams, 14 Cal.2d 154, 163, 93 P.2d 146. He impliedly asserts that the rejected instruction would have been more nearly a correct expression of the law. The answer to those criticisms is three fold: (1) Caljic instruction 527 [1] was read to the jury and it includes the substance of appellant's rejected instruction. (2) The second sentence of 527 is compliance with the rule of People v. Putnam. People v. Westek, 31 Cal.2d 469, 482, 190 P.2d 9. (3) The prosecutrix was not wholly uncorroborated. There was testimony concerning appellant's admissions "that he may have kissed her because he kissed all the children in the neighborhood"; he did not know he had kissed her hard enough to make a "monkey bite"; the mother observed the red spots on Alma's neck and breast; also, she met appellant coming out of her home near the time of the act as testified by Alma. Moreover, such testimony might reasonably have justified the deduction that such kissing alone effected the results forbidden by section 288. Aside from the corroboration the instruction does not limit the application of the rule in People v. Putnam but generously warned the jury of their likelihood of being misled by a young child's testimony concerning so repulsive and grave an accusation.

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[1] "It is not essential to a conviction in this case that the testimony of the prosecuting witness be corroborated by other evidence, provided that from all the evidence you are convinced beyond a reasonable doubt and to a moral certainty of the defendant's guilt. However, a charge such as that made against the defendant in this case is one which, generally speaking, is easily made, and, once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the complaining witness and the defendant usually are the only witnesses. Therefore I charge you that the law requires that you examine the testimony of the prosecuting witness with caution."

"In giving this instruction I do not mean to imply an opinion of my own as to the credibility of any witness." [Caljic is a volume of approved jury instructions commonly in use in criminal trials.]

[5, 6] It is asserted that the court erred in instructing the jury to "view with caution the testimony of any witness which purports to relate an oral admission of the defendant or an oral confession by him." By no method of ratiocination can such language be made to appear prejudicial. It is not only favorable to appellant but it relates to appellant's "admission" concerning purely factual matters, all of which the jury heard. See People v. Cryder, 90 Cal.App. 2d 194, 202 P.2d 765. That the word "confession" was used in the alternative could not, in the light of the evidence, reasonably have been construed to mean that appellant had confessed to the accusation.

Appellant assigns the following as prejudicially erroneous: "To constitute the offense charged in the information it is not necessary that the bare skin of the minor be touched. The touching, fondling, rubbing or feeling of the body, members or private parts of a minor, under the age of fourteen years, with the intent of arousing, appealing to and gratifying the lusts, passions, and sexual desires of either the minor or the accused constitutes the offense charged in the information, even though such touching, fondling, rubbing or feeling was through the clothing of the minor."

It is argued that this instruction is defective in that it does not inform the jury that the act must be lewd or lascivious and therefore violates the doctrine that an instruction to convict must state all the conditions necessary to a legal conviction. People v. Ranney, 213 Cal. 70, 1 P.2d 423. The force of such criticism is dissipated by the fact that the element omitted was contained in the next preceding instruction as follows: "Every person who wilfully and lewdly commits any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child is guilty of a crime."

The reading of the foregoing sufficiently supplemented the criticized instruction. The charge as a whole discloses that the jury were correctly advised as to the law pertaining to all the issues.

Both judgments are affirmed.

McCOMB and WILSON, JJ., concur.

91 Cal.App.2d 622

In re FERDUN'S ESTATE.

Civ. 7618.

Sac. 5986.

District Court of Appeal, Third District, California.

May 3, 1949.

Rehearing Denied June 3, 1949.

Hearing Denied June 27, 1949.

1. Wills 🔑601(8)

Holographic will devising everything to named brother with the exception of specified bequests of personalty devised all testatrix' realty to brother in fee, and subsequent testamentary language addressed specifically to brother directing him to keep specified realty as long as he lived and at his death to leave it to designated nephews and niece was ineffectual to reduce fee to a life estate.

2. Wills ⚷675

Where holographic will devised everything to named brother with exception of specified bequests and directed brother to keep specified realty as long as he lived and leave it at his death to designated nephews and niece, succeeding statement that named person should be executor of such realty did not create a testamentary trust as to such realty in absence of other necessary elements to create a trust. Civ.Code, § 2221.

3. Wills ⚷467

A testamentary expression of desire directed to beneficiary is generally regarded as precatory unless clearly the words express testator's intention to the contrary.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Proceeding in the matter of the estate of Lillian Ferdun, sometimes written Lillie Ferdun, deceased, wherein Ernest Ferdun and Charles Ferdun filed oppositions to petition for distribution. From a decree distributing decedent's realty in fee to John H. Plummer, Ernest Ferdun and Charles Ferdun appeal.

Decree affirmed.

Robt. J. Mertz and Chas. Ferdun, both of Lodi, for appellants.

Chester E. Watson, of Stockton, for respondent.

THOMPSON, Justice.

Charles F. Ferdun and Ernest Ferdun have separately appealed from a decree of final distribution in the estate of Lillian Ferdun, deceased. The appeals involve the construction of the language of the holographic will of the decedent. The appellants filed separate oppositions to the petition for distribution. The opposition of Charles, a nephew of the decedent, merely alleges that it was the *intent* of the testatrix, "as expressed in her will", to give to her brother, John H. Plummer, a life estate only in the "Addie Ferdun vineyard", and that the fee title therein was devised to the five children of Ernest Ferdun. The amended opposition of Ernest Ferdun, who is the father of Charles, merely alleges, on information and belief, that the will fails to dispose of the real property of the estate, which should therefore pass to the heirs according to the rules of descent. On hearing, the probate court determined that the will devised to John H. Plummer, the brother of the testatrix, the fee to all real properties of the estate, and thereupon distributed the real estate as prayed for. There is no controversy regarding the distribution of the stocks, bonds, money or other personal property. From that decree the appeals were perfected.

The testatrix was a widow who died January 9, 1947, possessed of real and personal property of the aggregate value of $163,936.81. December 5, 1945, she executed her last holographic will. It contains the following language:

> "*Will*
>
> This is my last will
>
> Dated Dec. 5—1945.
>
> Everything I own I leave to my Brother, 'John Henry Plummer'—with the exception of Five (500) hundred dollars, I leave to very good friend Esther Chappins, also the same amount to her Brother Ben Scheideman, Five hundred dollars—
>
> * * * [Here follows ten specific bequests of sums of money or designated items of personal belongings, to ten named heirs or friends.]
>
> If John does not want *my car*, he then will give it to Lena Scheideman.
>
> The Ferdun and Blodgett Vineyard, you can sell if you choose, but my advice is hang on to it, John.
>
> The vineyard on Harney Lane, I call it the Addie Ferdun vineyard, you keep as long *as you live*, at the time of *your death John* leave it to Ernest Ferduns family—that is the 4 nephews and one niece Gladys. Clarence Ferdun to be Executor of that ranch.
>
> One of my Bonds 'E' I leave to Reta Kolb.
>
> " " " One Thousand Bonds goes to Mrs. M. Brack Smith—Everything else

Bonds, Stock money and Etc goes to Brother John—

The Tractor, Truck and all other implements on the ranches, I own Three Fourths and Mrs. Blodgett (Florence) owns one fourth—

Signed Lillie or Lillian Ferdun

You will find all of my property clear, and money for every-thing

Put me away as near as Dear Sister Linnie was—

Lovingly
Lillian or Lillie Ferdun
#18999
Lillian Ferdun"

"(On Envelope attached) This is my will Lillie or Lillian at the time of my death my will is to be opened by my brother John H. Plummer

Lillie or Lillian Ferdun"

Upon petition of John H. Plummer, the foregoing holographic will was admitted to probate in San Joaquin County, without opposition, on January 28, 1947, and the petitioner was appointed and qualified as administrator with the will annexed. In due time the inventory and appraisement and supplemental inventory and appraisement were filed, appraising the entire estate at $163,936.81, including four separate tracts of land of the aggregate value of $69,900. The balance of the estate consisted of stocks, bonds, note and deed of trust, money in banks, and personal belongings of the value of approximately $94,000. April 17, 1948, the petition for final distribution was filed, praying for distribution of all real property, in fee, to the brother, John H. Plummer, and of the remaining personal properties to the legatees and devisees in accordance with the provisions of the will. The oppositions to distribution of the real estate as prayed for were filed, as previously stated. A demurrer to the opposition of Charles F. Ferdun was sustained. After hearing, and arguments of respective parties, the court determined upon construction of the will, that the real properties were devised in fee to John H. Plummer; that the challenged language of the will with respect to the "Addie Ferdun vineyard" is precatory in effect and not controlling, and the court thereupon dismissed the oppositions. The real properties were distributed to Mr. Plummer in fee, and the remaining stocks, bonds, money in bank and personal belongings were distributed to the legatees and devisees in accordance with the provisions of the will.

[1] We are of the opinion the trial court correctly construed the provisions of the will, and that the real property in question was properly distributed in fee to the petitioner, John H. Plummer. We cannot agree with appellant's contention that the testatrix failed to devise the real property by the terms of the will and that she, therefore, died intestate as to such property. Reading the will as a whole, it is quite evident that the testatrix intended to thereby dispose of all of her real property consisting of four different tracts. First she said, "Everything I own I leave to my Brother, 'John Henry Plummer'—with the exception of * * *." The exceptions which follow are special bequests to designated persons of money, bonds and personal effects. Then she addressed herself to her brother John with respect to certain mentioned real property, and offers him friendly advice in relation thereto, and makes a request that when he dies he "leave it [the Addie Ferdun vineyard] to Ernest Ferduns family." Regarding the "Ferdun and Blodgett Vineyard" she says, "you can sell it if you choose, but my advice is to hang on to it, John." Certainly that language does not limit or impair the first statement of the will that "Everything I own I leave to my Brother 'John Henry Plummer'", with certain expressed exceptions of specified bequests of personal property. The following language is the only provisions of the will open to controversy. It reads: "The vineyard on Harney Lane, I call it the Addie Ferdun vineyard, you keep as long *as you live,* at the time of *your death John* [you] leave it to Ernest Ferduns family—that is the 4 nephews and one niece Gladys. Clarence Ferdun to be Executor of that ranch."

It will be observed that the preceding language is specifically addressed to her brother John. It appears to be an expression of her wish, desire or request that when her brother John dies, he may devise or "leave it to Ernest Ferduns family." The testatrix does not say "*I* leave it to Ernest

Ferduns family." There is no language in the will indicating that the testatrix, herself, was conveying the fee in that particular land to the Ferdun family. After giving to her brother John, by the first clause of the will, all the real property and the remainder of the stocks, bonds and money of the estate, with certain designated exceptions, she advises him not to sell the Ferdun and Blodgett Vineyard, but to "hang on to it." She follows that statement by saying, with respect to the "Addie Ferdun vineyard", "you keep *as long as you live,* at the time of *your death John* [you] leave it to Ernest Ferduns family."

Following the foregoing-quoted language, which we construe to be a mere request for John H. Plummer to will or leave the "Addie Ferdun vineyard" to the five children of Ernest Ferdun, when he dies, is the sentence, "Clarence Ferdun to be Executor of that ranch." The last sentence seems to reinforce our conclusion that the previous language was a mere request for John to will that ranch to the children of Ernest Ferdun, when he died. Apparently the last-quoted sentence was intended as a further request to appoint Clarence Ferdun "Executor" *of the will* when John made it. No doubt that is what the testatrix meant by that language. Otherwise, that sentence would be meaningless, for the testatrix could not make Clarence *executor of a ranch* which she had given to John H. Plummer. That would be anomalous.

[2] There is no language in the will which may be construed to create a testamentary trust in the Addie Ferdun vineyard or in any other property of the estate. The necessary elements to create a trust are not stated. Civil Code, Section 2221. No purpose for the creation of a trust is mentioned. Nor is the duration of a trust stated. The word "trust" or "trustee" is not used in the will. We are satisfied there was no intention to create a testamentary trust by the mere statement that Clarence Ferdun was to be "Executor" of a particular ranch.

We conclude that the probate court correctly construed the will as a devise of all the real property of the estate, in fee, to John H. Plummer, the brother of the testatrix, and that the language with relation to the Addie Ferdun vineyard is the mere expression of a wish, desire or request that the testatrix' brother would will that ranch to the children of Ernest Ferdun when he died, which language is precatory in nature and ineffectual to modify or reduce the former devise in fee to a mere life estate in that ranch.

Numerous California cases, and those from other jurisdictions, have held that similar language of wills, addressed to the beneficiaries of particular devises, is precatory in effect, which may, therefore, not change or modify previous absolute gifts of real property in fee. In this case the very first declaration of the will is that, "Everything I own I leave to my Brother, 'John Henry Plummer' ", with the exception of certain specified legacies and bequests of money, stocks, bonds and personal effects. The Addie Ferdun ranch is not included in those enumerated exceptions. In re Estate of Marti, 132 Cal. 666, 671, 61 P. 964, 64 P. 1071; In re Estate of Mitchell, 160 Cal. 618, 117 P. 774; Adams v. Prather, 176 Cal. 33, 38, 167 P. 534; In re Estate of Cook, 58 Cal.App.2d 376, 136 P.2d 338; In re Estate of Sack, 88 Cal.App.2d 791, 199 P.2d 420; In re Estate of Hull, 77 Cal.App. 792, 247 P. 1093; In re Estate of Miles, 72 Cal.App.2d 336, 343, 164 P.2d 546; In re Estate of Mallon, 34 Cal.App.2d 147, 93 P.2d 245; 69 C.J. p. 78, secs. 1132, 1133; 19 Am.Jur. p. 576, sec. 120.

In Re Estate of Cook, supra [58 Cal.App.2d 376, 136 P.2d 339], the holographic will provided that, "All I have goes to Ethel the best wife a man could have. * * * At her death I would like my sister and brothers ~~and~~ get at least 2000.00 each of my money and the balance to go to my daughter." On the assumption that the will created only a life estate in the widow, the probate court ordered the legacies to be paid out of the estate. From that order the administratrix appealed. On appeal, that order was reversed. The Appellate Court quoted with approval from the opinion in Re Estate of Marti, supra, as follows:

"* * * 'While the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not when addressed to his legatee be construed as a limitation upon the estate or interest which he has given to him in absolute terms.'"

Commenting on that rule, the Appellate Court said:

"From our study of the cases it appears that the rule, broadly stated, is that when the person to whom a request is directed has nothing to do but to carry it into effect, which is usually true in the case of an executor, it will be deemed mandatory, but that if the desire is so stated as to indicate the testator's intention to merely influence and not control some future action to be taken by the person addressed, as is usually the case where such person is a beneficiary, the expression will be construed as precatory or as not effecting a testamentary disposition."

Applying that rule to the will in the Re Estate of Cook, the court said that the reference in the will to payments of $2,000 to each of testator's brothers and sister "means that the testator was attempting to influence the discretion of someone *who would have the power to dispose of what remained* of the estate upon the death of his wife." (Italics added.) Following the rule announced in the Re Estate of Marti, the Appellate Court held in the Cook case that the language relied upon was precatory and ineffectual to change the absolute gift of testator's entire estate to his wife. The decree of the probate court was therefore reversed.

In the present case the rule appears to be more clearly applicable for the language in controversy is specifically addressed to the testatrix' brother. She says, "at the time of *your death John* [you] leave it to Ernest Ferduns family." That language follows some friendly advice to her brother regarding that ranch and the Ferdun and Blodgett vineyard. In the Cook case the testator did not address his wife by name. He merely said "at *her* death I would like my sister and brothers" to get $2,000 each. Nevertheless, that language was held to be precatory and ineffectual.

[3] In conformity with the preceding cited authorities, the text in 69 Corpus Juris, at page 79, section 1133, reads in that regard:

"* * * Distinctions have been drawn between expressions of desire directed to beneficiaries, to executors, and to trustees. A wish directed to a beneficiary is generally regarded as precatory, unless clearly the words express the testator's intention to the contrary; * * *."

In 19 American Jurisprudence, at page 576, it is likewise said in that regard:

"Where there is an absolute or unlimited devise or bequest of property, a subsequent clause expressing a wish, desire, or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest or limit the estate or interest in the property to the right to possess and use during the life of the devisee or legatee. The absolute devise or bequest stands, and the other clause is to be regarded as presenting precatory language. The will must be interpreted to invest in the devisee or legatee the fee simple title of the land and the absolute property in the subject of the bequest."

We conclude that all of the real estate belonging to the testatrix was devised by the terms of the will to her brother John H. Plummer, in fee, unlimited by the subsequent precative language of the will with respect to the "Addie Ferdun vineyard", and that the trial court therefore properly distributed the real property to the devisee, John H. Plummer.

The decree of final distribution is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

EDWARDS v. FREEMAN.

Civ. 3770.

District Court of Appeal, Fourth District, California.

May 5, 1949.

Hearing Granted June 30, 1949.*

1. Automobiles ⚿244(36)

In action by occupant of automobile against driver of pickup truck for injuries sustained in intersectional collision, evidence sustained finding that collision was caused solely and proximately by the negligence of driver of the automobile.

2. Negligence ⚿93(8)

The negligence of driver of an automobile is not to be imputed to a passenger who has no control over automobile in fact, and who does not bear such a relation to use of automobile as to warrant assumption that he was jointly engaged with driver in operation thereof, and fact that they have a common purpose in making trip is not alone sufficient.

3. Negligence ⚿93(8)

Where son who lived about half a mile from his mother, while on a mission to business section of city, stopped on his way at her request to take her along so that she might have her eyes tested, and automobile was involved in collision with truck injuring mother, no agency relationship existed between mother and son, and negligence of son could not be imputed to mother, and instruction authorizing such imputation was error.

◆

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action by Eloney Edwards against William Otis Freeman to recover for injuries sustained by plaintiff when an automobile in which she was riding collided with a pick-up truck being driven by defendant. From a judgment for the defendant, the plaintiff appeals.

Judgment reversed.

C. Ray Robinson and Margaret A. Flynn, both of Merced, and Lucius Powers, Jr., of Fresno, for appellant.

Dearing, Jertberg & Avery, of Fresno, for respondent.

MUSSELL, Justice.

This is an action for damages for personal injuries sustained in an automobile accident.

Plaintiff was riding in the rear seat of an automobile, owned and being driven by her son, Ray Edwards, when it collided with a Ford pick-up, being driven by the defendant in a southerly direction on a north to south highway known as Marks Avenue. Ray Edwards was driving in an easterly direction on Manning Avenue, an east to west highway, and when crossing Manning Avenue at a point in the intersection approximately on the center line of Marks Avenue and about 2½ feet south of the center line of Manning Avenue, the left front of defendant's pick-up came into contact with the left rear fender and bumper of the Edwards car as it passed through the intersection. This contact between the vehicles caused Ray Edwards to lose control of his car which careened diagonally across Manning Avenue and struck a telephone pole north of Manning Avenue at approximately 134 feet from the point of impact, resulting in the injuries to plaintiff. The accident happened at about 8:15 A.M. on October 8, 1947. The weather was clear and the highway dry.

Plaintiff's motion for a directed verdict was denied and the jury returned a verdict in favor of defendant. Plaintiff then presented motions for judgment notwithstanding the verdict and for a new trial, both of which were denied, and this appeal followed.

Plaintiff's contentions are that the evidence does not support the verdict and that the instructions were erroneous, misleading and prejudicial as to contributory negligence, agency and imputed negligence.

The evidence, considered in the light most favorable to respondent, shows that defendant, prior to the accident, was driving at a speed of 25 to 30 miles per hour at a point approximately 200 feet north of Manning Avenue, and from that point had gradually reduced his speed until at the northerly edge of Manning Avenue he was driving at about 15 to 20 miles per hour; that when 200 feet north of Manning Avenue he looked to his right for vehicles approaching on Manning from the west, saw none, and continued to look in that direction until he reached a point 80 feet north of the intersection; that his view on Manning Avenue was unobstructed for a distance of approximately 400 to 500 feet as he traveled to within 80 feet of the intersection, and at that point there were no vehicles approaching on Manning Avenue from the west; that when 80 feet from the intersection he looked to the east for vehicles approaching from that direction on Manning and continued to look in that direction until he had reached the northern edge of Manning Avenue when he again looked to the west and saw the Edwards car at a point on Manning Avenue approximately 60 feet west of Marks Avenue approaching the intersection at a speed of about 60 miles per hour; that defendant acted to apply his brakes to avoid the collision but in less than one second the Edwards car, at high speed, came into and across the intersection in front of defendant and as it passed, struck defendant's car.

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* Subsequent opinion 212 P.2d 883.

Ray Edwards testified that when he was approximately 90 feet west of the intersection, defendant's Ford pick-up was then about 150 feet north of the intersection and being driven at a speed of 35 to 45 miles per hour; that he then drove on until his car was "probably" in the intersection at which time the defendant's pick-up was approximately 20 feet from the intersection and that at that time he saw defendant's car speed up. Edwards further testified that he then pulled his car to the right, speeded up and had gotten the back end of his car past the center of the intersection when defendant's car hit the left rear wheel fender and bumper of his car.

A highway patrol officer testified that at about 10 A.M. on the morning of the accident Ray Edwards stated to him that "he never saw the Ford pick-up prior to its collision with the Ford that he was driving there at Manning and Marks Avenue." Edwards in his testimony denied having made such a statement.

[1] While there is a conflict in the evidence the jury was entitled to believe the testimony of defendant and to find that the accident was caused solely and proximately by the negligence of Ray Edwards and that there was no negligence on the part of defendant. Hicks v. Reis, 21 Cal.2d 654, 659, 660, 134 P.2d 788; Nichols v. Mitchell, 32 Cal.2d 598, 606, 197 P.2d 550. The evidence was sufficient to support findings by the jury that defendant's pick-up had entered the intersection while the Edwards car was still approaching it and that the Edwards car was at least 400 feet from the intersection when defendant was 80 feet north of Manning Avenue. These were questions of fact for the jury to decide and their findings in this respect would not be disturbed on appeal but for the errors in the court's instructions noted herein.

The asserted errors in the instructions to the jury are in connection with the question as to whether the negligence of Ray Edwards could be imputed to plaintiff.

The evidence indicates that Ray Edwards lived about a half mile from his mother; that he went to her home the day before the accident and while there she asked him if he would "be dropping into town sometime" and that the next time he was going "she would like to go in and have her eyes tested;" that he said, "Well,—going in next morning to have my arm undressed;" that on the morning of the accident he picked his mother up at her home and was bringing her into town to get some glasses when the accident happened. Plaintiff testified in this connection as follows: "Q. Why were you going to town? A. I was coming to make an appointment to have my eyes tested to get some eye glasses. Q. When did you determine to do that? A. Oh, I been intending to do that quite a while. The day before, the day before I came I seen the boy and asked him was he going; when he was aiming to come into town again. I told him whenever he come I wanted to come with him. He says, 'Well, I am going tomorrow',—to make an appointment for my glasses."

Ray Edwards testified that when he had a conversation at the hospital with a traffic officer at 10 A.M. on the morning of the accident, the doctor had taken the bandage off his arm (which had been injured previously), and later he stated that the arm was still bandaged at the time the officer talked to him. Defendant testified that the day following the accident the arm was still bandaged.

There is no testimony that plaintiff said anything to Edwards about where he should go in town or as to how he should operate the car and at the time of the accident she was sitting in the rear seat combing her hair.

The trial court instructed the jury that "if you find from the evidence that Jodie Ray Edwards was guilty of negligence in the operation of the automobile, then and there being driven by him, and you find that such negligence should be imputed to the plaintiff, and that this negligence, if any, contributed in the slightest degree to the happening of the accident, then I charge you that your verdict must be against the plaintiff and in favor of the defendant." Elsewhere in the instructions the jury was instructed as follows: "As a matter of law there is no evidence in the case of any contributory negligence individually upon the part of the plaintiff, Eloney Edwards, herself, as distinguished from any imputed negligence of Ray Edwards, if any," and that "the defendant having alleged contributory negligence, must prove it by a preponderance of the evidence before you may find it to be true" and "in determining whether negligence, or proximate cause, or contributory negligence has been proved by a preponderance of the evidence, you should consider all the evidence bearing either way upon the question." In another instruction the jury was told that "if you believe from the evidence that the auto trip being made by Mrs. Edwards and her son was being made on the business of Mrs. Edwards, at her instance and request and for her benefit, so that she would have some control over where and how the car was being driven, then Ray Edwards was her agent to the extent that if Ray Edwards was negligent and such negligence contributed proximately to the accident here in question, such negligence may be imputed to her and would prevent her from recovering."

[2] To justify the foregoing instructions to the jury it was necessary that there be evidence upon which the jury could find that plaintiff had control, or the right of control of the operation of the car in which she was riding. As was said in Morrissey v. Kirkelie, 5 Cal.App.2d 183, at page 184, 42 P.2d 361: "The negligence of an automobile driver is not to be imputed to a passenger who has no control over the car in fact, and who does not bear such a relation to the use of the vehicle as to warrant the assumption that he is jointly engaged with the driver in the operation thereof. The fact that they have a common purpose in making the trip is not, alone, sufficient. It is unnecessary to discuss the authorities further than to say that they uniformly adhere to this rule. (Citing cases.)" This rule was approved by this court in Morrison v. Jose, 57 Cal.App.2d 795, 135 P.2d 586.

In Campagna v. Market St. Ry. Co., 24 Cal.2d 304, 149 P.2d 281, 283, it was held to be prejudicial error for the court to instruct the jury concerning the principles relating to the doctrine of imputed negligence where there was no evidence that at the time of the accident the plaintiff had control, or right to control the truck in which he was riding. The court there said: "The doctrine of imputed negligence is not to be loosely applied, and 'where there is nothing in common between the passenger and driver of the vehicle except a common destination and a common purpose in going there the negligence of the driver is not to be imputed to the passenger.' Wessling v. Southern Pac. Co., 116 Cal.App. 455, 458, 3 P.2d 25, 26. The passenger must do more than to indicate the route to be traveled, and a certain plan in common is not sufficient to establish the relationship. Pope v. Halpern, supra [193 Cal. 168, 223 P. 470]. Neither family relationship between the parties, nor association together in business, is determinative of the question. Bryant v. Pacific Elec. Ry. Co., supra [174 Cal. 737, 164 P. 385]; Moore v. Franchetti, 22 Cal.App.2d 75, 70 P.2d 492. And as the imputation of contributory negligence is an affirmative defense, the defendant has the burden of proof upon that issue. Bennett v. Chanslor & Lyon Co., supra

[204 Cal. 101, 266 P. 803]; Huber v. Scott, 122 Cal.App. 334, 10 P.2d 150."

[3] In the present case there is no evidence that plaintiff did control, or had the right to control the car in which she was riding. She did not say or do anything with respect to the operation of the automobile other than to request her son to stop and pick her up when he went to town. Under such circumstances it must be held, as a matter of law, that no agency relationship existed and that any negligence upon the part of Ray Edwards could not be imputed to plaintiff. The instructions to the jury that they might find that an agency relationship existed between plaintiff and her son, and that any negligence upon his part was imputable to her, were prejudicially erroneous and require a reversal of the judgment.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

WEST KEY NUMBER SYSTEM

91 Cal.App.2d 537

PEOPLE v. GEORGE et al.

Cr. 2562.

District Court of Appeal, First District, Division 1, California.

April 29, 1949.

1. Criminal law 🔑576(5)

Where defendants, who did not formally consent to a certain continuance, thereafter consented to further continuances, they thereby waived any right to object to the continuance to which they did not formally consent. Pen.Code, § 1382; Const. art. 1, § 13.

2. Criminal law 🔑576(5)

Where defendants, who were indicted on April 29, either consented to or acquiesced in all continuances during 60-day period and thereafter until July 13, when they moved to dismiss the indictment because of lack of speedy trial, motions to dismiss indictment on ground that defendants were denied a speedy trial were properly denied. Pen.Code, § 1382.

3. Criminal law 🔑576(5)

The consent of a defendant that his trial on a criminal charge be set for a date beyond 60-day limit prescribed by statute is equivalent to a postponement on his application within meaning of that statute, and is sufficient excuse for the delay. Pen. Code, § 1382.

4. Criminal law 🔑576(5)

Consent of a defendant that his trial on a criminal charge be set for a date beyond 60-day statutory limit is presumed where the defendant fails to object at the time the cause is set for trial beyond such period. Pen.Code, § 1382.

5. Criminal law 🔑576(5)

Where defendants either consented to, or acquiesced in, all continuances during 60 days' statutory period until July 13, when they moved for a dismissal for failure to bring them to trial in 60 days, their failure on July 13 to object to the setting of their trial for July 26 presumed consent, and they could not thereafter object that they were denied a speedy trial because of the fact that on July 13 trial was not set until July 26. Pen.Code, § 1382; Const. art. 1, § 13.

6. Criminal law 🔑304(2)

It is common knowledge that criminal courts, particularly in the larger counties, are extremely busy.

7. Criminal law 🔑576(5)

Where defendants either consented to, or acquiesced in, all continuances during 60-day statutory period, and thereafter until July 13, setting of trial on July 26 was not a denial to defendants of constitutional right to a "speedy trial". Pen.Code, § 1382; Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Speedy Trial".

8. Rape 🔑7

To constitute "rape", it is not necessary that there be complete penetration, in view of statutory provision that any sexual penetration, however slight, is sufficient to complete the crime of rape. Pen.Code, § 263.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Rape".

9. Rape ⊂⊃7

Rupture of the hymen is not necessary to constitute rape. Pen.Code, § 263.

10. Rape ⊂⊃51(3)

Evidence sustained conviction of three defendants of rape, over objection that prosecutrix' testimony was inherently improbable, in view of medical testimony that slight tear in prosecutrix' hymen was an old one, that there was no abnormality or swelling of external genitalia, and that no sperm were present. Pen.Code, § 263.

11. Criminal law ⊂⊃1171(3)

In rape prosecution of three defendants, who, according to prosecutrix' testimony, seized her and forcibly placed her in automobile, district attorney's reference, in closing argument to jury, to a gang of hoodlums or gangsters who show their bravery in numbers, was not prejudicial misconduct.

◆

Appeal from Superior Court, City and County of San Francisco; W. T. Belieu, Judge.

Jack Howard George, Alfred Lamboy, and Efren Albert Vargas were convicted of rape and of conspiracy to commit rape, and they appeal.

Judgments affirmed.

Jack Howard George, Alfred Lamboy, and Efren Louis Vargas, in pro per.

Fred N. Howser, Atty. Gen., for respondent.

BRAY, Justice.

All defendants were convicted in the superior court of two crimes: (1) Rape, and (2) conspiracy to commit rape. At judgment, the court ordered the sentences for the two offenses to run concurrently. From the judgment after jury verdicts, all defendants appealed. Motions for new trial and probation were denied.

Three contentions are made: (1) The trial court erred in denying defendants' motions to dismiss the indictments for lack of a speedy trial; (2) the testimony of the prosecutrix is inherently incredible, and therefore there is insufficient evidence to support the verdicts; and (3) prejudicial misconduct of the district attorney.

1. *Were Defendants Denied a Speedy Trial?*

In considering this question the record is important. It follows:

April 29: Indictment returned.

May 3: Arraignment. Defendants moved for reduction of bail. Cause continued to May 10.

May 10: Motion denied. Cause continued, to plead.

May 17: Defendants demurred to indictment. Demurrer overruled. Pleas of not guilty. Trial set for June 15.

May 20: Defendants moved to have complaining witness undergo physical examination.

May 21: Hearing on motion continued to May 26 with consent of respective counsel.

May 26: Motion taken under submission. Cause continued to May 28.

May 28: Cause continued to June 3 with consent of respective counsel.

June 3: Cause continued to June 4 with consent of respective counsel.

June 4: Cause continued to June 8 with consent of respective counsel.

June 8: Cause continued to June 10 with consent of respective counsel.

June 10: Cause continued to June 15 with consent of respective counsel, for hearing on motion for physical examination of complaining witness.

June 15: Motion requesting examination taken from the calendar. Cause continued to July 7 for trial. Record shows neither consent nor objection of counsel.

June 29: Expiration of 60 day period.

July 7: Cause continued to July 12 with consent of respective counsel.

July 12: Defendants moved to dismiss indictment because of lack of speedy trial. Cause continued to July 13 for hearing of motion. No objection made.

July 13: Motion to dismiss denied. "Thereupon the court restated the trial date that has been allotted to this action, namely, July 26th, 1948."

July 26: Trial began. Another motion to dismiss denied.

[1, 2] It is apparent that defendants either consented to, or acquiesced in, all continuances during the 60 day period and thereafter until July 13. While the record does not disclose any consent to the continuance of May 26, it shows no objection being made, and shows also that thereafter defendants consented to further continuances, and thereby waived any right to object to the preceding continuance to which they did not formally consent. The same is true of the continuance on June 15. On July 12, although defendants consented to the continuance of trial from July 7 to July 12 (and had consented, or not objected, to the other continuances, several of which were in connection with their motion for a physical examination, which was dropped from the calendar on June 15 because of the fact that the prosecutrix had voluntarily submitted to an examination by a doctor appointed by the court) they made a motion to dismiss the indictment on the ground that they had not been brought to trial within the 60 day period. Certainly they were not entitled to a dismissal at that time. To dismiss an indictment against defendants who had consented to the setting of their trial beyond the 60 day period, because of the very act to which they had consented, would be a miscarriage of justice.

[3, 4] "* * * if the consent of defendant to the postponements from time to time was not equivalent to an application by him for postponement, it was sufficient excuse for the delay." People v. Benc, 130 Cal. 159, 162, 62 P. 404, 405. "The consent of a defendant that his trial on a criminal charge be set for a date beyond the 60-day limit prescibed by subdivision 2 of section 1382, supra, is equivalent to a postponement upon his application within the meaning of that section, and is sufficient excuse for the delay. [Citing cases.] Consent is presumed when the defendant fails to object at the time the cause is set for trial beyond such period. [Citing cases.]" Ray v. Superior Court, 208 Cal. 357, 358, 281 P. 391, 392. "The record shows no objection by defendant at the time the continuances were ordered, and his consent is therefore presumed." People v. Howe, 1 Cal.App.2d 518, 36 P.2d 820, 821.

On the hearing of the motion to dismiss, the assistant district attorney filed an affidavit (defendants filed no counter-affidavit nor made any counter showing to the matters set forth therein) which, after giving the history of the continuances in the case and the fact that defendants had consented to them, stated that before June 28, the attention of defense counsel was called to the fact that a murder trial which had been set for trial on June 28 was not to be tried as the defendant had pleaded guilty. The assistant district attorney requested defense counsel to agree to the advancement of the trial of this case from July 7 to a day during the week of June 28, which the latter declined to do. Further, there had been negotiations for some time between respective counsel concerning "a possible plea to be entered" by the defendants, and it was not until July 9 that those negotiations were finally concluded by the defendants declining to enter a plea different from that already entered. Also, during all the time this case was on the calendar of department 12 (the department to which it had originally been assigned), that department's calendar was congested, there being at all times some forty or fifty cases awaiting trial, and that department, as well as the other criminal departments of the court, had been engaged constantly in trials of criminal cases. It appears also from the transcript of the proceedings on July 12 and 13, that the court was then engaged in a murder case to be followed on July 19 (the date requested by defendants for the trial of this case) by a burglary case, and that the first open date the court had was July 26. The judge asked the judge of department 11 to take the trial of the case, but he would not do so because of a criminal case going to trial there. Owing to the absence of one of the judges of the criminal department, there were only two judges left for the ensuing nine or ten days. That the defendants made no objection to the date set for the trial appears from the following excerpt from the transcript, showing how the proceedings on July 13 ended:

"The Court: The motion to set aside will be denied. What date, gentlemen?

"Mr. Lawless [for the prosecution]: July 26th?

"The Court: July 26th for trial.

"Mr. Dunn [for the defense]: In this department, Your Honor?

"The Court: Yes."

Defendants contend that the delay of 14 days from the date upon which the record last shows a formal consent, and 28 days after the expiration of the 60 day period, constitutes a denial of a "speedy trial," under the constitutional provision and section 1382 of the Penal Code.

Article I, section 13, of the Constitution provides in part: "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; * * *" Section 1382 of the Penal Code provides in part: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information. * * *" It has been held that "What constitutes a speedy trial must be determined in the light of all the circumstances. People v. Brock, 87 Cal.App. 601 262 P. 369, 263 P. 544; In re Alpine, supra [203 Cal. 731, 265 P. 947, 58 A.L.R. 1500]; People v. Molinari, supra [23 Cal.App.2d Supp. 761, 67 P.2d 767]." People v. Godlewski, 22 Cal.2d 677, 682, 140 P.2d 381, 384.

The minutes of July 13 do not state the reason the trial was continued. It is set forth that "the court *restated* the trial date that has been allotted to this action namely, July 26th, 1948." (Emphasis added.) This referred to the date set by the court on July 12.

[5] The defendants made no objection to the continuance from July 12 to July 13 or to the date set for trial, nor did they demand that they be tried July 13. Although they had moved for a dismissal for failure to bring them to trial in 60 days, when their motion was denied, if they objected to the fact that the court was setting their trial for 13 days away, they should have said so. Their failure then to object presumes consent. People v. Rongo, 169 Cal. 71, 145 P. 1017; In re Scott, 81 Cal.App. 577, 254 P. 596; Ex parte Apakean, 63 Cal.App. 481, 218 P. 768. The motion to dismiss, made the day of the actual trial, could not act as a substitute for the failure of the defendants on July 13 to object to the setting of the trial for July 26.

The cases cited by defendants are not opposed to this rule. In People v. Morino, 85 Cal. 515, 24 P. 892, 893, the defendant was arraigned on August 12, the fifth day after the information was filed. Not having been brought to trial and he having "never made any application for, nor was there any postponement of, the action in his behalf, or on his application" he made a motion for dismissal on the following 19th of March, more than eight months after the filing of the information. In Re Begerow, 133 Cal. 349, 65 P. 828, 56 L.R.A. 513, 85 Am.St.Rep. 178, defendant had been tried for murder three times, the jury failing to agree each time. After 60 days elapsed from the last trial, defendant moved to dismiss. The trial court denied his motion. On the 85th day, still not having been brought to trial, he petitioned the Supreme Court for a writ of habeas corpus, which was granted. No contention was made that he had consented to or acquiesced in the delay. In Harris v. Municipal Court, 209 Cal. 55, 285 P. 699, the court granted a writ of mandamus to dismiss a misdemeanor proceeding where the defendant was not brought to trial within 18 months of the filing of the complaint. Again, there was no contention that the defendant had in any way acquiesced in or agreed to the delay. People v. Angelopoulos, 30 Cal.App.2d 538, 86 P.2d 873, was a case in which the defendants were not brought to trial within 60 days after a mistrial. Two of the defendants consented to a continuance of the trial beyond the 60 day period thereafter. One of the defendants objected. It was held that as to him the case should have been dismissed. In Rice v. Superior Court, 40 Cal.App.2d 391, 104 P.2d 874, a writ of mandamus was issued to compel the dismissal of an information where the defendant had not been brought to trial for 64 days after the information was filed. No contention was made that the defendant had consented to or acquiesced in any way in the delay. In People v. Fegelman, 66 Cal.App.2d 950, 153 P.2d 436; the court gave an extremely narrow construction to the term "speedy trial." However, it is factually much different from the case at bar. There the case was originally set for trial for November 1, which was the 60th day after the filing of the information. On that day the deputy district attorney, representing the People, requested that the case be continued for one day in order that he might obtain evidence to lay a foundation for the admission of the preliminary testimony of an absent witness. Defendant very strenuously objected, both on the grounds that the continuance of one day would bring the trial beyond the 60 day period, and that no showing had been made why, with ordinary diligence, the district attorney could not that day produce evidence as to the absence of the police officer whose testimony was to be read. Again, the reporter's transcript quoted in the opinion shows that the trial court was quite arbitrary in first continuing the case until the afternoon because "I have some matters in chambers", 66 Cal.App.2d page 952, 153 P.2d page 438, and then continuing the case to the next day, saying he would "possibly" rule on the matter the next morning. These facts in no wise compare with those in our case. Dearth v. Superior Court, 40 Cal.App.2d 56, 104 P.2d 376, likewise can give no real comfort to defendants. There the case was set for trial in department 44 for March 27, approximately the 35th day after the information was filed. On that day, defendant appeared ready for trial, but the judge, on his own motion, continued the case to April 22, the 60th day. Again defendant appeared, ready for trial, but the case was continued until the next day. Again defendant appeared, ready for trial. However, a civil case had been set for trial in department 44 that day. The judge started the trial of the civil case and continued the criminal case to April 26. On April 24 defendant moved for a dismissal on the ground that he had not been brought to trial within 60 days. The judge denied the motion, stating that he would have been ready to try defendant's case on the 23rd, if the presiding judge had not assigned the civil case to his department. On April 26 defendant again moved for a dismissal, which was denied, and the case was transferred to department 41, the master calendar department. Again, there, defendant moved to dismiss, the motion was denied, and the case set for trial for May 13, the 81st day. On May 9 defendant applied to this court for a writ of mandamus to compel the dismissal of the information, which was granted. Obviously, the facts in that case are entirely different from those in our case. While the defendant there, by failure to object to the continuances prior to April 24, was deemed to have consented to such continuances, the court pointed out that over his objection, the court gave a civil case precedence over a criminal case, when section 1050 of the Penal Code requires that criminal cases should have the precedence.

In defendants' opening brief appears the statement that defendants "strenuously objected" on July 13 to the setting of the trial for the 26th. The record, including the transcript of the proceedings that day, shows no such objection having been made.

[6, 7] The question of whether defendant has been given a "speedy trial" must be viewed from a common sense viewpoint. It is a matter of common knowledge that criminal courts, particularly in the larger counties, are extremely busy. While it is important that the constitutional rights of a person to a "speedy trial" be fully protected, at the same time the crowded condition of our court calendars must likewise be regarded. Here the defendants, by dilatory pleas and their own acts, waived the right to a trial within the 60 day period. It is not reasonable to hold, under the circumstances here, that a delay of, at most,

14 days from the date to which they last formally consented that the trial be continued, deprived them of a "speedy trial." We do not intend to hold that where delay in trial is consented to by a defendant, such consent automatically gives the court another 60 day period in which to bring the defendant to trial. But the right to a "speedy trial" does not mean that a defendant has a right to be tried on *any certain day*. Here, as soon as the defendants showed a desire to have their case tried, the case was tried within 14 days.

That a defendant who has consented to a delay beyond the 60 day period is not entitled to an immediate trial on the day to which he has last consented is shown by the decision in People v. Santos, 134 Cal.App. 736, 26 P.2d 522. There the indictment was found on January 19. Defendant was arraigned on February 24, and the trial set for March 6. Subsequently, by the consent of respective counsel, the trial was continued to March 20. On that date, again by consent of respective counsel, it was "continued to be set" to March 25. This date was beyond the 60 day period. On March 25, defendant's counsel failed to appear, and the setting of the trial was continued to March 27. Again counsel failed to appear, and the trial was set for April 27. On that date defendant moved for a dismissal on the ground that he had not been brought to trial in 60 days. His motion was denied, and the trial set for May 11, when the trial began. It was exactly 14 days from the date of the denial of his motion to the date of trial. After holding that defendant's consent to continuances and the failure of his counsel to appear was equivalent to a postponement upon defendant's application, the court stated: *"It may be noted that the cause was tried within a reasonable time thereafter * * *"* 134 Cal.App. 744, 26 P.2d page 525. (Emphasis added.) Under all of the circumstances of our case, the defendants were not denied a "speedy trial," and the court properly denied the motions to dismiss.

2. *Testimony of Prosecutrix.*

Defendants' contention that the testimony of the prosecuting witness is inherently improbable is limited to the question of penetration. They contend that in view of the testimony of the medical doctors, her statement that there was penetration is incredible, and therefore, any proof of rape falls. As the defendants make no contention that the evidence is not sufficient to support the verdicts, if the question of penetration, which applies only to the rape charge, is proved, it is not necessary to go into all the sordid details of the case, except as to the facts concerning that issue.

The testimony of the prosecutrix as to the events of the evening and night in question and the fact that she was forcibly and against her will taken in defendant George's car by all defendants to a secluded spot is well corroborated. What happened there is disputed, the defendants denying that they raped or attempted to rape her. Prosecutrix testified that all three defendants came to the back seat of the car, her girdle and panties were ripped off, and two of them held her arms and legs, while each in turn managed to place his penis in her "privates." It is this statement of prosecutrix that defendants characterize as inherently incredible. Defendants finally took the prosecutrix home and she immediately notified the police. The latter took her to the Central Emergency Hospital for an examination. The examination disclosed bruises about her face and body, upon her hands, arms and upper thighs. An examination of the pelvic region showed a slight tear of the hymen, which admitted a swab about a half an inch in size readily, with some slight tenderness. The doctor thought that this tear was an old one, and he found "no abnormality of the external genitalia, no swelling or discharging, and separating the entrance to the vagina there was no laceration noticed." He found no sperm or gonorrhea. Later that day she was examined by another doctor who found one of the bones of the palm of her hand broken. Defendants contend that the absence of sperm, the slight amount of tenderness, and the testimony of the doctor that the tear in the hymen was an old one, and in any event, comparatively slight, make the prosecutrix's statement that there was any penetration incredible. This does not necessarily follow. According to the prosecutrix's testimony, she was struggling at all times and the defendants were having considerable difficulty in having intercourse with her—"one would say it was his turn, the other wasn't man enough, and he wasn't getting anywhere, and they would try to pull one another off, or they would say, how was he doing, and there was some statement made that I was tight, that they couldn't get what they wanted." Dr. Morse, who examined prosecutrix June 11 (the attacks occurred the morning of April 19), testified that the condition of the hymen indicated that the rupture had occurred not more than three months past at the most. It was the doctor's opinion that because of the smallness of prosecutrix's vagina the average male organ could not gain complete entrance. This fact corroborates the testimony of prosecutrix to the effect that each defendant did not stay on top of her long. He was dragged off by one of the others, who claimed it was his turn—"they were each there and saying it was their chance next and each one of them had stated they were having the same trouble, that I was tight and they couldn't get anywhere."

[8, 9] To constitute rape it is not required that there be complete penetration. "Any sexual penetration, *however slight,* is sufficient to complete the crime." Sec. 263, Penal Code; People v. Lindley, 26 Cal.2d 780, 161 P.2d 227; emphasis added. Nor is any rupture of the hymen necessary to constitute rape. The medical testimony does not make the statement of the prosecutrix that she was entered, improbable. In fact, the smallness of her vagina would account for the difficulty the defendants were having, but would not necessitate the conclusion that there was not some penetration. Prosecutrix testified (and the jury believed her) that the defendants had inserted their penises in her vagina. The value of her testimony was for the jury to determine. In People v. Stangler, 18 Cal.2d 688, 117 P.2d 321, where the defendant was accused of raping a 10 year old child, the same contention was made as here. That contention is well answered by the following quotation from that case, 18 Cal.2d page 691, 117 P.2d page 322: "The defendant contends first that the testimony of the prosecutrix was so inherently improbable, incredible and incongruous as to require a reversal of the order denying his motion for a new trial. He relies on the case of People v. Ogden, 41 Cal.App.2d 447, 457, 107 P.2d 50, 55, and the following language quoted therefrom: 'Before we are authorized to say that the testimony of the prosecutrix herein bears upon its face the brand of inherent improbability and is unbelievable per se, we must be warranted in concluding that what she testified to would seem impossible to have taken place under the circumstances described by her.' He contends that the prosecutrix' description of what took place was a physical impossibility, rendering her testimony incredible as a matter of law. However, the jury and the trial court had the defendant and the prosecutrix before them. Any doubt as to whether the acts described were physically impossible was resolved against the defendant by the jury and by the trial court on the motion for a new trial. It was also said in People v. Ogden, supra, citing People v. Newland, 15 Cal.2d 678, 104 P.2d 778, and People v. Gidney, 10 Cal.2d 138, 73 P.2d 1186, that an appellate tribunal cannot disturb the findings of the triers of fact unless it be made clearly to appear that upon no hypothesis is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in the lower court."

[10] On cross-examination prosecutrix was unable to state in detail what each of the defendants was doing at a particular time, that is, who was holding her hands and who was holding her legs and just which defendant was in the car and who was outside of it. In view of her attempted escape from the car, the forceful placing her back in the car, the attack by three men, the lateness of the hour (4:30 a. m.) and all the circumstances, it is not surprising that there was some confusion in her testimony, but such confusion does not make her testimony inherently improbable. The effect of it was for the jury, as was the lack of sperm found by the examining doctor.

3. *Alleged Misconduct.*

[11] Defendants contend that the assistant district attorney was guilty of prejudicial misconduct in stating in his closing argument: "Now, Members of the Jury, Mr. Dunn is right in one respect, that this is a serious case. It is serious. It is very serious. It is a thing in San Francisco that has to be stopped—some way, somehow. You cannot, you cannot allow this to go on and the only way that we law enforcement officers, who as a branch of the judicial system have to put a stop to this outrage to woman—there is only one way you can do it, and that is to punish those that do it and by that—and by that, Members of the Jury, put a deterrent, but a brake on others that may have the same idea. You can see, you can understand, Members of the Jury, that if a thing like this is allowed to go unpunished and allowed to run wild what protection would any woman, young or old, married or unmarried—what protection would you have? Would you want a situation where women at any time, either day or night, could be ravished at will, at the mere whim of any man or any gang of hoodlums? Any gangsters who show their bravery in numbers—" At this point defense counsel assigned the statement as misconduct and asked the court to instruct the jury to disregard it. The court stated: "I don't think this presentation is inflammatory. It appears to be within the rights of the District Attorney to argue the case fully and draw such conclusions as are justified by the evidence." Defendants have cited no case holding that statements of this nature constitute prejudicial misconduct. In People v. Burnette, 39 Cal.App.2d 215, 102 P.2d 799, cited in purported support of their contention, the court held that statements much worse than these, for example, referring to the defendants as "yellow rats," although overstepping the bounds of propriety, were not of "such a flagrant character as to require a reversal." 39 Cal. App.2d page 230, 102 P.2d page 807. Under the circumstances of this case, including the fact that the evidence of the forceful placing of prosecutrix in the car was corroborated, the fact that the defendant George when arrested admitted his guilt and named the other two defendants, the testimony of defendant George, the only one of the defendants to take the stand, which corroborated prosecutrix in most details (except as to the rape), we cannot say that the remarks of the district attorney constituted wilful misconduct.

The judgments are affirmed.

PETERS, P. J., and WARD, J., concur.

PRYOR v. UNION PAC. R. CO.

Civ. 16780.

District Court of Appeal, Second District,
Division 1, California.

May 2, 1949.

Hearing Granted June 27, 1949.*

1. Contracts 🔑127(4)

Portion of agreement signed by widow of railroad employee, purporting to limit widow's right to bring action for death to federal courts and state courts of specified counties located in Wyoming where employee was injured and died, was void under Federal Employers' Liability Act as being a contract, the purpose of which was to enable railroad to exempt itself from a "liability" created by the act, and was void under California law, and did not preclude widow from bringing action in California as a state in which railroad was doing business. Federal Employers' Liability Act §§ 1 et seq., 5, 6, 45 U.S.C.A. §§ 51 et seq., 55, 56.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Liability".

2. Courts 🔑489(9½)

The courts of California must assume jurisdiction of cases brought under the Federal Employers' Liability Act. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

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* Subsequent opinion 214 P.2d 377.

3. Contracts ⚿127(4)

In California, provisions in contracts relating to the place of trial in civil actions for enforcement thereof are void.

4. Contracts ⚿127(4)

Jurisdiction of California courts over actions ex contractu or ex delicto is not to be diminished by agreement of the parties as to venue regardless of whether the cause of action had accrued when agreement was entered into.

5. Contracts ⚿64

Agreement signed by widow of railroad employee purporting to limit widow's right to bring action for death against railroad to federal courts and state courts of specified counties in state where employee was injured and died, and reciting that payment to widow by railroad purporting to be consideration for agreement was an advance and deductible from amount if any of final settlement, was unenforceable for want of consideration. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action under the Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq., by Pearl L. Pryor, administratrix of the estate of Wintford A. Pryor, deceased, against Union Pacific Railroad Company, a corporation, for death of plaintiff's husband. From an adverse judgment, plaintiff appeals.

Judgment reversed.

Hildebrand, Bills & McLeod, and D. W. Brobst, all of Oakland, for appellant.

E. E. Bennett, Edward C. Renwick, Malcolm Davis and W. J. Schall, all of Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff is the widow of a railroad brakeman who was employed by the defendant railroad company. He was killed in the state of Wyoming on November 4, 1944, while so employed.

Two days later defendant paid plaintiff $500, and plaintiff executed an agreement which reads as follows:

"Agreement and Contract
"Draft No. 77183-GEO-

"Received of the Union Pacific Railroad Company Five Hundred Dollars ($500.00) being an amount advanced to me on account of personal injuries and death of my husband, Wintford A. Pryor, while employed as a brakeman, at or near Walcott, Wyoming, November 4, 1944, while in the service of the said Union Pacific Railroad Company, such payment not being an admission of liability and to be deducted from any final settlement, which might be made.

"It is agreed that as consideration for such payment, in the event settlement cannot be concluded, suit for damages, which I fully understand might, in the absence of this agreement, be brought in jurisdictions other than those herein set forth, will not be brought in any jurisdiction outside of the State and Federal Courts of Rawlins, Carbon County, Wyoming, or State and Federal Courts of Laramie, Albany County, Wyoming.

"I Have Read The Above Agreement And Contract And Fully Understand The Same.

"I have read the above agreement and contract and fully understand the same.

"Pearl Pryor,
"Administratrix of the Estate of
"Wintford A. Pryor, deceased.
"Laramie, Wyo.
"Nov. 6th, 1944.

"Witness to Signature:
"B. F. Muin, Laramie, Wyo.
"N. M. Johnston
"Frank H. Miller
"Don Dryor
"G. E. Alexander, Laramie, Wyo.
Nov. 6, 1944"

December 2, 1946, plaintiff was appointed administratrix of decedent's estate in the State of California. On December 6, 1946 she filed her complaint in the Los Angeles Superior Court alleging negligence as the cause of decedent's death and praying for damages; all in accordance with the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. Plaintiff's pleadings terminated with a second amended complaint, to which the railroad company interposed its answer, alleging the agreement as a bar to the action in California.

Upon this issue the trial court rendered judgment for the defendant.

Plaintiff appeals and contends that the judgment should be reversed for two reasons:

1. The agreement purporting to waive venue rights under the Federal Employers' Liability Act is invalid;

2. The defendant waived its right to object to the venue as now laid by answering plaintiff's complaint.

The pertinent sections of the Federal Employers' Liability Act are as follows:

Section 51, which prescribes the liability for negligence of common carriers for injuries sustained by their employees engaged in interstate commerce.

Section 55, which in part provides: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void * * *".

Section 56, which applied to the facts in this case, confers jurisdiction upon the California Courts.

If the covenant to bring suit against the railroad company in the state of Wyoming only is prohibited by section 55 above, the judgment of the Superior Court must be reversed.

This question is of first impression in California, and has never been decided by the U. S. Supreme Court.

In the recent case of Akerly v. New York Central Railroad Company, 168 F.2d 812, U. S. Circuit Court of Appeals, Sixth Circuit (decided June 14, 1948), it is held that such a covenant is void because the venue provision in the federal law is inherently part of the employer's liability.

The case authority on this question is in sharp conflict, and in the Akerly case there was a vigorous dissent by one of the circuit judges. These conflicting cases are collected and referred to in the Akerly case as follows, 168 F.2d at page 814: "District Courts in Missouri, Illinois, and Minnesota, and the Supreme Court of Minnesota, have held that such contracts are valid. Herrington v. Thompson, D.C., 61 F.Supp. 903; Roland v. Atchison, Topeka & Santa Fe Ry. Co., D.C.Ill., 65 F.Supp. 630; Clark v. Lowden, D.C.Minn., 48 F.Supp. 261; Detwiler v. Lowden, 198 Minn. 185, 269 N.W. 367, 838, 107 A.L.R. 1054, 1059. District Courts in Illinois, Minnesota, and Iowa, and the Supreme Court of Utah, have held that such contracts are invalid. Sherman v. Pere Marquette Ry. Co., D.C., 62 F.Supp. 590; Fleming v. Husted, D.C. Iowa, 68 F.Supp. 900; Petersen v. Ogden Union Ry. & Depot Co. [110 Utah 573], 175 P.2d 744. Cf. Porter v. Fleming, D.C. Minn., 74 F.Supp. 378."

[1] Most of the cases which have enforced the covenant to limit the venue have proceeded upon the theory that venue and liability as provided by the statute are separate and distinct, and that venue is not included in liability. The problem is not to be solved by this simple process. There are times when venue is definitely part and parcel of liability. In Petersen v. Ogden Union Ry. & Depot Co., 110 Utah 573, 175 P.2d 744, the contract under consideration was the same as the contract here before us, with the exception of the names of the parties and inconsequential details. In that case plaintiff, for an advance of money on the liability of the railroad, agreed to bring his action only in the federal court, northern district of Utah. The Utah court held that while venue may be waived in proper cases, in this type of case it is a privilege which may not be contracted away in the face of Sec. 55 of the Federal Employers' Liability Act.

And in that case, in discussing the concept that venue may be part of liability, the court observed that in the federal court twelve jurors must agree before finding their verdict, whereas in the state courts of Utah the plaintiff need convince only six out of eight jurors to prevail.

Indeed in dealing with juries, the number necessary for a verdict in civil cases may have even more far-reaching consequences that the necessity of convincing six as in Utah, nine as in California, or twelve as in the federal courts. Any lawyer who has tried cases where twelve jurors must agree can recall instances when agreement in the jury room was reached as to negligence over the objections of one or two intransigeant jurors, who then proceeded to argue down damages so successfully that when the verdict was finally reached the amount of recovery was pitifully inadequate.

In the case at bar defendant is seeking to enforce a contract limiting plaintiff's case to trial in the federal courts, where twelve jurors must agree to a verdict, and to certain state courts in Wyoming where twelve jurors likewise must agree to a verdict. Section 12-128, Wyoming Compiled Statutes 1945 provides as follows: "Trial Jury.—The first twelve (12) persons who appear as their names are drawn and called and are approved as indifferent between the parties and not discharged or excused must be sworn and constitute the jury to try the issue."

The plaintiff is now a resident of California and part of the liability of the railroad company is her right to bring the action in the proper courts of this state, in which the railroad does business. It would be more difficult for her to journey to Wyoming, employ counsel there, and plead her case in that state, than for the railroad company to defend it in California.

Moreover, this and other safeguards in the law have been placed there for the protection of employees and their dependents from what has been described as "the superior bargaining power" of railroads. Under the circumstances in this case it can be quite readily inferred that superior bargaining power was employed in obtaining the contract upon which defendant relies. It was presented for signature, together with $500 in cash, to a widow in the extremity of grief and financial necessity occasioned by the death of her husband.

Therefore that part of the contract here before us limiting venue of the action is void.

The same result is reached by reasoning from another legal premise.

[2, 3] The courts of California must assume jurisdiction of cases brought under the Federal Employers' Liability Act. Leet v. Union Pacific Railroad Company, 25 Cal.2d 605, 155 P.2d 42, 158 A.L.R. 1008. And in California provisions in contracts relating to the place of trial in civil actions for enforcement thereof are void. General Acceptance Corp. of California v. Robinson, 207 Cal. 285, 277 P. 1039. This case, and the cases therein cited, all have to do with actions ex contractu, and covenants as to venue in case of litigation arising out of the contract. The action here pending is ex delicto, and the agreement as to venue was made after the happening of the cause of action alleged.

[4] There are statements in text and reference books to the effect that when there is an accrued cause of action agreements as to venue are valid and enforceable. 17 C.J.S., Contracts, § 229, p. 606; sec. 1725 Williston on Contracts, Revised Edition, Vol. 6. It would seem, however, that the underlying principle upon which the rule should be based is that whether or not the cause of action is accrued, jurisdiction of our courts is established by law and is not to be diminished "by the convention of the parties." Meacham v. Jamestown, F. & C. R. Co., 211 N.Y. 346, 105 N.E. 653, 656, Ann.Cas.1915C, 851. See annotations L.R.A.1916D, 696; 59 A.L.R. 1445; 107 A.L.R. 1060. This view in no wise interferes with the power of a court, in proper cases, to change place of trial upon stipulation of the parties. In such situations the order is that of the court upon consent and agreement of the parties.

[5] While it has not been argued in the briefs, the U. S. Circuit Court in Akerly v. New York Central Railroad Company, supra, came to the further conclusion that such contracts as these are void for want of consideration. Also in the case of Petersen v. Ogden Union Ry. & Depot Co., supra, the chief justice of the Supreme Court of Utah bases in part his concurrence with the majority of the court upon this ground. In the present case the contract recites that the payment of $500 was an advance and deductible from the amount if any of the final settlement. Hence there was no consideration.

In view of our determination that the contract limiting the venue in this case is void, it is unnecessary to decide plaintiff's contention that defendant waived the bar of the contract by appearance and answer. Under our system of pleading it is difficult to see how an answering party may be held to waive a plea in bar set up as part of an answer.

The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

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91 Cal.App.2d 664

TRAVIS v. METROPOLITAN THEATRES CORPORATION et al.

Civ. 16923.

District Court of Appeal, Second District, Division 2, California.

May 4, 1949.

1. Theaters and shows 🔑6(2)

A theater proprietor is not an insurer of safety of his patrons, but is obliged to exercise such care as to keep premises reasonably safe for all invitees and is liable for harm caused by any dangerous condition, natural or artificial, if he knew of it or if by reasonable care he could have discovered it.

2. Theaters and shows 🔑6(1)

Theater operator must possess and reasonably exercise a superior knowledge of dangers incident to facilities and premises he provides for his patrons and must have sufficient personnel successfully to maintain theater in reasonably safe condition.

3. Theaters and shows 🔑6(10)

Theater operator has duty to anticipate and guard against lurking perils, inspect the premises and facilities and to keep aisles and other passageways free from substances which might cause a person to slip.

4. Theaters and shows 🔑6(25)

Direct evidence is not essential to prove that dangerous condition in theater existed so long that in exercise of reasonable care it should have been discovered and remedied by theater operator, as regards right of patron to recover from proprietor for injuries sustained as result of such dangerous condition.

5. Theaters and shows 🔑6(22)

Mere passage of time creates presumption of constructive notice of theater proprietor as to a dangerous condition in theater resulting in injuries to patron, and other consideration, such as lack of diligence on proprietor's part to discover the danger, increased risk of injury arising from the condition, probability that invitees will not discover the peril, and want of reasonable precautions taken for safety of patrons are elements to be considered in establishing proprietor's negligence.

6. Theaters and shows 🔑6(25)

Ordinarily, question as to whether dangerous condition in theater resulting in injury to patron existed long enough so that it should have been discovered and remedied by proprietor is for jury, and question as to whether premises had been negligently maintained is also a question of fact.

7. Theaters and shows 🔑6(31)

Evidence that vomit on floor of theater upon which patron slipped and fell when preparing to take her seat had remained long enough to form crust on its surface, together with fact that pungent odor should have caused ushers in course of their duty to detect it and fact that occurrence was within purview of expectancy, sustained finding that proprietor's employees were negligent in failing to discover and remove the substance, so as to render proprietor liable for injuries sustained by patron.

◆

Appeal from Superior Court, Los Angeles County; Thomas J. Cunningham, Judge.

Action by Betty Jane Travis against Metropolitan Theatres Corporation and another for injuries sustained from fall in named defendants' theater. From adverse judgment, the named defendant alone appeals.

Affirmed.

Sidney A. Moss, of Los Angeles (Henry F. Walker, of Los Angeles, of counsel), for appellant.

Nathan O. Freedman and Gerald L. Kales, both of Hollywood, for respondent.

MOORE, Presiding Justice.

The question for decision is whether the evidence was sufficient as a matter of law to establish the negligence of the proprietor of a place of public amusement, the patron having suffered personal injuries resulting from a fall caused by a slippery, repulsively odoriferous substance on the floor.

Respondent was a pay customer at appellant's theater. It opens regularly at 9 o'clock a. m. and remains open until after 4 a. m. of the following day. The premises are cleaned and inspected once daily, and that occurs in the morning before opening.

Shortly after 1 a. m. on November 1, 1946, respondent entered the theater with her escort, the witness Pike. No ushers being on duty, the couple remained at the head of an aisle in order to accustom their eyes to the darkness. Unaccompanied, they proceeded toward the stage and entered between two rows of seats. In front of the second seat plaintiff's foot encountered a deposit of vomit on the floor. She slipped, fell, and was injured. After inspecting the substance with the aid of a lighted match, Mr. Pike assisted her to the foyer and reported the accident to Mr. Erich, the manager, after which the couple departed.

There is no dispute that the substance which caused the fall was the regurgitated contents of a human stomach. Erich testified that after the accident he and the witness Jeffers cleaned up the filth. It is not suggested that an employee of the house caused the deposit to be made or that respondent or her companion did so. The sole contention on appeal is that the condition did not exist for such length of time that a reasonably prudent person would have discovered it in time to remove it prior to respondent's arrival.

[1-3] A theater such as that here involved invites the public to patronize it and large audiences gather there and occupy its auditorium to be entertained. They have no suspicion that defective carpets or furniture or offensive deposits on the floor will imperil their safety. Since she was an invitee of appellant, respondent's rights to redress are governed by the rule that pertains to disputes growing out of that relation. While a proprietor is not an insurer of the safety of his patrons, Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 560, 296 P. 76, yet he is obliged to exercise such care as to keep the premises reasonably safe for all invitees. He is liable for harm caused by any dangerous condition, natural or artificial, if he knew of it or if by the exercise of reasonable care he could have discovered it. The operator of a theater must possess and reasonably exercise a superior knowledge of the dangers incident to the facilities and premises he provides for his patrons and must have a sufficient personnel successfully to maintain the theater in a reasonably safe condition. Blumberg v. M. & T. Inc., Cal.App., 202 P. 2d 311; Rest. Torts, vol. 2 sec. 343; Newman v. Fox West Coast Theatres, 86 Cal.App.2d 428, 433, 194 P.2d 706. His duty is to anticipate and guard against lurking perils, inspect the premises and facilities and to keep the aisles and other passageways free from substances which might cause a person to slip. This is especially true in the case of a place in which many people assemble at all times of day and night. Louie v. Hagstrom's Food Stores, 81 Cal.App.2d 601, 608, 184 P.2d 708.

[4] Appellant contends that there is no evidence as to how long the defective condition existed, and that therefore only by guess, conjecture or surmise could the jury have determined that defendant should have discovered it. Direct evidence is not essential to prove that the dangerous condition existed so long that by the exercise of reasonable care it should have been discovered and remedied. Louie v. Hagstrom's Food Stores, supra.

[5, 6] While under circumstances similar to those involved in the instant action the mere passage of time will create a presumption of constructive notice, such is not the only factor involved. Other considerations such as the lack of diligence on the part of defendant to discover the danger, the increased risk of injury arising from the condition, the probability that invitees will not discover the peril, and the want of reasonable precautions taken for the safety of patrons, are all elements to be considered in establishing the negligence of the proprietor of a theater. Whether the condition existed long enough to be discovered is for the jury to determine. Rothchild v. Fourth and Market St. R. Co., 139 Cal.App. 625, 627, 34 P.2d 734; Hatfield v. Levy Bros., 18 Cal.2d 798, 807, 117 P.2d 841. Whether the premises have been negligently maintained is also a question of fact. Tuttle v. Crawford, 8 Cal.2d 126, 130, 63 P.2d 1128; Newman v. Fox West Coast Theatres, Inc., supra. Time limitations cannot be fixed because they vary with the circumstances of each accident.

[7] The evidence in the instant case was sufficient to warrant a finding of appellant's negligence not only because of its failure to maintain a vigilant watch over its premises but also by virtue of the fact that the substance had actually remained on the floor long enough to form a crust on its surface. Mr. Pike testified that the substance was dry on top with a crust like a pie but moist in the middle, that it was light yellow in the center and dark brown elsewhere. From such evidence the jury could reasonably infer that a substantial period of time had elapsed since the occurrence that caused the deposit. That there was contrary testimony is true, but it was rejected by the fact finders. Moreover, vomiting in appellant's theater was not uncommon. One of its employees testified that patrons of that particular theater became sick "maybe once every two or three nights." The occurrence was therefore no novelty but within the purview of expectancy. He testified also that after the accident was called to his attention he had no difficulty in seeing the substance when he flashed the light between the seats. It is apparent therefore that the assistance of ushers to conduct respondent and her escort to their seats and the customary use of a flashlight would have disclosed the presence of the substance on the floor even if it had been deposited only a moment before plaintiff's entrance. Such probability is rendered almost a certainty by reason of the fact that the pungent odor released by the soured contents of a stomach would readily have caused an usher in the course of his duty to detect them.

The evidence is sufficient to sustain the jury's implied finding that the condition existed long enough to require the agents of appellant in the exercise of ordinary care to discover and remove it. Such is the holding of Louie v. Hagstrom's Food Stores, 81 Cal.App.2d 601, 606, 609, 184 P.2d 708, wherein Owen v. Beauchamp, 66 Cal.App.2d 750, 152 P.2d 756, and McKellar v. Pendergast, 68 Cal.App.2d 485, 156 P.2d 950, relied upon by appellant are distinguished.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

BURTNETT v. KING et al.

S. F. 17550.

Supreme Court of California.
May 6, 1949.
Rehearing Denied June 2, 1949.

1. Judgment ⚷117

Under statute providing that relief granted if there be no answer cannot exceed that demanded in complaint, "demanded" means claimed, asserted a right to or prayed for. Code Civ.Proc. § 580.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Demanded".

2. Divorce ⚷254, 255

Under statute providing that relief granted if there be no answer cannot exceed that demanded in complaint, where wife's divorce complaint merely described community property, without referring to it in prayer for relief, default judgment awarding community property to wife was beyond court's jurisdiction, void, and not res judicata as to title. Code Civ.Proc. §§ 580, 585, subd. 2.

3. Courts ⚷40

Where statute requires court to exercise its jurisdiction in a particular manner, follow a particular procedure, or act subject to certain limitations, an act beyond these limits is in excess of jurisdiction.

4. Judgment ⚷131

Where clerk may enter a default judgment, as distinguished from a default, he has no authority other than that conferred by statutes, and failure to stay within statutory authorization renders the judgment void. Code Civ.Proc. §§ 580, 585, subd. 2.

5. Judgment ⚷117

A default judgment that exceeds the demand or gives relief where no demand is made therefor is void as in excess of court's jurisdiction and not res judicata. Code Civ.Proc. §§ 580, 585, subd. 2.

6. Judgment ⚷731, 739

A judgment is not res judicata as to issues that are not or could not be litigated.

EDMONDS and SPENCE, JJ., dissenting.

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Edward M. Burtnett against Ellijah B. King and others to quiet title to real estate. From a judgment for defendants, plaintiff appeals.

Reversed.

Prior opinion, 196 P.2d 927.

Robert E. Hatch, of San Francisco, for appellant.

Royal E. Handlos, of San Francisco, for respondents.

CARTER, Justice.

By this action plaintiff seeks to quiet his title to an undivided one-half interest in certain real property which was admittedly the community property of himself and his former wife, Marion Burtnett. On the 21st day of July, 1945, she instituted an action for divorce against him in San Mateo County and he was personally served with summons. He defaulted therein, and the divorce decree awarded said community property to his wife. She subsequently conveyed said property to defendants. In the instant action no contention is made that plaintiff has estopped himself from questioning the validity of the award of community property, and there is nothing in the record from which it can be said that the doctrine of estoppel is applicable to the situation here involved. Defendants interposed the plea of res judicata, and the judgment in their favor is based solely upon the ground that the divorce decree awarding the community property to the wife is res judicata of her ownership of the title to said property in severalty. To ascertain the propriety of allowing that defense we must examine the pleadings in the divorce action.

In that action plaintiff wife claimed extreme cruelty, and the only reference to property rights in her complaint was the allegation that "the community property of plaintiff and defendant consists of the interest of plaintiff and defendant in the real property and dwelling house * * *" in San Mateo County. In the prayer there was no mention of the community property or request that it be awarded to any one.

There was a request for an order restraining the husband "from being upon or at the home" which plainly referred to an allegation in the complaint that he was molesting and harassing her. There was a prayer for general relief.

[1, 2] The statutes are very specific in their requirements for a judgment following a default. "The relief granted to the plaintiff, if there be no answer, *cannot exceed* that which he shall have *demanded* in his complaint; but *in any other case*, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." [Emphasis added.] Code Civ.Proc. § 580. In cases where no answer has been filed and a default has been entered, but the clerk may not enter a default judgment, the plaintiff may apply to the court "for the relief *demanded* in the complaint" and after evidence is heard, the court may render a default judgment "for such sum *(not exceeding the amount stated in the complaint)*, as appears by such evidence to be just." [Emphasis added.] Code Civ.Proc. § 585 (2). Manifestly "demanded" means claimed, asserted a right to or prayed for. That there was no demand for the property in the instant case is plain; that is, not only did the relief accorded *exceed* the demand, it adjudicated property rights when none were ever asserted, claimed or prayed for.

[3] It is equally clear that by reason of the mandatory language of the statute (the court *cannot* give a default judgment in excess of the demand), the court's jurisdiction to render default judgments can be *exercised only in the way authorized by statute.* It cannot act except in a particular manner, that is, by keeping the judgment within the bounds of the relief demanded. It has been held repeatedly, and recently, that where a statute requires a court to exercise its jurisdiction in a particular manner, follow a particular procedure, or subject to certain limitations, an act beyond those limits is in excess of its jurisdiction. See, Tabor v. Superior Court, 28 Cal.2d 505, 170 P.2d 667; Lord v. Superior Court, 27 Cal.2d 855, 168 P.2d 14; Redlands etc. Sch. Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411; Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107; Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109; Spreckels Sugar Co. v. Industrial Acc. Comm., 186 Cal. 256, 199 P. 8. Certainly no statutory method of procedure or limitation on power could be more clearly expressed than that set forth in section 580 of the Code of Civil Procedure, supra. Thus the court wholly lacked jurisdiction to render a judgment affecting the community property, for there was no demand for such relief. Having no jurisdiction the judgment was not res judicata on this issue. It was void.

[4] The essence of the policy underlying section 580 of the Code of Civil Procedure, supra, is that in default cases, defendant must be given notice of what judgment may be taken against him—a policy underlying all precepts of jurisprudence and protected by our constitutions. If a judgment other than that which is demanded is taken against him, he has been deprived of his day in court—a right to a hearing on the matter adjudicated. In cases where the clerk may enter a default judgment, as distinguished from a default, he has no authority other than that conferred by the *statutes.* He must strictly stay within his statutory authorization and a failure to do so renders the judgment *void.* Baird v. Smith, 216 Cal. 408, 14 P.2d 749; Landwehr v. Gillette, 174 Cal. 654, 163 P. 1018; Farrar v. Steenbergh, 173 Cal. 94, 159 P. 707; Reher v. Reed, 166 Cal. 525, 137 P. 263, Ann.Cas.1915C, 737; Crossman v. Vivienda Water Co., 136 Cal. 571, 69 P. 220; Wharton v. Harlan, 68 Cal. 422, 9 P. 727; Junkans v. Bergin, 64 Cal. 203, 30 P. 627; Tregambo v. Comanche Mill & Mining Co., 57 Cal. 501; Providence Tool Company v. Prader, 32 Cal. 634, 91 Am. Dec. 598; Kelly v. Van Austin, 17 Cal. 564; Potts v. Whitson, 52 Cal.App.2d 199, 125 P.2d 947; Crofton v. Young, 48 Cal.App.2d 452, 119 P.2d 1003; Spaulding & Co. v. Chapin, 37 Cal.App. 573, 174 P. 334; Kimbel v. Osborn, 61 Wyo. 89, 156 P.2d 279, 158 A.L.R. 1091, 1114; 14 Cal.Jur. 893. True, the courts in those cases spoke of the ministerial character of the clerk's func-

tion, but the policy there enunciated is based upon the necessity of notice. It is clear that the lack of it is as grave to defendant whether the clerk or the court renders the default judgment.

[5] It is a settled rule, and has been clearly stated in many recent authorities, that a default judgment by the court that exceeds the demand or gives relief where no demand is made therefor is void as in excess of the court's jurisdiction and not res judicata. Lang v. Lang, 182 Cal. 765, 190 P. 181; Metropolitan Life Ins. Co. v. Welch, 202 Cal. 312, 260 P. 545; Gregg v. Stark, 128 Cal.App. 434, 17 P.2d 766; Balaam v. Perazzo, 211 Cal. 375, 295 P. 330; Horton v. Horton, 18 Cal.2d 579, 116 P.2d 605. It is said in Lang v. Lang, supra, 182 Cal. at page 768, 190 P. at page 182, where the divorce decree adjudicated community property rights where none were mentioned in the pleadings: "The defendant in that action (plaintiff here) had the right to assume that the judgment which would follow a default on her part would embrace only the issues presented by the complaint *and* the relief therein prayed. * * *

"Parties to an action for divorce may submit to the court the simple issue of their right to a divorce without reference to their property. Coats v. Coats, 160 Cal. 671, 118 P. 441, 36 L.R.A.,N.S., 844. This being so, where a complaint in divorce contains no allegation with reference to property rights, a defaulting defendant should be entitled to assume that the only matter which will be determined by the court is the matter of divorce, and that the question of property rights will be left for consideration and determination in another and separate action. In addition thereto, it is a well-established rule *that in a default case the relief granted cannot exceed the prayer.* Brooks v. Forington, 117 Cal. 219, 48 P. 1073; Mudge v. Steinhart, 78 Cal. 34, 20 P. 147, 12 Am.St.Rep. 17. *And where relief is given beyond the scope of that asked for, it is a nullity, and may be attacked collaterally, or its effect avoided* under the doctrine that it is not res judicata." [Emphasis added.] And in Horton v. Horton, supra, 18 Cal.2d at page 583, 116 P.2d at page 607: "While all these cases [referring to Lang v. Lang, supra, and others] *correctly* state the rule that in such circumstances *the allowance of relief beyond the scope of the pleading is a nullity,* for a defendant has the right to assume that the judgment which would follow a default on his part would embrace only the issues presented by the complaint and the relief therein asked, these authorities are not in point here because the wife's pleading amply sustains the amended decree as rendered." [Emphasis added.]

Some cases have said that the judgment is erroneous. Balfour-Guthrie Inv. Co. v. Sawday, 133 Cal. 228, 65 P. 400; Longmaid v. Coulter, 123 Cal. 208, 55 P. 791; Foley v. Foley, 120 Cal. 33, 52 P. 122, 65 Am.St.Rep. 147; Gage v. Rogers, 20 Cal. 91; Lattimer v. Ryan, 20 Cal. 628; Mudge v. Steinhart, 78 Cal. 34, 20 P. 147, 12 Am.St.Rep. 17; Burke v. Koch, 75 Cal. 356, 17 P. 228; Pittsburgh Coal Min. Co. v. Greenwood, 39 Cal. 71; Parrott v. Den, 34 Cal. 79; Darsie v. Darsie, 49 Cal.App.2d 491, 122 P.2d 64; Flores v. Smith, 47 Cal.App.2d 253, 117 P.2d 712; Von Der Kuhlen v. Hegel, 51 Cal.App. 416, 196 P. 913; Williams v. Reed, 43 Cal.App. 425, 185 P. 515; Brown v. Caldwell, 13 Cal.App. 29, 108 P. 874; see, merely reversed, Sav. & Loan Society v. Horton, 63 Cal. 105. But none of those cases decided or found it necessary to decide that the judgment was not void.

The cases of Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246; Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868; Karlslyst v. Frazier, 213 Cal. 377, 2 P.2d 362; Parker v. Parker, 203 Cal. 787, 266 P. 283, and Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520, are not in point for the reason that there, support money or alimony were involved, and it may be conceded that this issue is so germane to the issue of divorce that a defendant must anticipate an award therefor although there is no prayer to that effect. Those cases involved awards of alimony or support for children. In the Bowman case it was alleged in the complaint that the husband and wife owed specific debts and requested that defendant husband be ordered to pay the debts. That request was granted in the judgment. In the Miller case the prayer requested that an agreement which contained a provision for alimony be made a part of the decree. The Karlslyst case involved support of a child and while permanent support was given the prayer asked for temporary support only. In the Parker case the weekly earnings of defendant husband was alleged, the custody of the child requested and the child was shown to be of tender years, and in the Cohen case the holding was based on the ground that the award of alimony was a necessary part of the proceeding.

[6] It is conceded, as it must be, that it is erroneous to grant relief in excess of the demand, as all the cases hold to that effect. If it is error, it must be for the reason that the judgment violates section 580 of the Code of Civil Procedure, and that the violation consists in attempting to adjudicate matters beyond the issues made by the complaint. The only issues that may be litigated in a default proceeding are those presented by the complaint. As to other issues, those are not and cannot be litigated or adjudicated. It has long been settled that a judgment is not res judicata as to issues that are not or could not be litigated. In English v. English, 9 Cal.2d 358, 363, 70 P.2d 625, 628, 128 A.L.R. 467, this Court quotes with approval from Corpus Juris: "The doctrine of conclusiveness of judgments applies to a judgment by default with the same validity and force as to a judgment rendered upon a trial of issues, provided such judgment is regular and valid, and shows distinctly on what count or cause of action it was rested. But the confession implied from the default is limited to the material issuable facts which are well pleaded in the declaration or complaint, and does not apply to issues which were not raised in the pleadings. Nor, subject to the rule that the judgment is conclusive as to every fact necessary to uphold it, is a default judgment conclusive, in a subsequent suit on a different cause of action, against any defenses defendant may have, although the same defenses, if pleaded and proved in the former action, would have defeated plaintiff's recovery, because in the absence of a trial and hearing in the first suit, it cannot be said that such matters were adjudicated therein."

In the divorce action here involved no notice was given to the husband that the community property would be adjudicated. The prayer did not demand an award of such property. It made no mention of it at all. It may be observed that the complaint alleged that said husband would inflict bodily injury upon plaintiff unless restrained. The prayer asked that such violence be restrained, and incidentally, to carry out that purpose, that he be ordered to stay away from the "home of plaintiff and defendant." Rather than advising the husband that the rights in the home would be adjudicated, the clear implication is that it was conceded that the property was *the home of both*, and would remain such, but that the husband should not go there during the pendency of the action. The only reasonable interpretation of the pleading is that the wife was not going to claim the home as hers, and she was recognizing her husband's interest therein. The only prayer that could possibly be said to embrace a demand for the property was a general prayer for such other relief as may be proper. It is clear that the husband had no notice or warning that the property would be affected by a default judgment. On the contrary, as above seen, the only indication was otherwise, and in addition, by reason of his wife's silence on the subject in her prayer, he would properly assume that the rights to the property were not to be litigated in that action. To hold otherwise would mean that this court sanctions a procedure under which a defendant may be *trapped* by a default judgment. Merely alleging that the property was community in no way challenged his right to retain his interest therein. Rather it admitted he should. He would feel wholly safe in agreeing to that allegation without any thought that his interest in the property was in jeopardy. Under such circumstances the default judgment could not be res judicata of his interest in the property.

The judgment is reversed.

SHENK, TRAYNOR and SCHAUER, JJ., concur.

EDMONDS, Justice (dissenting).

Unquestionably, in a default action, the court may not grant relief beyond that which is demanded in the complaint. Code Civ.Proc. § 580. But a judgment in excess of the prayer of the complaint is not necessarily void and thereby subject to collateral attack. Only to the extent that it includes a subject matter not embraced within the pleadings, is the judgment void. Where the subject matter is before the court by appropriate allegations of the complaint, a judgment which exceeds the demands of the prayer is erroneous and subject to direct, but not collateral, attack.

In an action where the jurisdiction of the court depends upon the amount of the "demand," ordinarily the prayer is determinative of the question. Miller v. Carlisle, 127 Cal. 327, 59 P. 785; and see Becker v. Superior Court, 151 Cal. 313, 90 P. 689. But the right to adjudicate does not always depend upon the measure of the relief sought; it may be "found in the nature of the case as made by the complaint." Silverman v. Greenberg, 12 Cal.2d 252, 254, 83 P.2d 293, 294. As stated in section 1917 of the Code of Civil Procedure: "The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment."

The case of Horton v. Horton, 18 Cal.2d 579, 116 P.2d 605, 607, is directly in point here and should be controlling. That was an action for separate maintenance in which the plaintiff had alleged the existence of community property, describing it, and the husband's ability to pay for her support. The prayer requested "a reasonable sum" for that purpose, as well as for attorneys' fees and costs, and for an order restraining dissipation of the assets by the husband. The decree required the husband to pay specified amounts to her for her separate maintenance, and she also was awarded certain property described in the complaint. Upon collateral attack, this court held that the allegations as to the ability of the husband to pay support and the itemization of the community property "were sufficient to notify him that the disposition of the community property and his ability to make the payments requested were issuable facts." Horton v. Horton, supra, 18 Cal.2d at page 583, 116 P.2d at page 607.

In the present case, although the complaint did not contain a specific prayer for a division of community property, there were allegations sufficient to bring it within the rule of the Horton case. Paragraph V of the divorce complaint reads: "That the community property * * * consists of the interest of plaintiff and defendant in the real property and dwelling house situated at No. 478 Miriam Street, Daly City, County of San Mateo, State of California, one (1) cook stove, cash in the amount of One Hundred Dollars ($100.00) and four United States Bonds of the maturity value of Twenty-five ($25.00) Dollars each." This is not an allegation such as may be disposed of as a mere preliminary to the prayer for injunctive relief; if this were the sole purpose of the allegation, why was there included the enumeration of the stove, cash and bonds?

The majority opinion contains a striking anomoly. It is first stated in the most unequivocal terms "that by reason of the mandatory language of the statute (the court *cannot* give a default judgment in excess of the demand), the court's jurisdiction to render default judgments can be *exercised only in the way authorized by statute.* * * * Thus the court wholly lacked jurisdiction to render a judgment affecting the community property, for there was no demand for such relief. Having no jurisdiction the judgment was not res judicata on this issue. It was void." The rule thus stated would appear to be unswerving and final, and, incidentally, contrary to the rule of Horton v. Horton, supra. Yet at a later point the opinion demonstrates little difficulty in bending its rigid rule to avoid the inevitable collision with certain cases. Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246; Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868; Karlslyst v. Frazier, 213 Cal. 377, 2 P.2d 362; Parker v. Parker, 203 Cal. 787, 266 P. 283; Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520. Of these cases, it is said: They "are not in point for the reason that there, support money or alimony were involved, *and it may be conceded that this issue is so germane to the issue of divorce that a defendant must an-*

ticipate an award therefor although there is no prayer to that effect." (Emphasis added.) Why this exception? If, as the opinion states, the court's jurisdiction to enter judgment in a default action is strictly limited to the "very specific" terms of Section 580 of the Code of Civil Procedure, how can a court be held to have "jurisdiction" beyond the scope of the prayer in cases where alimony or support is in issue when the statute makes no mention of such an exception? It would seem, rather, that if the majority has properly construed the statute, consistency requires that the support and alimony cases be overruled or disapproved.

Nor is it clear why alimony is any more "germane" to an action for divorce than is community property. Each of these issues is frequently, if not generally, determined in a divorce proceeding; yet, a divorce may be entered without a determination of either issue. Where, as here, there is an allegation listing all of the community property of the spouses, the husband is certainly on notice that the issue of property is "germane" to the litigation. If there is no prayer for division of the property, the decree which includes such division is erroneous but not void, if and to the extent that, there is a proper allegation in the complaint to raise the issue. Horton v. Horton, 18 Cal.2d 579, 116 P.2d 605.

SPENCE, J., concurs.

Rehearing denied; EDMONDS and SPENCE, JJ., dissenting.

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33 Cal.2d 797

Ex parte SMITH.

Cr. 4949.

Supreme Court of California.
May 3, 1949.

1. Evidence 🔑345(1)

No certain words are necessary to create a valid certificate attesting a purported copy of a document as a "certified" copy. Code Civ. Proc. §§ 1918, 1923.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Certified".

2. Evidence 🔑345(1)

Generally, recognized meanings of "attest", as that word is used on a copy of a document intended to be placed in evidence, include to certify to the verity of a copy of a public document formally by signature; to affirm to be true or genuine; and word is appropriately used for affirmation of persons in their official capacity to test truth of a writing, and it is a technical word by which certifying officer gives assurance to verity of a copy. Code Civ. Proc. §§ 1918, 1923.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Attest".

3. Evidence 🔑345(1)

In habeas corpus proceeding to secure release from prison on ground that order of Adult Authority extending petitioner's term was void because made after expiration of original term, document purporting to be an excerpt from minutes of a meeting of authority held on a date prior to expiration of original term, which excerpt contained order in question and upon which appeared the word "attest", a date, and a signature followed by rubber stamp impression "Executive Secretary, Adult Authority, Department of Corrections", and the seal of the Authority, was properly certified for admission in evidence. Code Civ. Proc. §§ 1918, 1923.

4. Evidence 🔑60, 70, 83(1), 87

Minute entry of Adult Authority which recites an order and which is evidenced by a certified copy comes within the disputable presumptions that it is truly dated, that official duty has been regularly performed, and that a person is innocent of crime or wrong. Code Civ. Proc. § 1963, subds. 1, 15, 23; Pen.Code, § 2919.

5. Habeas corpus 🔑83

On application for habeas corpus, court would not under record accept, as proof of any pertinent fact, petitioner's assertion, made for first time in his reply to respondent's return, that he expected to establish by unidentified contents of secretary's records that the order of Adult Authority extending his term was made nunc pro tunc after expiration of term. Pen. Code, § 3020.

6. Prisons 🔑15

Refusal of Adult Authority to allow prisoner time credits for current period is not the equivalent of a declaration of a forfeiture of time credits previously allowed which would require notice, hearing, proof, and a finding that prisoner was guilty of misconduct. Pen. Code, §§ 2919, 2920, 2923, 2924.

7. Prisons 🔑15

A prisoner is not entitled to time credits as a matter of right, but they must be allowed by affirmative action of Adult Authority in its discretion, and authority, when considering whether a prisoner has earned and should be allowed credits, is not required to give notice and hold a hearing or make a written finding as to reason for its action. Pen. Code, §§ 2919, 2920.

8. Criminal law 🔑1208(9)

Order of Adult Authority, made nine days before expiration of original term fixed for prisoner refixing term for a longer period pursuant to parole officer's factually unchallenged report and recommendation, was not an order suspending or "revoking parole", within statute providing that no parole shall be suspended or revoked without cause, which cause must be stated in order suspending or revoking parole. Pen. Code, § 3063.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Revoking Parole".

9. Criminal law 🔑1208(9)

An order of Adult Authority refixing term of sentence need not state cause of its making. Pen. Code, §§ 3020, 3022.

10. Criminal law 🔑1208(9)

Where Adult Authority had before it parole officer's report disclosing violations of parole by parolee, and recommendation that term be refixed, order refixing sentence at maximum term was not without cause. Pen. Code, §§ 3020, 3022.

11. Criminal law 🔑1208(9)

Where parolee's term, as originally fixed, would expire March 16, action of authority on March 7, based on parole officer's report of February 18 refixing term, was not invalid for failure of authority to give 30 days' notice of meeting to determine term to judge before whom prisoner was tried and to district attorney and sheriff of county from which prisoner was sentenced. Pen. Code, §§ 3022, 3042.

12. Constitutional law 🔑270

The action of Adult Authority in lengthening a term of imprisonment beyond that originally, and by law only tentatively, fixed but still within maximum term provided for offense of which his guilt has been adjudged, does not deprive prisoner of liberty without due process of law. Pen. Code, §§ 3020, 3022; Const. Cal. art. 1, § 13; U.S.C.A.Const.Amend. 14.

13. Constitutional law 🔑92

A prisoner, including one who is constructively a prisoner under sentence in legal custody and under control of Department of Corrections, has no vested right to have term of imprisonment which he is serving fixed or remain fixed at less than maximum term prescribed by law. Pen. Code, §§ 3020, 3022; Const. Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

14. Criminal law 🔑1208(9)

Where prisoner was in custody under sentence for robbery in the first degree, the maximum punishment for which is life imprisonment, so long as he remains in actual or constructive custody, Adult Authority could determine and redetermine his term of imprisonment in accord with best interest of prisoner and society. Pen. Code, §§ 213, 671, 3020, 3022; Const. Cal. art. 1, § 13; U.S.C.A.Const.Amend. 14.

◆

Original proceeding in the matter of the application of Walter J. Smith for a writ of habeas corpus, to secure petitioner's release from Folsom State Prison.

Writ discharged, and petitioner remanded to custody of warden.

Walter J. Smith, in pro. per., for petitioner.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

By this application for the writ of habeas corpus petitioner, an inmate of Folsom State Prison, seeks his release upon the ground that on March 16, 1947, the term of his imprisonment as then fixed by the Adult Authority, with credits earned and allowed, expired. This contention, as will hereinafter appear, is not sustained by the record.

In 1942 petitioner began service of concurrent sentences for attempted robbery, robbery of the first degree and violation of section 503 of the Vehicle Code (driving or taking a vehicle in absence and without consent of owner). In 1944 he was released upon parole. Prior to the time of such parole petitioner's term had been fixed at five, eight and five years, the sentences to run concurrently. His "ticket of leave" (which set forth the conditions of his parole) stated, among other things, "Expiration of Sentence March 16, 1947 with benefit of credits if allowed." On February 18, 1947, petitioner's parole officer reported to the Adult Authority that petitioner had violated a term of his parole in that he had been using alcohol to excess; that petitioner's mother in Michigan had offered to give petitioner a home and arrange for employment for him; that the Parole Bureau was attempting to make arrangements with Michigan parole officers permitting transfer of petitioner to that state; that "a change of environment may be of considerable assistance to him in re-establishing himself. However, subject's violation of the parole regulations by drinking is of such a serious nature * * * that his parole term should be extended to maximum, then allowing future conduct to determine the length of term subject should serve." Thereafter the Adult Authority made the following order dated March 7, 1947: "Term of Robbery 1st degree charges refixed at 10 years. No credits for current period." This action of the Authority was taken without giving petitioner notice or opportunity to be heard. For reasons hereinafter stated petitioner urges that this order and, therefore, the subsequent orders of the Adult Authority as to him are void.

Early in May, 1947, petitioner, without notice to or consent of his parole officer, left his place of residence and his employment and went to Michigan. His "ticket of leave" provided that such conduct was in violation of the terms of his parole. On May 26, 1947, petitioner's parole officer advised the Adult Authority that petitioner had violated his parole in the above respects and that "Subject has apparently passed some forged checks * * * and a warrent has been issued for his arrest by the Los Angeles Police Department." Pursuant to the parole officer's report the Authority ordered that petitioner's parole be suspended and he be returned to prison. Petitioner was apprehended in Wisconsin, returned to Los Angeles, pleaded guilty to the forgery charge and served a sentence therefor in the county jail. Upon his release from the county jail he was returned to state prison and, after notice and hearing, the Adult Authority revoked his parole and forfeited six months' credits.

It is petitioner's position that, as stated above, the order of the Adult Authority dated March 7, 1947, was void and that, therefore, his term expired on March 16, 1947, and subsequent orders of the Adult Authority cannot revive such term. (See In re Shull (1944), 23 Cal.2d 745, 753, 146 P.2d 417, 420, which, petitioner contends, is analogous to the present situation: "[O]nce a prisoner has been allowed credits and by reason thereof his reduced term has expired, his term, as not reduced, may not thereafter be revived by a forfeiture of credits for conduct occurring after the expiration of his reduced term.") Petitioner urges that the order dated March 7, 1947, was void for two reasons: first, because it was not actually made on March 7, 1947, but was made nunc pro tunc after March 16, 1947, when petitioner's term, as then fixed, had expired; second, even if the order was made before expiration of the term fixed, it was invalid because it was made without petitioner's receiving notice and an opportunity to be heard.

[1-3] In support of his contention that the order was made nunc pro tunc petitioner asserts that it is not "certified as a true and correct copy of the minutes of the Adult Authority." Statutory provisions pertinent to authentication and use of such a copy are: "Documents of any other class [there is no other provision covering minutes of the Authority] in this state [may be proved] * * * by a copy, certified by the legal keeper thereof." (See Code Civ.Proc., § 1918, par. 6.) "Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original * * *. The certificate must be under the official seal of the certifying officer, if there be any * * *" (Code Civ.Proc., § 1923.) The attorney general has filed a document purporting to be an "Excerpt from * * * Minutes of a meeting of the Adult Authority Held * * * March 7, 1947," which contains the order in question and upon which appears the following handwriting "Attest: Sept. 29, 1948. E. A. Burkhart"; the following by rubber stamp impression, "Executive Secretary, Adult Authority, Department of Corrections"; and the seal of the Authority. "No certain words are necessary to create a valid certificate attesting a purported copy as a 'certified copy.'" (Harting v. Cebrian (1935), 10 Cal.App.2d 10, 17, 51 P.2d 195, 198.) Generally recognized meanings of "attest" include "to certify to the verity of a copy of a public document formally by signature * * *; to affirm to be true or genuine * * * It has been said that the word is appropriately used for the affirmation of persons in their official capacity to test the truth of a writing, and that it is the technical word by which, in the practice of many states, a certifying officer gives assurance to the verity of a copy." (7 C.J.S., Attest, p. 691.) Therefore, it appears that the copy of the minutes is acceptably certified.

[4, 5] There is a disputable presumption that the minute entry of the Authority which recites the order, and which is evidenced by the certified copy, is truly dated; there are also similar presumptions that official duty has been regularly performed and that a person is innocent of crime or wrong. (Code Civ.Proc., § 1963, pars. 23, 15, 1.) Petitioner alleges no facts and produces no evidence sufficient to dispel these presumptions. He asserts that because of "the fact that no notice or hearing was given to petitioner, it is his stand that no such order was made on March 7, 1947." Whether petitioner was given notice or hearing is not relevant to the date of the making of the order for, under the circumstances shown and as hereinafter explained, the Authority was not required to give notice and opportunity to be heard prior to, or notice after, the making of the subject order. Petitioner asserts, further, that he has "reason to believe that the refixing of his term of imprisonment was by a nunc pro tunc proceeding subsequent to the expiration of the original term fixed on March 16, 1947, as petitioner's request (by letter) for the subpoena of Mr. A. E. [sic] Burkhart, Secretary to the Adult Authority, and his records, was not received by this Honorable Court. Petitioner believes upon information that the Prison Officials withheld his letter from the United States Mail. That petitioner expected to establish by Mr. Burkhart and his records that the order of March 7, 1947 * * * was made in a nunc pro tunc proceeding subsequent to the expiration of petitioner's term of imprisonment and parole." Petitioner cannot now rely upon his asserted belief that the records of the secretary of the Adult Authority would show that the order dated March 7, 1947, was made at a later date and falsely dated, for the following reasons: As petitioner indicates, this court has never received from him a request "for the subpoena of Mr. A. E. [sic] Burkhart, Secretary to the Adult Authority, and his records." According to a letter from petitioner to this court, dated and received after oral argument of this matter, petitioner had in mind at the time of such argument his asserted desire, and his asserted unsuccessful attempt to communicate to this court his desire, to produce the records before this court. Nevertheless, petitioner did not mention this during oral argument and upon such argument rejected the offer of the court to appoint counsel to aid petitioner in

the presentation of his contentions. In these circumstances we do not accept as proof of any pertinent fact petitioner's assertion, made for the first time in his "Reply to Respondent's Return," dated and filed after the last above mentioned letter from petitioner received by this court, that he "expected to establish" by unidentified contents of the secretary's records, that the order dated March 7 was made nunc pro tunc.

[6, 7] Petitioner next asserts that, assuming that the order of March 7, 1947, is correctly dated, it is void because the Adult Authority failed to comply with sections 2923 and 2924 of the Penal Code. The pertinent substance of those sections is a provision that the Authority ("unless such offender be outside the walls of the prison as an escape and fugitive from justice") "may declare a forfeiture of * * * time credits theretofore earned by or allowed to" a prisoner only upon notice, hearing, proof and a finding that the prisoner was guilty of misconduct. The order of March 7, however, does not purport to "declare a forfeiture" of time credits; rather it refuses to allow "credits for current period." Time credits do not accrue as a matter of right but must be allowed by affirmative action of the Adult Authority in its discretion (see Pen.Code, §§ 2919, 2920; In re Mann (1923), 192 Cal. 165, 166, 219 P. 71; In re Bogden (1924), 193 Cal. 21, 222 P. 353), and no provision of law requires that the Authority, when considering whether a prisoner has earned and should be allowed credits, need give notice and hearing or make a written finding as to the reason for its action.

[8-10] Likewise without merit is petitioner's contention that the order of March 7, 1947, violated section 3063 of the Penal Code. That section provides that "No parole shall be suspended or revoked without cause, which cause must be stated in the order suspending or revoking the parole." The order of March 7 does not purport to revoke parole. There is no provision of law requiring that an order refixing the term of sentence state the cause of its making, and (we assume that such an order cannot be made upon mere caprice or for no reason) it cannot be said that the order, made pursuant to the parole officer's factually unchallenged report and recommendation, was without cause.

[11] Section 3020 of the Penal Code, which authorizes the Adult Authority to redetermine the length of time of imprisonment, does not require that the prisoner be given notice or opportunity to be heard. Such requirement was eliminated in 1941. (Stats.1941, ch. 106, § 15 p. 1110; see In re Etie (1946), 27 Cal.2d 753, 759, 167 P.2d 203; In re Borgfeldt (1946), 75 Cal. App.2d 83, 85, 170 P.2d 94). The only statutory provision as to notice in the case of such a redetermination is that "At least 30 days before the board [Authority] shall meet to fix and determine the length of time any prisoner shall be confined, the said board shall send written notice thereof to the judge of the superior court before whom the prisoner was tried and convicted, and to the district attorney and the sheriff of the county from which the prisoner was sentenced." (Pen.Code, § 3022.) As petitioner points out, there is no showing that the Adult Authority gave such notice; on the contrary it appears to be the position of the Authority that its action of March 7, 1947, was based on the parole officer's report of February 18, 1947; thus there was not sufficient time after the Authority received the information which led to its refixing petitioner's term for it to give the statutory 30-day notice. In our opinion, failure of the Authority, under the circumstances shown, to give notice to the judge, district attorney and sheriff as provided by section 3020 does not invalidate its order redetermining the length of time petitioner shall be imprisoned. It is suggested in In re Knaesche (1937), 22 Cal.App.2d 667, 671, 672, 72 P.2d 216, and stated in 3 Ops. Atty. Gen. (1944), 88, with reference to the similar statutory 30-day notice to judge, district attorney and sheriff before the Authority acts upon an application for parole (Pen.Code, § 3042), that the Authority "could not act on * * * any parole until thirty days after written notice is sent to the officers named in that section." But we cannot believe that the Legislature by such provisions as those of sections 3022

and 3042, intended to deprive the Adult Authority of all power to act in a situation where such Authority otherwise had power to act but where it was impossible to give 30 days' notice; where, for example, as here, the Authority, less than 30 days before expiration of a prisoner's term as fixed, received information which indicated that it would be for the best interests of the prisoner and society that he remain in custody.

[12-14] Petitioner next contends that the want of provision for notice and hearing before the Adult Authority redetermines the length of time a prisoner shall remain in custody is not in accord with due process of law (U.S.Const., Amendment XIV; Cal. Const., art. I, § 13). We cannot agree with petitioner that the action of the Authority in lenghtening a term of imprisonment beyond that originally (and by law only tentatively) fixed but still within the maximum term provided for the offense of which his guilt has been adjudged, constitutes a deprivation of liberty within the meaning of the due process clauses of the federal and state Constitutions. Petitioner has been deprived of his liberty, in compliance with due process of law, by the trial court's adjudication that he is guilty and the ensuing imposition of sentence for the indeterminate period; the Adult Authority, by administering the indeterminate sentence law, does not further deprive the prisoner of liberty. A prisoner (including one who is "constructively a prisoner under sentence in the legal custody and under the control of the Department of Corrections" [In re Marzec (1945), 25 Cal.2d 794, 797, 154 P.2d 873, 874]) has no "vested right" to have the term of imprisonment which he is serving fixed or remain fixed at less than the maximum term prescribed by law (see In re Cowen (1946), 27 Cal.2d 637, 641, 166 P.2d 279; In re Hicks (1938), 28 Cal.App.2d 671, 674, 83 P.2d 73); i. e., in the case of petitioner, life imprisonment (the maximum punishment for robbery of the first degree [Pen.Code, §§ 213, 671]). So long as the prisoner remains in custody, actual or constructive, the Adult Authority may determine and redetermine his term of imprisonment in accord with the best interest of the prisoner and society, without notifying the prisoner that it proposes to act on the question of the length of time he shall be imprisoned.

For the reasons above stated the writ is discharged and petitioner is remanded to the custody of the warden of Folsom State Prison.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

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91 Cal.App.2d 394

Application of ROGERS.

Cr. 2116.

District Court of Appeal, Third District, California.

April 22, 1949.

Rehearing Denied May 7, 1949.

1. Criminal law ⚷997

Evidence established that defendant who pleaded guilty to robbery charge had not been threatened by arresting officers with prosecution for other crimes committed in connection with the robbery, and that officers had not threatened to implicate defendant's brother and sister, if defendant refused to plead guilty to robbery charge, so as to entitle defendant to relief from robbery conviction on writ of error coram nobis.

2. Criminal law ⚷997

Defendant waived objection to sufficiency of evidence introduced on preliminary hearing to justify holding defendant for trial, or to irregularities of preliminary hearing, by failing to move to quash information pursuant to statute, and could not object to sufficiency of evidence or to irregularities in preliminary proceedings on application for writ of error coram nobis.

3. Criminal law ⚷997

The "writ of error coram nobis" is an extraordinary writ to afford relief only when accused has been deprived of a right of trial through no fault of his own, by extrinsic threats, fraud, coercion, or misrepresentations which prevented a valid trial, and lies to correct prejudicial mistakes of fact only, as distinguished from mistakes of law, which occur through no fault of defendant, when no statutory remedy therefore exists or the statutory remedy is ineffectual.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Writ of Error Coram Nobis".

4. Criminal law ⚷997

Where mistake of fact relied upon by a defendant was known to defendant, or by reasonable diligence should have been known to defendant, petition for writ of error coram nobis will not lie.

5. Criminal law ⚷997

Where defendant before pleading guilty to robbery charge knew that one of two convictions alleged in information was a misdemeanor conviction and could not be used to have defendant adjudged an habitual criminal, writ of error coram nobis would not issue on ground that district attorney had told defendant that, if defendant did not plead guilty to robbery charge, charges of prior conviction would not be dismissed and defendant would be adjudged an habitual criminal under the two prior convictions alleged in information.

◆

Appeal from Superior Court, Nevada County; James Snell, Judge.

Proceeding in the matter of the application of Raymond Rogers, against the People of the State of California, for a writ of error coram nobis to vacate a conviction for robbery in the second degree. From order denying the petition, petitioner appeals.

Order affirmed.

Raymond Rogers, in pro. per., for appellant.

Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

This is an appeal from an order of the Superior Court of Nevada County, denying petitioner's application for a writ of coram nobis. At that hearing the petitioner appeared in proper person, as he did on appeal to this court.

It is contended the petitioner, who was charged in three counts of an information with different felonies growing out of the same transaction, and with two prior convictions of felonies, was induced to plead guilty to the third count of robbery, by the coercion, threats and misrepresentations of the arresting officers and the District Attorney. It is also asserted the evidence taken at the preliminary hearing fails to show probable cause to believe the defendant was guilty of any of the crimes charged, and that he was therefore wrongfully held for trial.

The preliminary hearing occurred in Grass Valley in May, 1947. At that hearing the defendant waived counsel. The prosecuting witness testified that while she was attending a dance at Lake Olympia in Nevada County, she went to sleep in her automobile parked near by, and that the defendant entered the car and attempted to rape her; that she resisted his assault, and in the struggle which ensued her chin was severely cut and bled profusely; that when the defendant's attempt was frustrated he tore her watch from her wrist, seized her purse, containing two fountain pens and other effects, and a wallet containing some money, which lay upon the cushion, and fled. She returned to the dance hall and told her sister of the affair. They telephoned the officers at Grass Valley of the assault and robbery. The following morning the defendant was arrested. The officers searched him and found in his possession the purse, wallet, watch, two fountain pens and $43 in cash. The owner went to Grass Valley the following morning and identified the defendant and the said personal property which had been stolen from her. The arresting officer testified to the receiving of the telephone call and the arrest of the defendant in a taxicab on the way to Grass Valley, the search of his person and the finding of said property in his possession. The defendant failed to take the witness stand at that hearing or to deny any of the charges of the witnesses. The magistrate held him for trial upon three charges of felonies, including robbery. The evidence adduced at the preliminary hearing was adequate upon which to hold him for trial.

June 9, 1947, an information was filed in Nevada County, charging the defendant in three counts with different felonies growing out of that affair, and with two prior convictions of other felonies. Neither a demurrer nor motion to quash the information was filed or made. Upon arraignment of the defendant, on July 7th, Lynn Kelly, a capable and reliable attorney, was appointed and represented the defendant throughout the criminal proceedings. Upon advice of his attorney and in accordance with a previous agreement with the District Attorney, the defendant pleaded guilty to the third count of robbery, and at the same time, upon motion of the prosecuting officer, the other two counts of the information and both charges of prior convictions of other felonies were dismissed. The District Attorney then stated to the court in the presence of the defendant and his attorney that, since filing the information, he had discovered that the second alleged prior conviction "was not a felony." With the consent of the defendant, the case was continued to July 18th for sentence. The court then determined that the defendant had been "duly convicted * * * of the crime of felony, towit: Robbery of the second degree." Upon sentence the defendant was asked if he had legal cause to show why judgment should not be pronounced, to which he replied "that he had none." He was thereupon sentenced to imprisonment at San Quentin for the term prescribed by law. During all of said proceedings neither the defendant nor his attorney suggested to the court or to any of its officers, or at all, that said plea of guilty of robbery was procured by the threats, fraud, coercion or misrepresentations of the District Attorney, the arresting officers or any other person. The defendant asked for probation, which was denied. No appeal was taken from the judgment, and no complaint was made of proceedings until about a year thereafter.

This is the third special writ of this nature which has been denied this petitioner. In May, 1948, his petition for a writ of habeas corpus, upon substantially the same grounds urged in this petition, was denied by the Supreme Court. A petition for a writ of coram nobis was subsequently presented and heard by the Superior Court of Nevada County, and denied. The present petition for a writ of coram nobis was filed and heard by the Superior Court of Nevada County. In effect, the petitioner asked the court to set aside the judgment of conviction of robbery of the second degree which was rendered against him upon his plea of guilty of that offense, and to permit him to withdraw that plea and to enter a plea of not guilty and to grant him a trial upon the merits of the criminal charges. The petition alleges that petitioner was induced to plead guilty to the charge of robbery by the threats, coercion and misrepresentations of the arresting officers and the District Attorney. The chief assertions are that said officers threatened to prosecute him for other alleged crimes, and to implicate his brother and sister therein, if he stood trial on the charges filed against him, that the District Attorney wrongfully informed him that the two charges of prior convictions of alleged felonies contained in the information would result in his being adjudged an habitual criminal under Section 644 of the Penal Code, and that the penalty imposed upon him would be increased, when, in truth, one of the alleged prior convictions was in fact not a felony but merely a misdemeanor, and the defendant was therefore not subject to be adjudged an habitual criminal. The petition also alleged that the judgment is void for lack of evidence and irregularities of proceedings at the preliminary hearing.

Upon the hearings of this petition for coram nobis, the petitioner appeared in proper person. Oral and documentary evidence was adduced. All of the pleadings and proceedings of the criminal case, including the transcript of testimony of the preliminary hearing were introduced in evidence and are before us. The five arresting officers who were charged in this petition with coercion, deceit and misrepresentations were sworn and examined. Each of them positively denied that any such threats, coercion or misrepresentations were made to the defendant. It satisfactorily appears that the defendant voluntarily pleaded guilty to robbery, with full knowledge of all material facts, in accordance with a previous agreement between himself and his attorney with the District Attorney that if he did so all other counts of the information and both charges of prior convictions would be dismissed. At the same time the defendant pleaded guilty to robbery under the third count, the District Attorney, in good faith, moved the court to dismiss the other counts and the charges of prior convictions, which motion was granted and they were dismissed. At the time of the plea, the District Attorney frankly stated to the court, in the presence of the defendant and his attorney, that since filing the information he had discovered that the second charge of prior conviction "was not a felony." No objection was then made by the defendant or his attorney that they had been misled on that account, or at all, or thereby induced to plead guilty to robbery. Moreover, it clearly appears the defendant was not misled or deceived. On the contrary, he at all times had full knowledge of the fact that the second charge of prior conviction was erroneously termed a felony, and that in fact that alleged conviction was merely for petit larceny, a misdemeanor. Prior to the entry of his plea the defendant knew that fact. The time and place of that conviction were specifically alleged in the information. The information was filed June 9, 1947. The plea was not entered until July 7th. On June 14th he told the District Attorney that conviction was for petit larceny only. In his argument to this court he admitted his knowledge of that fact before his plea was entered. He said in that regard, "The defendant then [on June 14th] informed Mr. Sheldon that his second prior conviction was not burglary, as charged in the information, but that it was petit theft with a prior felony conviction."

The defendant failed to take the witness stand in his own behalf on this hearing. He furnished no substantial testimony to support the allegations of his petition.

Upon the evidence adduced at the hearing of this petition for a writ of coram nobis, the trial court denied the writ and remanded the prisoner. From that order this appeal was perfected.

[1] The alleged fraud and deceit of the arresting officers and the District Attorney are thoroughly refuted by the testimony of the officers and by the record in this case. We are convinced the defendant was not deceived, misled or coerced by any of the officers to plead guilty to robbery. At least, there is adequate evidence to support the order of the court denying the petition for coram nobis.

[2] The defendant waived any objection which he may have had to the sufficiency of the evidence or irregularities of the preliminary hearing, by failing to move to quash the information under Section 995 of the Penal Code, if any such existed, which we do not concede. The defendant pleaded guilty with full knowledge of all essential facts. The District Attorney dismissed counts one and two of the information and both charges of prior convictions, in exact accordance with his agreement. The only pretended defense to the criminal case, on its merits, suggested by the defendant, was the statement which he made to his attorney when he was told that his possession of the stolen property immediately after the alleged offense, would be difficult to satisfactorily explain, that he had previously taken two drinks of liquor and that after the second one he sustained a complete "blackout" of memory and was unconscious of what occurred, and that he did not know how he became possessed of the stolen property. To that suggestion his attorney wisely replied that he thought amnesia would be a weak defense to the charge of robbery in view of the evidence adduced at the preliminary hearing. His attorney therefore advised him to plead guilty to robbery upon agree-

ment that the other counts of the information and the charges of prior convictions would be dismissed. We are satisfied no unfair advantage was taken of the defendant as alleged in this petition, or at all.

The petitioner is precluded from challenging the alleged inadequacy of the evidence or irregularities of procedure of the preliminary hearing, by his failure to move to quash the information under Section 995 of the Penal Code. In re Dorsey, 81 Cal.App.2d 584, 586, 184 P.2d 702; People v. Bagasol, 22 Cal.App.2d 327, 329, 70 P.2d 970; People v. Harris, 219 Cal. 727, 730, 28 P.2d 906; People v. Egan, 73 Cal.App.2d 894, 897, 167 P.2d 766; People v. Greene, 80 Cal.App.2d 745, 749, 182 P.2d 576; People v. Duncan, 50 Cal.App.2d 184, 187, 122 P.2d 587.

[3-5] The application of the writ of coram nobis has its limitations. It is an extraordinary writ to afford relief only when an accused person has been deprived of a right of trial through no fault of his own, by extrinsic threats, fraud, coercion or misrepresentations which prevented a valid trial. The writ lies to correct prejudicial mistakes of fact only, as distinguished from mistakes of law, which occur through no fault or negligence of the defendant, when no statutory remedy therefor exists, or when that remedy is ineffectual. People v. Butterfield, 37 Cal.App.2d 140, 142, 99 P.2d 310; People v. Mooney, 178 Cal. 525, 529, 174 P. 325; People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; People v. Martinez, 88 Cal.App.2d 767, 199 P.2d 375; People v. Coyle, 88 Cal.App.2d 967, 200 P.2d 546; 27 Cal.Law Rev. 228. Where the mistake of fact relied upon is known to the defendant, or by the exercise of reasonable diligence should have been known to him, the petition for a writ of coram nobis will not lie. People v. Shorts, 32 Cal.2d 502, 514, 197 P.2d 330; People v. Coyle, supra, 88 Cal.App.2d 967, 200 P.2d 546; 31 Am.Jur. 325, sec. 806. In the present case the defendant had full knowledge of the chief alleged mistake of fact upon which he relies, with relation to the second charge of a prior conviction. Twenty-two days before the arraignment the defendant told the District Attorney that he had not at that time been convicted of burglary, but only of petit theft. Under the preceding authorities the writ of coram nobis will therefore not lie on that ground. In the Shorts case, supra, quoting with approval from 31 American Jurisprudence, it is said at page 514 of the opinion in 32 Cal.2d at page 337 of 197 P.2d:

"* * * 'It is essential to the availability of the remedy of coram nobis or coram vobis that the mistake of fact relied upon for relief was unknown to the applicant at the time of the trial, and could not by the exercise of reasonable diligence have been discovered by him in time to have been presented to the court.'"

For the foregoing reasons the order denying the petition for a writ of coram nobis is affirmed.

ADAMS, P. J., and PEEK, J., concur.

91 Cal.App.2d 786

BAUGH v. BEATTY et al.

Civ. 16878.

District Court of Appeal, Second District,
Division 2, California.
May 12, 1949.

1. Appeal and error ⇨257

The error, if any, in defendants' use in selecting jury of privately compiled "jury book" containing information about jurors was waived, where plaintiff took no exception to court's ruling on plaintiff's objection to use of book. Code Civ.Proc. §§ 646, 647.

2. Animals ⇨69, 70

A cause of action for injuries inflicted by defendant's animal may be based on negligence or keeping an animal known to be vicious.

3. Appeal and error 🔑193(3)

An objection may not be raised for first time on appeal that complaint raises two issues contained in one count. Code Civ.Proc. § 434.

4. Animals 🔑74(2)
Pleading 🔑35

In action against owner of animal inflicting personal injuries, allegation of owner's negligence is unnecessary and may be treated as surplusage if owner knows animal is vicious and dangerous.

5. Trial 🔑203(1)

A litigant is entitled to requested instruction presenting his theory, and if inconsistent causes of action or defenses are alleged, instructions covering them must necessarily be based on conflicting and contradictory hypotheses.

6. Animals 🔑74(3)

A wild animal is presumed to be vicious.

7. Animals 🔑69

The owner of wild animal or animal which is known by owner to be vicious and dangerous is an insurer against acts of animal to any one who is injured.

8. Appeal and error 🔑1067

In action for injuries sustained by four year old circus patron who was bitten while feeding peanuts through bars to defendant's caged chimpanzee in animal tent, refusal to give patron's requested instruction on negligence of defendant was not error inasmuch as defendant was insurer against acts of wild animal known to be vicious and dangerous.

9. Negligence 🔑138(3)

A four year old circus patron suing for injuries sustained when he was bitten while feeding peanuts through bars to defendant's caged chimpanzee in animal tent was not entitled to instruction on attractive nuisance doctrine where patron was business invitee and not trespasser.

10. Negligence 🔑23(1)

A wild animal in cage is not "artificial" and is not a "contrivance", as respects whether caged animal is an attractive nuisance.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Artificial" and "Contrivance".

11. Negligence 🔑23(1), 39

The attractive nuisance doctrine is an exception to rule that owner of premises is under no obligation to keep premises in safe condition for trespassers.

12. Animals 🔑74(7)

In action for injuries sustained by four year old circus patron who was bitten while feeding peanuts through bars to defendant's caged chimpanzee in animal tent, instruction on defendant's knowledge of ferocity of chimpanzee was not proper, since chimpanzee was of class of animals ferae naturae, of known savage and vicious nature.

13. Negligence 🔑136(29)

Whether a minor of tender years has conducted himself with care and prudence due from one of his years and experience is question of fact for jury.

14. Animals 🔑74(7)
Appeal and error 🔑1064(1)

In action for injuries sustained by four year old circus patron who was bitten while feeding peanuts through bars to defendant's caged chimpanzee in animal tent, instructions that patron could not recover if patron's conduct caused injury or if conduct of father in charge of patron caused injury were confusing and prejudicial, where sole question for jury was whether patron knowingly and voluntarily invited injury.

15. Appeal and error 🔑110

An order denying a new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Personal injury action by Dennis Ray Baugh, a minor, by John R. Baugh, his guardian ad litem, against Clyde Beatty and others. From a judgment for the defendants and from an order denying a new trial, the plaintiff appeals.

Judgment reversed and attempted appeal from order denying new trial dismissed.

Byron R. Bentley and Rogers & Carnes, all of Los Angeles, for appellant.

Reginald I. Bauder and Bauder, Gilbert, Thompson, Kelly & Veatch, all of Los Angeles, for respondents.

WILSON, Justice.

From a judgment in favor of defendants in an action to recover damages for personal injuries, plaintiff appeals. He has also purportedly appealed from the order denying a new trial.

Plaintiff, a minor four years of age, was taken by his parents to the circus operated by defendants. Following the performance in the main tent they went to see the animals in the "animal tent" and it was there that plaintiff was bitten by a chimpanzee, sustaining the injury which is the basis of this action.

The chimpanzee was in a circus wagon cage in the front of which there were perpendicular iron bars set about three inches apart. There was no meshed wire inside or around the bars of the cage to prevent the ape from reaching his arms through the bars. The wagon, together with other wagons containing animals, was set back approximately five feet from a rope or chain, which was about three feet above the ground, and which passed through holes in the poles holding up the tent. There was no fence under the rope to keep small children back and no guard in the vicinity of the cage. At the time of the incident there were from 100 to 200 people along the rope in front of four or five animal cages and some of the ladies in the crowd were reaching over the rope and feeding peanuts to the chimpanzee. At plaintiff's request his father put him down. The child worked his way through the crowd, under the rope and up to the cage containing the ape. The boy was next seen holding a peanut up to the animal which reached through the bars, grabbed the child's hand and bit him.

Plaintiff assigns two grounds of error: (1) that he was deprived of a fair and impartial jury trial when defendants' attorney was permitted, over plaintiff's objection, to use the so-called "jury book" in selecting jurors, and (2) the giving and refusing of certain jury instructions.

The affidavit of plaintiff filed with his motion for a new trial sets forth the following with respect to the "jury book": "* * * said book contains a page for each juror and that in that book there is listed the name, address, age, occupation, spouse's occupation, and other data pertaining to said juror; that included in the book is a list of all the cases on which each juror has *set* and a statement of how he voted, and where he voted for damages, the amount voted for by him; that also included in the service of the said book is a rating sheet as to the different jurors, with the jurors being classified by a certain number of stars, red and blue or other colors, indicating that they are decidedly pro-plaintiff, fairly pro-plaintiff, neutral, fairly pro-defendant or decidedly pro-defendant; that some of the data is taken from the jury list and some is obtained from other sources and that in the collection of data and arranging the said ratings the party preparing said book makes it a common practice to talk to court attaches, attorneys who have tried cases, judges, and even the jurors themselves to determine the views, prejudices, interests, and propensities of the different jurors; * * * that said book is rented to attorneys at a price in the neighborhood of $25.00 per trial; * * *" Defendants have not denied these allegations.

[1] Plaintiff contends that the use of this jury book defeats the right to an impartial and unbiased jury; that it constitutes an extraneous influence brought to bear upon the jury; that jurors know the service is in existence and see it used openly at the counsel table; that they know a record is being kept of their decisions and they may expect to be challenged on the basis of their past records and rating. Some of the material contained in the jury book may properly be obtained by interrogation of the prospective jurors on voir dire and much of it is available from the public records. Admittedly the use of the service by one litigant gives him an advantage over the opposing litigant in selecting jurors who he feels would be desirable

from his standpoint. However, there is nothing in the record to indicate that the service is not available to either or both litigants upon the payment of the specified fee nor that plaintiff could not have had its use upon the same terms as defendants. Likewise there is nothing in the record to the effect that the jurors knew the purpose of the book, that they were in any way influenced by its use or that they were even aware that it was being used. Furthermore, plaintiff took no exception to the ruling of the court upon his objection to the use of the jury book. The ruling is not one to which an exception is deemed by law to have been taken and the error, if any, was therefore waived. Code Civ. Proc. sec. 646, 647; Lee v. Murphy, 119 Cal. 364, 367, 51 P. 549, 955; Hughes v. Duncan, 114 Cal.App. 576, 579, 300 P. 147.

Plaintiff asserts that the court erred in refusing to give two instructions requested by him: (1) covering the duty of an operator of a business toward an invitee in keeping the premises in a condition reasonably safe, and (2) an instruction on the attractive nuisance doctrine.

[2-4] It is plaintiff's contention that the jury should have been instructed on the theory of negligence in failing to take reasonable precautions against injury to plaintiff as a business invitee, as well as that on the liability for injury by a wild animal. A cause of action against the owner of an animal for injuries inflicted by it may be based upon negligence as well as upon the ground of the keeping of an animal known to be vicious. Clowdis v. Fresno Flume & Irrigation Co., 118 Cal. 315, 322, 50 P. 373, 62 Am.St.Rep. 238; see also Ficken v. Jones, 28 Cal. 618, 623. The complaint raises both issues and although they are contained in the one count, no demurrer having been interposed, an objection may not be raised for the first time on appeal. Roberts v. Eldred, 73 Cal. 394, 398, 15 P. 16; Flint v. Conner, 53 Cal.App. 279, 285, 200 P. 37; Code Civ. Proc. sec. 434. However, if the animal which inflicted the injury is vicious and dangerous, known to defendant to be such, an allegation of negligence on the part of defendant is unnecessary and the averment, if made, may be treated as surplusage. Opelt v. Al G. Barnes Co., 41 Cal.App. 776, 778, 183 P. 241.

[5-8] A litigant requesting it is entitled to instructions presenting his theory of the case and if inconsistent causes of action or defenses are alleged, the instructions covering them must necessarily be based upon conflicting and contradictory hypotheses. Brown v. Yocum, 113 Cal.App. 621, 623, 298 P. 845; 24 Cal.Jur. 826 and cases cited. However, a wild animal is presumed to be vicious and since the owner of such an animal, or the owner of an animal which is known by him to be vicious and dangerous, is an insurer against the acts of the animal to any one who is injured, and unless such person voluntarily or consciously does something which brings the injury on himself, the question of the owner's negligence is not in the case. Opelt v. Al G. Barnes Co., supra; Clowdis v. Fresno Flume & Irrigation Co., supra. There was, therefore, no prejudicial error in the court's refusal to give the requested instruction on negligence.

[9-11] Plaintiff's contention that the court erred in refusing to give his requested instruction on the attractive nuisance doctrine is not tenable. The instruction refers to the keeping of an "artificial and dangerous contrivance." An animal in a cage is not artificial and it does not fall within the definition of the word "contrivance" which is defined in Webster's New International Dictionary, 2d Ed. (1947) page 580 as "a mechanical device; an appliance." Whether the attractive nuisance doctrine could be extended so far as to include a caged animal is not necessary for us to determine, since the doctrine is not applicable to the facts in the present case. It is conceded that plaintiff was a business invitee and not being a trespasser there is no need to invoke the doctrine, which is but an exception to the rule that the owner of premises is under no obligation to keep it in a safe condition for trespassers. Melendez v. City of Los Angeles, 8 Cal.2d 741, 745, 68 P.2d 971; Crane v. Smith, 23 Cal.2d 288, 301, 144 P.2d 356; Kataoka v. May Dept. Stores Co., 60 Cal.App.2d 177, 185, 140 P.2d 467.

[12] The court instructed the jury with respect to the liability of the keeper of a vicious or dangerous animal, known to be such by its owner.[1] Although plaintiff has not raised any objection to this instruction, it was not proper in the instant case since the animal was of the class of animals ferae naturae, of known savage and vicious nature, and hence an instruction on the owner's knowledge of its ferocity was unnecessary.

The court followed the instruction quoted in the footnote with two instructions which plaintiff maintains were incorrect statements of the law, were confusing and contradictory and constituted prejudicial error:

(a) "You are instructed that while the negligent conduct of the father, if there was any, is not imputed in law to his minor son, nevertheless if you should find that the sole proximate cause of the injury to the minor was the conduct of the father, whether negligent or not, then neither the child nor the father may recover. The term 'sole proximate cause' as used in this instruction means that cause which in natural and continuous sequence sets in motion the factors which accomplish the injury, or, in other words, the cause without which the injury would not have occurred."

The only conduct of the father which the jury could have considered was that of putting the child down in the proximity of the caged animal. Furthermore, the only proximate cause with which the jury need have been concerned was whether the acts of the animal were the cause of the injury.

(b) "You are instructed that while the keeper of a wild animal is liable to the public for injuries occasioned by such animal, unless the injured party knowingly or consciously conducts himself so as to make the injury possible.[2] In that connection you are further instructed that if the conduct of the injured party was the sole factor which produced the injury and without which the injury could not have occurred then plaintiff may not recover."

[13, 14] The second sentence of this instruction contradicts the first part and is not a correct statement of the law. Whether plaintiff's conduct was the sole factor which produced the injury is immaterial unless by such conduct he voluntarily and consciously placed himself in danger. Obviously if the child had not approached the cage the injury would not have occurred. Whether a minor of tender years has conducted himself with the care and prudence due from one of his years and experience is strictly a question of fact for the jury. Opelt v. Al G. Barnes Co., 41 Cal. App. 776, 781, 183 P. 241. Thus the sole question for the jury to have determined was whether plaintiff knowingly and voluntarily invited the injury. These instructions could only serve to confuse the jury. They were clearly prejudicial since the jury could have reached but one of two conclusions, either that the conduct of plaintiff caused the injury or the conduct of the father was the cause of the injury, in either of which events, the jury was told, plaintiff could not recover. What the jury should have been told to determine was whether under the circumstances of the case plaintiff knowingly or consciously placed himself in danger.

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[1] "Where injury is done by a vicious or otherwise dangerous animal, known to be such by its owner, the owner is liable to the injured person in a sum that will compensate him reasonably for all detriment suffered by him and resulting from the injury, unless the injured person knowingly and voluntarily invited the injury and brought it upon himself. To have done that, he voluntarily must have done something with respect to the animal that induced the injury and which he either knew, or should have known was dangerous. The principle of law does not require a finding that the owner was negligent. The liability attaches to his ownership of such an animal, with knowledge of its dangerous character, and makes him an insurer against injury done by it. Thus, in applying this rule of law, you are required first to ask and answer the question: Was the plaintiff injured by a vicious or dangerous animal? If so, two other questions must be answered: 1. Was that animal then owned by the defendants in this action? 2. Did the owners then have knowledge of the dangerous character of the animal?"

[2] The foregoing language, while copied from the record on appeal, is grammatically erroneous, incomplete and meaningless.

[15] Judgment reversed. The order denying a new trial being a nonappealable order the attempted appeal therefrom is dismissed.

MOORE, P. J., and McCOMB, J., concur.

91 Cal.App.2d 592

HILL v. HILL et al.

Civ. 13917.

District Court of Appeal, First District, Division 2, California.

May 3, 1949.

1. Deeds 🔑208(3, 4)

Proof that deed was acknowledged and recorded and was in grantee's possession when he died made out a prima facie case of delivery.

2. Deeds 🔑194(5)

Delay of almost nine years before recording deed supplies basis for inference that delivery was not unconditional.

3. Deeds 🔑208(3, 4)

Presumption of delivery of deeds from daughter to father, arising from recordation and possession, was sufficiently rebutted by evidence that daughter mortgaged and insured the property conveyed after the alleged delivery and evidence of father's subsequent testimony, declarations and affidavit that he had no property. Code Civ. Proc. § 1963, subds. 1, 12; Insurance Code, §§ 2071, 2072.

4. Deeds 🔑208(1)

Evidence to rebut the disputable presumptions and prima facie showing of delivery of deed must be clear, convincing and satisfactory.

5. Appeal and error 🔑996, 1011(1)

Trial court's findings on disputed issues of fact are conclusive on appeal, not only where testimony is in conflict with regard to exact things said and done, but also where opposing inferences may be reasonably drawn from undisputed facts.

6. Appeal and error 🔑1170(7)

Any error in admitting evidence of notary's statements to grantor that notary had released deed from escrow under pressure from grantee was not prejudicial where other substantial and competent evidence supported findings that deed was not delivered and judgment based thereon. Const. art. 6, § 4½.

7. Appeal and error 🔑931(6)

In a case tried without jury, reviewing court should not presume that court based its findings on any incompetent evidence.

8. Quieting title 🔑47(2)

Findings in quiet title suit, which followed language of pleadings by reciting that respondent was the owner, were sufficient without explicit finding as to delivery of deed from respondent.

9. Evidence 🔑265(8)

Daughter's petition for special letters of administration on father's estate, alleging that such estate consisted of "an alleged interest in" described realty, was not an admission, conclusive against daughter in quiet title suit, that father owned such realty.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Eve L. Hill, as administratrix of the estate of John Samuel Hill, also known as John S. Hill, deceased, against Dorothy Hill and others, to quiet title, wherein named defendant filed cross-complaint. From a judgment for cross-complainant, plaintiff appeals.

Affirmed.

Leo R. Friedman, of San Francisco, for appellant.

O'Gara & O'Gara, Thomas Casey, Jr., and James A. O'Gara, all of San Francisco, for respondent.

GOODELL, Justice.

John S. Hill died on July 6, 1942. Title to the property in litigation then stood of record in his name under a deed from his daughter, respondent herein, dated July 3, 1926 and recorded June 19, 1935. The property is on the corner of Twentieth and Lexington streets in San Francisco and is improved with a two-story dwelling. Appellant sued to quiet title thereto, joining as defendants the respondent and Inez Hill, her mother. The latter filed an answer disclaiming any interest in the property. Respondent filed a cross-complaint asserting title in herself. The court awarded judgment in her favor. Appellant's motion for a new trial was denied and she took this appeal from the judgment.

In order to find the title vested in respondent the court had to first determine that the deed from respondent to decedent was never delivered. Appellant contends that the evidence is insufficient to sustain such determination.

John S. Hill had been married to Inez Hill, and respondent was their only child. Some years prior to 1922 they were divorced. He later married Catherine Hill and they had three daughters, Eve (appellant), Marjorie and Lila. On July 28, 1923 a final judgment of divorce dissolved the marriage of John and Catherine, the interlocutory judgment having been entered on January 17, 1922.

Respondent acquired the property from John H. and Ellen Blakeway, by a deed dated July 1, 1922. Respondent testified that it was purchased with money furnished by her father. Elsewhere she testified that he contributed *most* of the purchase price. She also testified that she had told her father on one occasion that "that was the only thing that he had ever given me in any way at all."

On April 24, 1925, before the Blakeway deed was recorded, Catherine Hill sued John S. Hill, Dorothy Hill and John H. and Ellen Blakeway, to establish a community interest in the property in question and for its partition. She alleged that in the divorce action her husband had fraudulently concealed from her and from the court cash and other assets accumulated by their joint efforts while married and which had not been disposed of in the divorce case. She alleged that the property now in litigation had been acquired by her husband from the Blakeways with community funds, but that the deed thereto had been taken in the name of this respondent and had not been recorded, thereby leaving the record title in the names of the Blakeways.

The court in that case held in favor of John S. and Dorothy Hill, and against the plaintiff, and found that on July 1, 1922 Dorothy Hill had purchased the property from the Blakeways for approximately $6000 "and at said time paid part of the said purchase price and thereafter the balance of said purchase price all out of her own sole and separate funds and estate and in which neither the defendant John S. Hill nor the plaintiff [Catherine] ever had or has any interest of any kind or description whatsoever." The conclusion of law was that the property "was and is the sole and separate property of the defendant, Dorothy Hill." The judgment, to the same effect, was entered on June 8, 1926, and no appeal was taken. The judgment-roll in that case was introduced in evidence in this, without objection.

Within a month after the entry of that judgment, i. e., on July 3, 1926, (the deed from the Blakeways to respondent being still unrecorded) respondent signed and acknowledged the deed now in question from herself to decedent. It is typewritten on a Cowdery's form of deed of gift, recites love and affection as the consideration, and describes the property in litigation. A certificate of acknowledgment is attached, dated July 3, 1926, signed by Harriet K. Hobart, Notary Public, with her seal affixed. At the time of its execution the words printed at the bottom of the deed "Signed and Delivered in the Presence of" were followed by the signature "Harriet K. Hobart" and the word "Delivered" was underscored in ink. At a later time this was changed to read as follows:

> "The actual delivery of this deed was made ~~Signed and Delivered~~ in the Presence of and witnessed by:
>
> "Harriet K. Hobart."

In the making of this alteration the printed words "in the Presence of" and Mrs. Hobart's signature were untouched.

The remaining words are in ink, in the handwriting of Mrs. Hobart.

Respondent called Dr. E. O. Heinrich, an expert on handwriting, who testified that these alterations had been made by Mrs. Hobart some time after October, 1934. He had made an examination of the day-to-day entries in her notarial record and by a comparison of her handwriting and the inks used in these entries he was able to fix that time.

The testimony of Mrs. Hobart was not available at the trial because of her advanced age.

Respondent testified that her father asked her to make this deed and that his purpose in having it executed was to keep her mother from inheriting any share in the property in case respondent died before he did; that it was left in escrow with Mrs. Hobart with instructions to deliver it to him only in case of respondent's death, and to return it to respondent if he died first. She testified that it was not her intention at the time she signed the deed to deliver title to her father at that time, but that her intention when she signed it and deposited it with Mrs. Hobart, was that title would be retained by respondent if her father died first.

The entry which the Notary wrote in ink in her book, apparently at the time of the acknowledgment and in the regular course of official business, reads: "1926 . . . July 3 Dorothy A. Hill to John S. Hill Deed Gift . . . del. S. E. Cor. Lexington & 20th Sts. 24′ 6″ X 85′."

Mrs. Hobart's daughter testified that she was familiar with her mother's practice and that the abbreviation "del." stood for "delivered".

Respondent testified that for some time before the recordation of the deed her father had strongly importuned her to consent to its release from escrow but that she had refused to do so. Respondent testified over objection that Mrs. Hobart had told her that decedent was putting pressure on her to let him have the deed and that she repeatedly urged respondent to consent to its release so as to remove this pressure, and that finally Mrs. Hobart had told her that she could no longer withstand decedent's importunities and had yielded and turned the deed over to him. The date of this latter conversation was fixed by respondent at February 1, 1935, by association with another event (discussed later).

The deed was recorded by decedent on June 19, 1935, almost 9 years after it was signed.

After making the deed respondent exercised acts of dominion over the property, inconsistent with a divestiture of her title. Decedent also exercised acts of dominion, most of which were proved by respondent's own testimony.

Among such acts was a mortgage on the property made by respondent to Bank of Italy N. T. & S. A. on August 16, 1927, to secure $3500 or $4000 which she borrowed to invest in stocks. Decedent got none of this money. When asked if he knew about the mortgage respondent answered "Yes, he did. He was up to his neck in his own stock business." She was still paying off this loan at the time of trial.

Decedent had been occupying the house before the deed was made, and thereafter continued to do so. From time to time he rented rooms therein and kept the rents. In September, 1940, he made a one-year lease of the basement. Respondent at no time occupied the house. She never sought to recover the rentals from decedent, or to assert her own title or right of possession. She testified that decedent paid the taxes and insurance whenever he had the money but when he was not in funds she did so, and that after 1935 she paid the insurance.

Several documents relating to insurance were introduced by appellant. One is an abstract of a $6000 fire policy insuring the improvements from July 1, 1931 to July 1, 1934, in the name of Dorothy A. Hill, with loss payable to Bank of America N. T. & S. A. Attached thereto are two fragments of the letter transmitting it from Mrs. Hobart to John S. Hill, the bottom of which letter is torn off. Attached also are two receipts for premium money paid by decedent, signed by Mrs. Hobart, one in 1931, the other in 1934.

In January, 1933, decedent, in moving for a modification of the decree in the divorce case between himself and Catherine

Hill, filed an affidavit (notarized by Mrs. Hobart) deposing that he was "without money, means, property or income of any kind with which to support himself or his minor children" or his former wife.

In March, 1935, Catherine Hill brought decedent before the Municipal Court in a non-support proceeding. Counsel who then represented him testified herein that when he interviewed decedent "he explained to me that his second wife was attempting to collect alimony from him, or support money, through the criminal courts, and was insisting that he owned a piece of real property that he was getting rents from. I asked him whether that was correct or not and he said, as nearly as I can recall, that he didn't own the property and was getting nothing from it. In the course of interviewing him, I asked him whether there was anyone who could prove it, he told he that his daughter, Dorothy Hill, could * * * and I contacted her." The attorney testified that at the hearing decedent "testified to his lack of funds and lack of property, and his daughter, Dorothy Hill, who had been called by me as a witness, also testified." The court dismissed the matter.

On February 2, 1935, respondent executed and recorded a deed of the property to her mother, Inez Hill. Respondent testified that Mrs. Hobart had telephoned her on the previous day that she had turned over the deed of July 3, 1926 to decedent, and that on learning this she immediately made the deed to her mother. It is appellant's theory that it was the recordation of this deed that motivated decedent to record the deed of July 3, 1926. Mrs. Hill later reconveyed and has filed a disclaimer herein, hence the deed of February 2, 1935 plays but a minor part in this litigation.

Both sides agree that the real question in the case is whether the deed of July 3, 1926, was delivered.

"The elements of delivery are, that the writing must be meant by the maker to take immediate effect * * *." 9 Cal. Jur. p. 151. Appellant's position on this point is "that the deed was accompanied by an absolute delivery; that no condition was attached thereto; that *John S. Hill had possession of this deed from the time it bears date.*" (Emphasis added.)

[1] The deed was acknowledged and recorded, and was in the grantee's possession when he died. Appellant relies on the well-settled presumptions flowing from these facts. Thomas v. Peterson, 213 Cal. 672, 674, 3 P.2d 306; Butler v. Woodburn, 19 Cal.2d 420, 425, 122 P.2d 17. Appellant rested after introducing the recorded deed, and there is no doubt that she had then made out a prima facie case.

In Ward v. Dougherty, 75 Cal. 240, 242, 17 P. 193, 194, 7 Am.St.Rep. 151, (followed in Stewart v. Silva, 192 Cal. 405, 409, 221 P. 191) the court says: "The question of delivery being one of fact, and possession being only primary evidence of delivery, he who disputes such fact may rebut the presumption arising from possession by showing that there has in fact been no delivery; but it has been said that where a deed is found in possession of the grantee, nothing but the most satisfactory evidence of non-delivery should prevail against the presumption. * * *" In Severn v. Ruhde, 58 Cal.App.2d 704, 707, 137 P.2d 466, 467, the court says: "The evidence should be 'clear and convincing.'"

Based on that rule appellant contends that "* * * it appears that the trial Court rendered judgment on the sole and uncorroborated statement of the defendant that she never intended to part with title to the property. This statement is contrary to every presumption of law and every other fact in the case * * *. The uncorroborated word of the defendant in this action does not meet the required legal test."

Is this contention borne out by the record?

With respect to the alteration of the deed, it is an uncontradicted fact that the Notary altered it after October, 1934. Appellant's theory is that "The change in the witness clause of 1934 or 1935 does not contradict or cast suspicion upon any of the foregoing facts [theretofore discussed]; if anything, it strengthens such facts. In 1935, Mr. Hill discovered that the defendant had made a deed to her mother of the property. It was at such time that Mr. Hill had his deed recorded and, for the purpose of leaving no question open, Mrs. Hobart made the witness clause more emphatic." This means that decedent had it in 1934–5 and when he decided to record it he took it back to the Notary and had her change it to state that she witnessed "The actual delivery" instead of delivery. We agree that was one inference which might have been drawn.

[2] It has to be admitted, however, that the alteration by the Notary eight years after the acknowledgment is susceptible of an opposing inference, namely, that the document had been lying in escrow continuously for those eight years. The delay of almost nine years in recording the deed lends support to such contrary inference. But standing alone, and independently of the alteration, the delay in recordation supplies the basis for an inference that the deed had not been unconditionally delivered. Such delay is a suspicious circumstance. See Joy v. Helbing, 7 Cal.App. 519, 523, 94 P. 863. Both the alteration and the delay in recordation are consistent with respondent's testimony that the intent was that the deed was to remain in escrow, to be delivered to the grantee only if respondent died first, and returned to her if he died first.

With respect to the acts of dominion exercised by both grantor and grantee, and the legal effect thereof, Section 1963, subd. 12, Code Civ.Proc. provides that there is a presumption "That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership." Appellant strongly relies thereon but, like any other good rule, it works both ways. Here it operates in respondent's favor as well as in appellant's. Decedent paid taxes and insurance *and so did respondent.* Respondent testified that decedent paid them by way of recompense for his use and occupancy of the house. It is true decedent occupied the house and retained the rents, but he had occupied it before the deed was made, and simply remained there. He was, after all, respondent's father, and in straightened circumstances a large part of the time and "she felt he needed shelter and he needed a place to live." During the time (before 1935) that he was living there and paying insurance premiums, *the property was insured in favor of respondent and her mortgagee.* After 1935 respondent paid the premiums. Thus there are counter-balancing features attending decedent's payment of taxes and insurance and his occupancy. The weighing of these neutralizing features was the province of the trial court. Respondent's acts of ownership were unequivocal and clear cut.

When respondent in August, 1927, a year after signing the deed, mortgaged the property she was its owner of record. Her father knew about the mortgage. He took no part in it, and got none of the borrowed money. As an act of ownership it was open and notorious since it was a matter of public record. The making of a mortgage is, as the court said in Donahue v. Sweeney, 171 Cal. 388, 391, 153 P. 708, 709, an act "tending to rebut the testimony of plaintiff regarding the alleged delivery of the deed." There were no equivocal or neutralizing features about the mortgage.

Next take the renewal of the insurance in the name of respondent, with loss, payable to her mortgagee. If the deed was actually delivered in Mrs. Hobart's presence on July 3, 1926, with the intent that decedent, the grantee, should immediately become the absolute owner, it is difficult to reconcile (a) her negotiation of this renewal in respondent's name with (b) the passing of title from respondent to decedent five years before. Mrs. Hobart, as Notary and witness, knew of the deed (it is conceivable she drew it) and as broker in the 1931 renewal she was the agent of the insured, the true owner, thus duty-bound to see that such owner (whoever it was) was protected. If decedent held the "unconditional and sole" ownership when this renewal was made in the name of one who held no title, the whole insurance was jeopardized under familiar principles of insurance law. See secs. 2071-2072, Insurance Code.

From the fact that the insurance was in respondent's name the court could, and apparently did, draw the inference (seemingly inescapable) that when decedent arranged for the renewal in June, 1931, he knew that title then remained vested in his daughter. The circumstances are unexplainable on any other hypothesis.

It need hardly be added that this conspicuous act of ownership, proved by documentary evidence, was corroborative of respondent's testimony respecting intent. Incidentally, and in passing, the payment of premiums by decedent on property insured in respondent's name could well have been ruled out by the court as presumptive evidence of his ownership under section 1963, subd. 12, supra.

Some time between 1935 (it was in 1935 that father and daughter became estranged) and decedent's death, during which time respondent paid all the insurance, there was a fire. Somebody in the house called respondent (because she had the insurance) respecting necessary repairs. Respondent had the repairs made and was indemnified for them by the insurance company. This, of course, was another unequivocal act of ownership.

The affidavit of January 1933 is another piece of documentary evidence, and its importance cannot be discounted since it spoke on a material issue in a judicial proceeding. The truth of decedent's allegation that he had no property of any kind, depended on the underlying fact that the deed had not been delivered to him. The affidavit was made over two years prior to the *recordation* of the deed, but if, as appellant now contends, the affiant "had possession of this deed from the time it bears date" he then had title and had held it for over six years, since July 3, 1926. In that event he perjured himself. The court in the instant case had before it the presumption "That a person is innocent of crime or wrong" (sec. 1963, subd. 1, Code Civ. Proc.) and the findings imply that the court gave the affiant the benefit of that presumption. The holding that the affidavit was truthful, rather than perjured, finds support in decedent's conduct in the insurance transaction which amounted to an admission, by conduct at least, that he was not the owner but respondent was. Both episodes are consistent with, and lend corroboration to, respondent's testimony respecting intent and her theory that title did not pass.

The language that affiant was "without money, means, *property or income of any kind* * * *" (emphasis added) was a direct averment that he held title to no real property.

What has just been said applies with equal force to decedent's testimony in the Municipal Court in March, 1935, that he owned no property, and to a lesser extent to his unsworn statement to his counsel at that time to the same effect. Both declarations were consistent with the affidavit of January, 1933, and with the insurance transaction; both corroborate respondent's testimony.

[3, 4] Thus it will be seen that appellant's contention that respondent's testimony was uncorroborated is not borne out by the record. We are satisfied that had she not testified at all, there would still have been ample substantial evidence (and for the most part documentary) to support the findings. There are in this case a number of facts established without contradiction from each of which the inference could be drawn that the deed was not delivered. When these facts are taken in combination, a case is made out which satisfies the rule (which operates in, and is for the guidance of, the trial court—see Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732 and Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3) that the evidence to rebut the disputable presumptions and *prima facie* showing of delivery must be clear, convincing and satisfactory.

What was said in Rice v. Carey, 170 Cal. 748, 754, 151 P. 135, 137, is applicable to the case at bar:

[5] "The trial court's findings on disputed issues of fact are conclusive here, not only where the testimony of witnesses is in conflict with regard to the exact things said and done, but also where opposing inferences may be reasonably drawn from undisputed facts. Here the court drew the inference that the intent necessary to a valid delivery was lacking, and with its conclusion in this regard the appellate court cannot interfere."

[6, 7] The court over objection admitted respondent's testimony with respect to a series of conversations between herself and Mrs. Hobart in which the latter said that decedent had been exerting pressure on her to release the deed and that because of his pressure she had finally released it. It is claimed that these conversations were inadmissible because hearsay, and that they were extremely damaging. There is a question just what parts of these conversations are or are not competent evidence. That question need not be decided since without them there was plenty of substantial and competent evidence to support the findings and judgment. It is not to be presumed, in such a case (tried without a jury), that the court based its findings on any incompetent evidence. Conceding that it was error to admit at least some or even all of it, we are satisfied that it was not prejudicial. Sec. 4½ Art. VI, Constitution. See Roy v. Salisbury, 21 Cal.2d 176, 186, 130 P.2d 706; Frazure v. Fitzpatrick, 21 Cal.2d 851, 858, 136 P.2d 566; Ford v. Lou Kum Shu, 26 Cal.App. 203, 212, 146 P. 199 (hearing denied); Roth v. Thomson, 40 Cal.App. 208, 216, 180 P. 656, dealing with hearsay; Watt v. Copeland, 92 Cal.App. 161, 170, 267 P. 928, involving, as here, intent on delivery of deed (hearing denied); Martin Music Co. v. Robb, 115 Cal.App. 414, 423, 1 P.2d 1000, dealing with hearsay; Ericson v. Steiner, 119 Cal.App. 305, 308, 6 P.2d 298; Lincoln v. Averill, 47 Cal.App.2d 335, 338, 117 P.2d 913 (hearing denied); Cordi v. Garcia, 56 Cal.App.2d 584, 589, 132 P.2d 887; Bisno v. Herzberg, 75 Cal.App.2d 235, 241, 170 P.2d 973; Brock v. Fouchy, 76 Cal.App.2d 363, 371, 172 P.2d 945.

[8] Appellant urges error in the court's failure to make an explicit finding on the question of delivery. The complaint contained no allegation that the deed was delivered. It simply alleged decedent's ownership. Respondent specifically denied this allegation. In respondent's cross-complaint she alleged her ownership and appellant joined issue thereon by a general denial. Hence the issue raised by the pleadings was the broad one of ownership. On that issue the court found that respondent was the owner. Thus the findings followed the language of the pleadings which has been held sufficient. Turner v. Turner, 187 Cal. 632, 636, 203 P. 109. See, also Colver v. W. B. Scarborough Co., 73 Cal.App. 421, 433, 238 P. 1096. The findings also contain the language that the property at the time of decedent's death "was vested in defendant and cross-complainant * * *". Both the finding of ownership and the finding that the property was vested in respondent carry the implied finding that the deed had not been delivered. No harm was suffered by appellant by the absence of an explicit finding on delivery.

Appellant introduced respondent's petition for special letters of administration on her father's estate, alleging that it consists of "an alleged interest in real property and personal property as follows: An alleged interest and/or equity and/or right to possession in real property (describing this property)."

[9] Appellant claims this is an admission by respondent that decedent owned the property. Respondent replies in substance that to speak of an "alleged" interest is not to admit ownership. The court apparently so viewed it.

Appellant and her sisters testified that they had seen in their father's possession a letter to him from respondent containing statements inconsistent with respondent's position. The letter in the form they described was not produced. The secondary evidence of its contents apparently did not convince the court.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

91 Cal.App.2d 647

KROUPA v. KROUPA.

Civ. 13618, 13624.

District Court of Appeal, First District,
Division 2, California.

May 4, 1949.

Hearing Denied June 27, 1949.

1. Divorce ⇨245(2)

Under the statute providing that where divorce is granted for offense of husband, court may compel him to make suitable allowance for support and may modify orders in such respects, divorce court is given generally power to increase or decrease alimony allowed in decree upon showing of changed circumstances sufficient to justify modification. Civ.Code, § 139.

2. Statutes ⇨181(2), 184

Statutes are to be reasonably construed to effect their legitimate purpose. Civ. Code, § 3542.

3. Evidence ⇨82

Under statute providing that relief granted plaintiff, if there be no answer, cannot exceed that demanded in complaint, defendant has right to assume that judgment which will follow default on his part will embrace only issues presented by complaint and relief therein asked. Code Civ. Proc. § 580.

4. Statutes ⇨225½

A general statutory provision must yield to one that is special.

5. Divorce ⇨245(2, 3)

Under the statutes limiting plaintiff on default to relief demanded in complaint, and authorizing modification of support allowances in divorce actions, plaintiff in default divorce action may apply for modification of decree to provide alimony payments above those demanded in complaint, and modification upward may be made upon showing change of circumstances and after full opportunity is afforded defendant to be heard in opposition. Code Civ.Proc. § 580; Civ.Code, § 139.

6. Divorce ⇨236, 245(1)

Agreement solely for payment of alimony is subject to modification by trial court both in decree and afterwards. Civ. Code, § 139.

7. Divorce ⇨245(1)

Award of alimony is subject to modification even when based on a property settlement where decree makes no reference to settlement agreement. Civ.Code, § 139.

8. Divorce ⇨245(1)

Where divorce decree referred to no property settlement, and affidavits of parties showed that husband merely consented to wife's requesting and his paying certain sum per month toward her support and maintenance and no more, no property settlement was shown precluding modification of decree upward on wife's application. Civ.Code, § 139.

◆

Appeals from Superior Court; City and County of San Francisco; James G. Conlan and Lile T. Jacks, Judges.

Action by Hazel M. Kroupa against Richard W. Kroupa for divorce. From an order denying plaintiff's application for an increase of alimony, and from a subsequent order directing defendant to pay plaintiff for attorney's fees to prosecute her appeal, plaintiff and defendant appeal.

Order denying plaintiff's motion reversed, and order allowing counsel fees affirmed.

Carl H. Allen and George L. Cooke, both of San Francisco, for appellant.

J. Oscar Goldstein, P. M. Barceloux and Burton J. Goldstein, all of Chico, for respondent.

DOOLING, Justice.

Two appeals are herein presented, the first by Hazel M. Kroupa from an order of the superior court denying her application for an increase of alimony, and the second by Richard W. Kroupa, from a subsequent order directing him to pay Hazel M. Kroupa $250 for attorneys' fees to prosecute the first appeal plus the necessary costs of that appeal. The parties will hereafter be referred to as plaintiff and defendant.

Plaintiff on May 25, 1944 filed a complaint for divorce from defendant. On June 8, 1944 an answer signed in propria persona by defendant was filed, denying only the alleged grounds for divorce, and on June 9, 1944 a written stipulation was filed that the cause might be set for trial on the uncontested calendar and waiving notice of time of trial, findings of fact and conclusions of law. The complaint prayed for $75 per month alimony. On June 10, 1944 an interlocutory decree of divorce was entered which recites that defendant appeared in propria persona but offered no evidence. This decree provides for $75 per month as alimony and the same provision was carried into the final decree of divorce.

The motion for an increase of alimony was made on August 13, 1946 and was supported by plaintiff's affidavit showing a change in circumstances both in the increase of defendant's earnings and of plaintiff's necessities.

The trial court treated the divorce decree as one taken by default and held that since the complaint prayed for alimony at the rate of $75 per month the court was without jurisdiction to amend the judgment to allow more. Whether, under the facts recited, the decree was in fact a default decree need not, as we view the law, be decided.

Defendant relies upon Code of Civil Procedure section 580:

> "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint * * *."

Our case technically does not fall under this provision for here there was an answer, but treating the case as one in which there was no answer defendant is confronted with another code provision, Civil Code section 139, reading, so far as here material:

> "Where a divorce is granted for an offense of the husband, the court may compel him * * * to make such suitable allowance to the wife for her support * * * as the court may deem just * * * and the court may, from time to time modify its orders in these respects."

[1] The provision for modification in the last clause quoted gives the divorce court generally the power to increase or decrease the alimony allowed in the decree of divorce upon a showing of changed circumstances sufficient to justify such modification. 1 Cal.Jur., Alimony and Separate Maintenance, secs. 83, 84, pp. 1031–1035.

Defendant contends that the power to modify in this case is limited by the provision of Code Civ.Proc. sec. 580 above quoted under which it is argued plaintiff cannot have any modification which would increase the award to her above the $75 per month prayed for in her complaint. No case directly in point has been discovered. Defendant relies upon the cases which hold that the original judgment in a divorce action where the judgment is granted by default cannot provide for alimony in excess of the prayer of the complaint. Blackwell v. Blackwell, 86 Cal.App.2d 513, 194 P.2d 796; Eddy v. Eddy, 64 Cal.App.2d 672, 149 P.2d 187; Peck v. Peck, 52 Cal.App.2d 792, 127 P.2d 94; Darsie v. Darsie, 49 Cal.App.2d 491, 122 P.2d 64.

None of the cases however deals with the question here presented. It does not necessarily follow from the fact that Code Civ.Proc. sec. 580 forbids the court initially to include in a default divorce decree a provision for alimony in excess of the prayer of the complaint that it also forbids the court later to modify the alimony award upon a showing of changed circumstances pursuant to Civ.Code sec. 139.

[2, 3] Statutes are to be reasonably construed to effect their legitimate purpose. Civ.Code sec. 3542; 23 Cal.Jur., Statutes, sec. 139, pp. 764-765. The purpose of Code Civ.Proc. sec. 580 is to assure a defendant that if he does not contest the action the judgment taken against him will not go beyond the prayer of the complaint, "for a defendant has the right to assume that the judgment which would follow a default on his part would embrace only the issues presented by the complaint and the relief therein asked". Horton v. Horton, 18 Cal.2d 579, 583, 116 P.2d 605, 607. This purpose is fully accomplished in a divorce action if the alimony initially allowed to a wife against her defaulting husband does not exceed the amount prayed for.

The purpose of the provision in Civ.Code sec. 139 allowing the subsequent modification of alimony awards is to give the court a continuing jurisdiction to increase or decrease the allowance initially made to meet changes in the circumstances and necessities of the parties, both of the divorced husband and the divorced wife, to the end that on the one hand the payments required of the divorced husband shall not be unduly onerous upon him in view of any change in his circumstances since the entry of the decree, and on the other hand that any increase in the necessities of the divorced wife may be taken care of within the limits of the divorced husband's reasonable ability to meet them. The reason for this continuing jurisdiction is as great in a case where the original decree is taken by default of the husband as in any other.

If defendant's position is correct in this case it would still be open to him to ask for a modification of the decree under Civ. Code sec. 139 to reduce his alimony payments below $75 per month, but it would not be open to plaintiff to secure a modification to increase them beyond that amount however great her necessities may have become in the meantime nor however much defendant by reason of improved economic position may then be reasonably able to pay.

[4, 5] The two code sections must be construed to reconcile them if possible and to effectuate the legislative purpose involved in each. In doing this we are entitled to consider that Code Civ.Proc. sec. 580 is a general statute applying to all judgments taken by default for failure to answer in every type of action and that Civ.Code sec. 139 is a special statute applying only to judgments for alimony. It is an accepted rule of statutory construction that a general statutory provision must yield to one that is special. 23 Cal.Jur., Statutes, sec. 136, pp. 762-763.

It was said in Hough v. Hough, 26 Cal.2d 605, 612, 160 P.2d 15, 18:

"The settlement of property rights should be final in order to secure stability of titles. Support allowances on the other hand should be subject to the discretion of the court as justice may require. It may well be reasoned that the provision of section 139 of the Civil Code authorizing the modification of support allowances becomes an implied part of the agreement when it is incorporated into the decree.

It may be reasoned with more force that construing Code Civ.Proc. sec. 580 and Civ. Code sec. 139 together, the former section is satisfied if the original decree in a default case does not allow alimony in excess of the prayer and that the right to modify the award reserved to the court by the latter section becomes an implied part of the decree. No violence is done to due process by such a construction of the two sections. The defendant is assured that if he defaults no alimony judgment may be taken against him in excess of the prayer of the complaint and he is also assured that no modification upward will afterwards be made without a showing of a change in circumstances and after full opportunity afforded to him to be heard in opposition to the plaintiff's motion.

[6-8] Defendant also argues that the $75 allowance contained in the decree was part of a property settlement agreement arrived at by the parties and for that reason may not be increased. The record fails to support the contention. The decree refers to no property settlement and the affidavits of the parties are not sufficient to show one. The defendant's affidavit denies "that any agreement of any kind was made with the plaintiff other than that he would consent, and in fact did consent, to her requesting, and his paying the sum of $75.00 per month toward her support and maintenance and no more." This, even if true, falls far short of establishing a property settlement. An agreement solely for the payment of alimony is subject to modification by the trial court both in the decree and afterwards. Adams v. Adams, 29 Cal.2d 621, 624-625, 177 P.2d 265; Hough v. Hough, supra, 26 Cal.2d 605, 612, 160 P.2d 15. An award of alimony is likewise subject to modification under Civ.Code sec. 139 even when based on a property settlement where the decree makes no reference to the settlement agreement. Ross v. Ross, 1 Cal.2d 368, 35 P.2d 316; Gosnell v. Webb, 60 Cal. App.2d 1, 4, 139 P.2d 985; Armstrong v. Armstrong, 132 Cal.App. 609, 23 P.2d 50.

The appeal from the order allowing plaintiff counsel fees and costs to prosecute the first appeal is based solely on the ground that the trial court had no jurisdiction to modify the alimony award. It follows from our conclusion that the trial court has such jurisdiction that this order must be affirmed.

The order denying the plaintiff's motion to modify the provision for alimony is reversed with directions to the trial court to entertain the motion and decide it on its merits. The order allowing counsel fees and costs is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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91 Cal.App.2d 610

In re HANSEN'S ESTATE.

HANSEN v. TOOMEY.

Civ. 16713.

District Court of Appeal, Second District,
Division 3, California.
May 3, 1949.

1. Appeal and error 🔑931(1)

Where superior court recited in findings and judgment that oral and documentary evidence was received, and in absence of any record as to evidence that was taken, District Court of Appeal conclusively presumed that findings had support in evidence.

2. Death 🔑4
Husband and wife 🔑249

Evidence sustained finding that air corps pilot died on day he disappeared in action, so that money received by executors from Army as pay and allowances earned from date he was missing to date of presumptive finding of death was not "community property" so as to entitle wife to one-half thereof, but passed under will to his daughter. Civ.Code, §§ 163, 164, 687.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Community Property".

3. Husband and wife 🔑249

"Community property" is that which is acquired by husband or wife after marriage and during existence of marriage, other than by gift, bequest, devise, or descent, with rents, issues and profits thereof.

4. Husband and wife 🔑248

Existence of marital relationship is indispensable to acquisition of property as community property.

5. Appeal and error 🔑931(1)

Presumption that evidence sustains findings does not apply where it appears clearly that court has made specific findings as to facts in issue and also a finding of ultimate fact based solely on probative facts found, and such probative facts must be regarded as a determination of all questions of fact to which evidence relates, and finding of ultimate fact must be regarded merely as a deduction which trial court made from facts established by specific findings.

6. Husband and wife 🔑276(8)

Where finding that money paid as pay or allowances from date air corps pilot was missing in action to date of presumptive finding of death was community property evidenced a misconception of law as applied to specific facts, general finding gave way to specific finding that such funds were not community property but were subject to disposition by will. Civ.Code, §§ 163, 164, 687.

◆

Appeals from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Proceeding in the matter of the estate of Carl H. Hansen, deceased, wherein Doris Hansen Toomey filed a petition for a decree determining her interests and that of Sheila Virginia Hansen, a minor, by her guardian, Virginia Hansen, in the estate. From the judgment, Sheila Virginia Hansen appeals, and petitioner cross-appeals.

Reversed with directions. Attempted appeals from order denying motion for new trial dismissed.

John E. Sisson, of Los Angeles, for appellant and cross-respondent.

Joseph L. Fainer and Louise A. Steele, both of Los Angeles, for respondent and cross-appellant.

SHINN, Presiding Justice.

Carl H. Hansen, deceased, made a will September 22, 1943, by the terms of which he bequeathed $1 to his then wife, Doris Hansen, and the entire residue of his estate to the child of their marriage, Sheila Virginia Hansen. The will was duly admitted to probate and thereafter Doris, who had remarried to one Toomey, filed a petition for a decree determining her interest and that of the daughter in the estate. The court found that there was community property consisting of $4,716.29 in cash, awarded $1 to Doris Hansen Toomey and divided the remainder between her and the daughter. Both parties appeal. The record consists of the clerk's transcript.

The petition of Mrs. Toomey came on for hearing September 18, 1947, she and the daughter being represented by counsel. The court made findings, conclusions and a decree which recite that oral and documentary evidence was introduced in the hearing by all parties and that the same was duly considered by the court.

The court found that decedent, an air corps pilot, failed to return to his base in New Guinea while on a campaign mission over a wild jungle area and that he died on or about March 13, 1944. It was also found that the War Department continued decedent in a status of "missing in action" until January 27, 1946, when the department issued a presumptive finding of death as of that date. Through the Finance Officer of the United States Army $4,716.29 was paid to the executors of the will of decedent as pay and allowances earned by him to January 27, 1946. Upon these facts the court concluded that the amount in question is community property and distributed it as aforesaid.

[1, 2] On the appeal of Doris Toomey she contends there was no evidence to support the finding that decedent's death occurred March 13, 1944. This contention cannot prevail. In view of the recital of the findings and judgment that oral and documentary evidence was received, and in the absence of any record as to the evidence that was taken, it must be conclusively presumed that the finding had support in the evidence. Harrison v. Adams, 20 Cal.2d 646, 128 P.2d 9. However, since it appears from the briefs that the parties are in agreement as to the facts that were made known to the court in the hearing, we are disposed to consider the points made in the briefs on the basis of those facts. The clerk's transcript contains a copy of a telegram from the Secretary of War addressed to Virginia Hansen, dated March 23, 1944, advising her that her son, Carl H. Hansen, had been missing in action since March 13 over New Guinea; also a letter from the War Department, dated January 27, 1946, addressed to Mr. and Mrs. Carl J. Hansen, advising them that their son's bomber disappeared in action March 13, 1944, in bad weather; that a search had been conducted for him for more than a week without success; that the case had been reviewed and that Lieutenant Hansen was continued in the status of missing in action as of March 14, 1944; that it had been reviewed again and that the War Department, as of January 27, 1946, had terminated Lieutenant Hansen's absence by a presumptive finding of death stating, "the finding does not establish an actual or probable date of death; however, as required by law it includes a presumptive date of death for the purpose of termination of pay and allowances, settlement of accounts and payment of death gratuities." There is also a copy of a certificate of the Controller General of the United States stating that a treasury check was enclosed therewith for the sum of $4,571.09 payable to the executors of the last will of decedent on account of the amount due him at the presumptive date of death. These documents bear a filing mark some two months subsequent to the date of the hearing but they bear no other endorsement and there is no stipulation or certificate that they were received in evidence. Nevertheless, the parties on the appeal agree that the facts are as

stated in such communications and they, no doubt, had the same understanding at the trial. Assuming, however, as the parties do, that this correspondence constituted the only evidence that was before the court, the finding that death occurred March 13, 1944, is, in our opinion, well supported.

Although Mrs. Toomey alleged in her petition that "Carl H. Hansen died or was listed as missing in action at New Guinea during the month of March, 1944" she now relies upon the procedure followed by the War Department as proof that he died at a later date. It is stated in the brief of Sheila Virginia Hansen that Doris Hansen remarried December 28, 1944, and we take it to be a fact, since the assertion is not disputed in Mrs. Toomey's brief, and she does not state when she became Mrs. Toomey. It is not, however, a material point.

It does not appear that any part of the sum received by the executors consisted of pay or allowances earned by decedent prior to March 13, 1944.

[3] Sections 163, 164 and 687, Civil Code, read together define community property as that which is acquired by husband or wife after marriage and during existence of the marriage other than by gift, bequest, devise, or descent, with the rents, issues and profits thereof. The sum paid to the executors was not acquired by Lieutenant Hansen or by his surviving wife, nor was it acquired during the existence of their marriage. Deferment by the War Department until January 27, 1946, of a finding of presumptive death as of that date did not establish the actual date of death, nor did it constitute evidence that death had not occurred March 13, 1944. The status of "missing in action" was maintained for nearly two years with full knowledge that Lieutenant Hansen might not return, and that his estate would become the beneficiary of the amounts that were accumulated if he failed to return. The payment was not made as a bonus for services rendered prior to his death. It fairly appears from the correspondence that the status of "missing in action" would have been discontinued had the fact of death been established to the satisfaction of the War Department at any time prior to January 27, 1946.

[4] Existence of the marital relationship is indispensable to the acquisition of property as community property. Civ.Code, sections, supra; Feig v. Bank of Italy Nat. Trust & Sav. Ass'n, 218 Cal. 54, 21 P.2d 421; In re Estate of Nelson, 104 Cal.App. 613, 619, 286 P. 439; Stafford v. Martinoni, 192 Cal. 724, 221 P. 919; 5 Cal.Jur., p. 284.

The contingency that would have given the funds the character of community property did not occur. The accumulation took place and the money was received by the estate after the dissolution of the community. It belongs to those who take under the will of decedent, subject to administration. No part of it is community property.

[5, 6] There is another point that we should consider, although it is not discussed in the briefs. The court made a separate finding that the funds in question are community property, and incorporated in the conclusions of law a statement to the same effect. It should not be presumed that there was evidence, other than the official correspondence, as to the source of the funds. To do so would be contrary to the concessions made in the briefs. Moreover, the presumption does not apply in a case such as this where it appears clearly that court has made specific findings as to all the facts in issue, and also a finding of the ultimate fact based solely upon the probative facts found. For the reasons stated, the probative facts must be regarded as a determination of all questions of fact to which the evidence related, and the finding of ultimate fact must be regarded merely as a deduction which the trial court made from the facts established by the specified findings. The finding that the money is community property evidences a misconception of the law as applied to the specific facts found. The general findings must give way to the specific findings. McKay v. Gesford, 163 Cal. 243, 246, 124 P. 1016, 41 L.R.A., N.S., 303, Ann.Cas. 1913E, 1253; People v. Reed, 81 Cal. 70, 22 P. 474, 15 Am.St.Rep. 22; Geer v. Sibley, 83 Cal. 1, 23 P. 220; Hammond Lumber Co. v. Barth Inv. Corporation, 202 Cal. 601, 604, 262 P. 29; Savings & Loan Soc. v. Burnett, 106 Cal. 514, 540, 39 P. 922; Gar-

rison v. Edward Brown & Sons, 25 Cal.2d 473, 478, 154 P.2d 377; Falk v. Falk, 48 Cal.App 2d 762, 120 P.2d 714.

The attack which Doris Toomey makes upon the decree is confined to the adjudication that Carl H. Hansen died March 13, 1944. The decree awarded her all she prayed for in her petition and much more than she was entitled to. She has failed to show any good reason for disturbing the decree with respect to the declaration of the date of death. The appeal of Sheila Virginia Hansen is meritorious, since the property in question was subject to disposition by the will of her father.

The judgment is reversed with instructions to the court to amend its conclusions of law and its judgment to provide that the money in question is not community property and that, subject to proper deductions to be made in the administration of the estate, the sum of $4,716.29, or so much thereof as remains, shall be distributed: $1.00 to Doris Hansen Toomey, and the balance to Sheila Virginia Hansen. The attempted appeals from the order denying motion for new trial are dismissed.

WOOD and VALLÉE, JJ., concur.

91 Cal.App.2d 641

McCULLOCH v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.

No. 14151.

District Court of Appeal, First District,
Division 1, California.
May 4, 1949.

1. New trial 🔑150(2)

Order granting new trial for purpose of permitting introduction of additional evidence on issue of damages was improper, where there was no showing before court that there was in existence additional evidence on the subject. Code Civ.Proc. §§ 657, subd. 4, 658.

2. New trial 🔑½, 1

Court has no inherent power, except in cases of extrinsic fraud, to grant new trial, but court's power to grant new trial is restricted to grounds and to methods provided by statute. Code Civ.Proc. §§ 657, subd. 4, 658.

3. New trial 🔑110

Under statute regulating powers of court on motion for new trial, powers given to court are dependant on a valid motion for new trial having been made. Code Civ.Proc. §§ 657, 662.

4. Appeal and error 🔑1202

Where appellate court determined that as a matter of law the evidence compelled but one judgment, such determination became the law of the case, and trial court had no power to disregard or overrule it, and order granting new trial on gound of insufficiency of evidence to warrant judgment was improper. Code Civ.Proc. § 657.

5. Mandamus 🔑58

Where appellate court determined that evidence compelled but one judgment, but trial court granted a new trial on ground of insufficiency of evidence to warrant judgment, mandamus was the appropriate remedy, since it was mandatory duty of trial court to deny motion for new trial and mandate would lie to compel court to perform its duty.

6. Mandamus 🔑4(1)

The general rule is that where petitioner has right of appeal mandate will not issue, but issuance of writ of mandate in such a situation is a matter discretionary with court.

7. Mandamus 🔑4(3)

Where appellate court determined that evidence compelled but one judgment, but trial court granted new trial on ground of insufficiency of evidence to warrant judgment, appellate court in exercise of its discretion would grant writ of mandate, in view of fact that appeal would involve delay and expense and would present question which had been determined on prior appeal.

Proceeding for writ of mandate, certiorari or prohibition by R. H. McCulloch against the Superior Court of the State of California in and for the County of San Mateo and the Honorable A. R. Cotten, Judge thereof, and Alphonsus Liguori and wife, real parties in interest, to undo action of trial court in granting a new trial in an action by R. H. McCulloch against Alphonsus Liguori.

Peremptory writ of mandate granted.

Ernest I. Spiegl, of San Francisco, for petitioner.

Norman S. Menifee, of Redwood City, for respondent.

BRAY, Justice.

This proceeding is the aftermath of our decision in McCulloch v. Liguori, 88 Cal. App.2d 366, 199 P.2d 25, and is based upon a petition for a writ of mandate, certiorari or prohibition, whichever is appropriate, to undo the action of the trial court in granting a new trial in the above mentioned case. On such petition, we issued an alternative writ of mandate.

Facts.

There is no dispute as to the facts. In the Liguori case we reversed the judgment of the trial court insofar as it denied recovery to the plaintiff in excess of the sum of $750, and directed that court, inasmuch as there was no conflict in the evidence on the question of damages, to enter judgment in favor of plaintiff in the sum of $6960. Upon the return of the remittitur, the trial court entered judgment in accordance with our directions. Thereafter, defendants filed a notice of intention to move for a new trial, specifying all seven grounds provided by section 657, Code of Civil Procedure. At no time did defendants file any affidavits to be used on the motion. When ten days had expired after the service of the notice of intention and no affidavits had been served or filed, plaintiff filed a notice of motion to strike from the files the notice of intention to move for a new trial. This motion was heard at the same time the motion for a new trial was heard, and was denied. The motion for a new trial was granted.

Questions Involved.

These are: (1) Did the trial court have the power to grant the motion for new trial? (2) As petitioner has a right of appeal from the order granting the new trial, can and should mandamus issue?

1. The Order Granting New Trial Was Void.

[1, 2] The order is based on two grounds therein set forth: (1) "insufficiency of evidence to sustain the judgment," and (2) "for the purpose of permitting the introduction of additional evidence on the issue of damages." As to the second ground, there was no showing before the court that there was in existence additional evidence on the subject. The only ground provided by the code upon which a new trial can be granted to permit the introduction of additional evidence (other than the ground of insufficiency of evidence, which will be discussed hereafter) is that of newly discovered evidence, provided in subdivision 4 of section 657 of the Code of Civil Procedure. But under section 658, when the application for new trial is made for that cause, it must be made upon affidavits, and there were none. Respondents concede that so far as this ground is concerned the court was in error, unless, as they contend, a trial court, in addition to the power mentioned in section 657, has the inherent power to grant a new trial. No cases are cited, and we have been unable to find any, upholding this theory. Section 657 sets forth seven grounds for new trial, four of which under section 658 must be based upon affidavits. It is obvious that the court's power to grant new trials is restricted to the grounds and to the method provided by the statute. There is no inherent power (except in cases of extrinsic fraud, not here present) to grant new trials. Spiegelman v. Bowlus, 15 Cal.App.2d Supp. 765, 59 P.2d 225; see also Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486.

[3] Respondents contend that section 662 of the Code of Civil Procedure gives a court the power to grant a new trial regardless of section 657. However, section 662 begins, "In ruling on such motion" the court may, among other things, grant

a new trial. It is clear that the powers given to the court under this section are dependent upon a valid motion having been made pursuant to section 657.

[4] The main question here is whether, where, as in this case, the higher court has found that there is no conflict in the evidence and has directed the trial court to enter a certain judgment, the latter court has any power to grant a new trial on the ground of insufficiency of the evidence to warrant that judgment. To ask the question is to answer it. In the Liguori case we held, 88 Cal.App.2d 366, 199 P.2d page 31, "there is no conflict in the evidence" as to damages. We found not only that the evidence is sufficient to support the judgment directed, but also that there is no evidence to the contrary. In other words, as a matter of law, the evidence compels but one judgment. That finding becomes the law of the case, and being such, the trial court has no power to disregard or overrule it. To hold otherwise would be to permit a retrial on the very issue decided by this court.

In Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, the court was considering the right of an appellate court to make findings and to direct a judgment contrary to those of the trial court, and pointed out that the higher court could do so where it could be declared, as matter of law, that the respondent "could not make a substantial showing in support of his cause if a new trial were had, or that the respondent could not, or should not in the interests of justice, make or be permitted to make a further showing upon a retrial if one should be had." 208 Cal. page 270, 280 P. page 976. The court said further, 208 Cal. page 269, 280 P. page 975: "It may be true in a practical sense that the judgment on appeal may so establish the law of the case as to make further proceedings in the trial court or a subsequent appeal from the directed judgment futile."

That a motion for new trial on the ground of insufficiency of the evidence does not lie in a case of this kind is well established. "On a question of law this court decided that respondent was not entitled to damages, and that his claim, therefore, was barred. That order of this court, as contained in the remittitur, is conclusive upon the trial court, and determines decisively the nature and character of the judgment to be entered. The trial court, therefore, was in error in granting respondent's motion for a new trial." Snoffer v. City of Los Angeles, 14 Cal.App.2d 650, 654, 58 P.2d 961, 962. "The trial court having entered the judgment in the exact form directed by this court exhausted its jurisdiction to entertain a motion for new trial from that directed judgment * * *." Kramer v. Superior Court, 35 Cal.App.2d 239, 242, 95 P.2d 158, 159. See also Berry v. Maywood Mut. Water Co. No. One, 13 Cal.2d 185, 88 P.2d 705; Buttram v. Finley, 73 Cal.App.2d 536, 166 P.2d 654.

The motion to strike the notice of intention to move for a new trial should have been granted. The court had no power to grant a new trial for insufficiency of the evidence, because the law of the case held that the evidence was not only sufficient but compelling, and as no affidavits were filed, the court had no power to grant a new trial for the purpose of introducing additional evidence.

2. *Mandamus an Appropriate Remedy.*

[5] While petitioner has asked in the alternative for mandate, certiorari or prohibition, mandate is the appropriate remedy.

In Harris v. Municipal Court, 209 Cal. 55, 285 P. 699, the petitioner sought mandate to compel the trial court to terminate a misdemeanor prosecution for failure to bring the case to trial within a reasonable time. The court held, 209 Cal. page 65, 285 P. page 703: "Under the admitted facts there was no justifiable reason for the respondent court to refuse to dismiss the action against the petitioner. An abuse of discretion was thereby committed to correct which, under the authorities in this state above cited, the writ of mandamus is available to the petitioner." In Andersen v. Superior Court, 187 Cal. 95, 200 P. 963, the petitioner sought mandate to compel the superior court to dismiss a civil case which had not been brought to trial within the five year period. It was argued that mandate would not lie because it was contended that the matter of dismissal was discretionary with the trial court. The opinion pointed out that the requirement to dismiss after five years is mandatory and not discretionary, and hence mandate was the proper remedy to compel the trial court to perform its duty. Under the circumstances of our case, the trial court had no discretion even to consider the motion for a new trial. It was mandatory that the court should have denied it. Hence, mandate will lie to compel the court to perform its duty.

Respondents contend that mandate should not issue because the petitioner has the right to appeal from the order granting the new trial (although not from the order denying the motion to strike), and it is claimed such a remedy is an adequate one. "The existence of a remedy by appeal generally precludes resort to mandamus. [Citing cases.]" Kahn v. Smith, 23 Cal.2d 12, 16, 142 P.2d 13, 15. However, there is an exception to this rule, and that is in cases where the remedy of appeal is not speedy and adequate. As said in LaMar v. Superior Court, 87 Cal.App.2d 126, 196 P.2d 98, 102: "The question whether the legal remedy is speedy and adequate is always a matter to be determined by the court to which the application is made (Jensen v. McCullough, 94 Cal.App. 382, 393, 271 P. 568) and the court should act in such manner as will promote justice and conclude the controversy without delay. Even though the order is appealable, mandate is available and the writ will issue if the remedy by appeal is not speedy and adequate. Archer v. Superior Court, 81 Cal.App. 742, 745, 254 P. 939; Edwards v. Superior Court, 88 Cal.App. 260, 262–263, 263 P. 347; Holtum v. Greif, 144 Cal. 521, 527, 78 P. 11; Evans v. Superior Court, supra [20 Cal.2d 186, 124 P.2d 820]; Sullivan v. Superior Court, supra [185 Cal. 133, 195 P. 1061]; City and County of San Francisco v. Superior Court, supra [94 Cal.App. 318, 271 P. 121]. * * *

"Especially applicable to the situation now before us is the case of Holtum v. Greif, 144 Cal. 521, page 527, 78 P. 11, page 13, where it is said: 'The appeal, in the ordinary course, would not be decided for a long time, and pending the appeal there would be no security for the payment of the judgment; and, besides, nothing would necessarily result from an appeal beyond a reversal of the order, and this would merely confirm the right of the petitioner to execution—a right already complete.' In the instant case there would be no security for payment pending the appeal and the reversal of the order would leave petitioner in the position he is now in—he has a right to the money but he is without the means of enforcing such right."

[6, 7] Under the authorities, even though the general rule is that where the petitioner has the right of appeal, mandate will not issue, the issuance of such a writ in such a situation is a matter discretionary with this court. Here there is the delay and expense attendant upon an appeal and the fact that on the appeal the very question which we determined on the prior appeal would be presented. In the words of Holtum v. Greif, 144 Cal. 521, 78 P. 11, 13, quoted above, "nothing would necessarily result from an appeal beyond a reversal of the order, and this would merely confirm the right of the petitioner to execution—a right already complete." These considerations, plus the fact that there would be no security for the payment of the judgment, requires that, in the exercise of our discretion, the writ of mandate shall issue.

A peremptory writ of mandate is ordered to issue commanding the superior court to enter its order granting petitioner's motion to strike from the record defendants' motion for a new trial and all proceedings thereunder in McCulloch v. Liguori, No. 41437, Records of the Superior Court of the State of California in and for the County of San Mateo, including the order granting a new trial.

PETERS, P. J., and WARD, J., concur.

91 Cal.App.2d 633

PEOPLE v. VAN DE WOUWER.

Cr. 2115.

District Court of Appeal, Third District, California.
May 3, 1949.

Hearing Denied June 2, 1949.

1. Rape ⚿51(7)
Robbery ⚿24(3)

Evidence was sufficient to identify defendant as person who committed charged rapes and robbery notwithstanding variance in proof as to manner in which defendant was dressed at time of committing the charged rapes and robbery.

2. Rape ⚿57(2)
Robbery ⚿26

In prosecution for rape and robbery, variance in proof of the manner in which defendant was clothed when the charged crimes were committed merely affected the weight of evidence and presented questions for jury.

3. Criminal law ⚿566

A defendant may be identified as the person who committed the charged crime by proof of any peculiarities of size, appearance, similarity of voice, features or clothing.

4. Indictment and information ⚿129(1)

Under statute providing that an indictment, information, or complaint may charge two or more different offenses connected together in their commission, a defendant could be separately charged in different counts in one information with a rape and robbery growing out of same transaction. Pen.Code, § 954.

5. Criminal law ⚿620(1)

Information charging defendant with rape was properly consolidated for trial under information charging commission of another rape upon a different victim and a robbery committed as part of the same transaction within six weeks of time when first rape was committed, all of which were committed by intimidating victims by use of a revolver. Pen.Code, § 954.

6. Indictment and information ⚿130

Charge of rape could be united under a separate count of same information with charge against same defendant of raping a second victim within six weeks of time when first rape was committed and of a robbery committed as part of the same transaction, all of which were committed by intimidating victims by use of a revolver. Pen.Code, § 954.

7. Criminal law ⚿620(1)

Defendant by failing to object to action of trial court in consolidating for trial informations charging rape of different victims and a robbery committed as part of same transaction as second rape, and by failing to move for separate trials, waived his right to separate trials. Pen. Code, § 954.

8. Criminal law ⚿785(3)

In prosecution for raping two victims and for a robbery committed as part of same transaction as second rape, jury was fully and fairly instructed upon every essential issue of charges involved, as against contention that court failed to properly instruct jury regarding credibility of witnesses when it appeared that their testimony was conflicting or erroneous with respect to identification of defendant by clothing defendant wore, or by his personal appearance at time of the charged crimes.

9. Criminal law ⚿1163(2)

District Court of Appeal, in absence of specific assignments of alleged prejudicial misconduct of district attorney in propounding improper questions to witnesses at trial, would assume that jury was not prejudiced.

10. Criminal law ⚿1178

In absence of authorities or references to transcript where alleged misconduct of district attorney in propounding improper questions to witnesses at trial could be found, defendant's general charge of prejudicial misconduct would be disregarded.

◆

Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

Peter James Van De Wouwer was convicted of rape and robbery and he appeals.

Affirmed.

Peter James Van De Wouwer, in pro per.

Fred N. Howser, Atty. Gen. and Gail A. Strader, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant was charged in two informations with separate crimes of rape and robbery of different individuals. The first information charged him with rape of Sedona Yarger committed on June 8, 1948. The second information was couched in two counts. The first count charged him with rape of Myrna Eunice Everson committed on March 21, 1948. The second count charged him with robbery of the husband of Mrs. Everson committed with the use of a revolver. The robbery was committed as a part of the transaction of the last-mentioned crime of rape. Both informations were filed on August 5, 1948. At the trial the defendant was represented by able counsel. The two cases were consolidated for trial without opposition. The jury found the defendant guilty of the three crimes as charged. A motion for new trial was denied. The court sentenced the defendant to state prison for the term prescribed by law and directed that the terms of imprisonment for the counts of rape and robbery as charged in the second information should run concurrently. But the court directed that the terms of imprisonment for the crimes stated in the different informations should run consecutively. The defendant appealed from the order denying the motion for new trial and from the judgments of conviction. On appeal the defendant appears in proper person.

It is contended the verdicts and judgment are not supported by the evidence chiefly because of a lack of identification of the defendant; that the court erred in consolidating the causes for trial; that the court erred in failing to properly instruct the jury with respect to the credibility of witnesses, and that the district attorney was guilty of prejudicial misconduct.

[1, 2] In spite of some conflict regarding the identity of the defendant, we are convinced there is an abundance of evidence of the identity of the defendant and adequate proof to support the judgments. The mere variance in proof of the manner in which the defendant was clothed is immaterial. He was positively identified by several witnesses. The variance affects only the weight of the evidence and merely presents questions for reconciliation by the jury. People v. Avery, 64 Cal.App.2d 850, 854, 149 P.2d 758; People v. Fleming, 58 Cal.App.2d 37, 44, 136 P.2d 88.

The circumstances of this case are somewhat startling. The evidence depicts the conduct of a depraved, bold and reckless man.

Upon proof of the rape which occurred in the trailer on June 8, 1948, the victim, Mrs. Sedona Yarger, testified positively to the identity of the defendant as the man who committed that crime. She was corroborated in her identification of the defendant as her assailant by Mr. Bertolone and his two workmen who saw him coming from the direction of her home and passing the place where they were building a house at two o'clock in the afternoon, immediately following the time when the rape occurred. They described the manner in which he was dressed and his appearance.

The defendant was a comparative stranger in that community. He had not resided there long. He was formerly employed in the United States Navy, and frequently wore navy clothes, including a blue knitted stocking cap. He often wore dark glasses. He was about five feet, ten inches tall. He had a light complexion, blue eyes, light brown hair, showing gray over the temples, and possessed a prominent, bridged nose. He was thirty-one years of age, married and is the father of one child.

Mr. and Mrs. Yarger arrived from Minnesota in their automobile and trailer in January, 1948. Mrs Yarger was forty-five years of age. They had three sons and a daughter. They located on Palmer Creek, near the highway about a quarter of a mile from Fortuna. He was a builder and carpenter, and was then employed at the Gist Auto Court on the other side of Fortuna. They were building a home on their property. The trailer was parked in their yard. They slept in the trailer while they were completing their house. Mr. Yarger was away from home in the daytime during working hours. He returned for luncheon and after working hours. A short distance from their home Fred Bertolone was building a home on a hillside between the Yarger house and the highway. He had two workmen assisting him. Mr. Arthur Yarger patronized the Salliday barber shop in Fortuna. The defendant, who was employed there, knew him, and had cut his hair on two or three occasions. Evidently, the defendant knew of his employment away from his home during the daytime. Prior to June 8th, the date of the alleged rape, Mrs. Yarger had her hair trimmed on one occasion by Mr. Salliday. The defendant worked at the adjoining chair and talked to her. During that conversation she mentioned the fact that they had a trailer for sale.

On June 8th, about two o'clock in the afternoon, while Mr. Yarger was working away from home, and no person other than Mrs. Yarger was about the premises, a man suddenly appeared at their home. He wore a blue navy knitted stocking cap, dark glasses, and a navy jacket. Owing to the difference between the way he was clothed when she saw him in the barber shop and the manner in which he was then dressed, she failed to recognize him. He did not remind her of their former meeting. He did not introduce himself, but asked her if they had a trailer for sale. She replied that they had one which would be for sale later when their house was completed. He insisted on inspecting it then. She told him it was not in proper order at that time, but, with the prospect of a sale, she consented to show him the trailer. They went together to the vehicle. She entered first and he followed her. While she was showing him the cupboards and other furnishings, he suddenly poked a nickle-plated revolver against her back and ordered her to take off her clothes. She was hysterical and wept, protesting against his demand, but fearing that she would be shot if she refused, she removed her clothing and he forcibly raped her on the bed at the rear of the trailer. He placed his revolver on the ice-box near the entrance to the car, where it remained during that period of time. As he departed, he picked up his revolver and told her that if she informed anyone of that affair he would come back and "take a potshot at her." She testified that she was in mortal fear of him. In terror, she watched him leave the premises and go up the hill toward the Bertolone house, which was a short cut back to the Fortuna highway. After he had passed from her sight, she left the trailer and rushed to the house and, taking their automobile, she drove directly to the Gist Auto Court where her husband was employed and told him about the affair. He consulted another employee about the crime and they phoned to the officers. She described the defendant and the manner in which he was clothed, but said she did not recognize the man as anyone she knew. Mr. and Mrs. Yarger drove directly to the office of Dr. Goble, who made a physical examination. He testified positively, from an analysis of the contents of the vagina, that intercourse had occurred within four hours of his examination.

Two or three days later Mrs. Yarger chanced to see the defendant on the street in Fortuna, and immediately recognized him as her assailant, and also as the barber in Salliday's shop. She promptly informed her husband that the barber was the man who had raped her. They afterward went to the barber shop, and when the defendant saw them entering the shop he darted out through a back door. The officers were informed of the identity of the man and he was arrested. At the trial Mrs. Yarger positively recognized and identified him as her assailant. Mr. Bertolone and his two workmen, Lyle Jensen and James Boughner, who were working on Bertolone's house near which the defendant passed as he left the Yarger premises after his commission of the crime, about two o'clock P.M. on June 8th, positively recognized the defendant as the man who passed their house at that very time. They described his manner of walking, and the way in which he was clothed. Each of them said he wore a blue navy knitted stocking cap, dark glasses and navy or army fatigue clothes. He was a stranger to them. There can be little doubt the defendant was the man who committed that crime.

With respect to the other joint charges of rape and robbery committed by the defendant on March 21, 1948, about six weeks previous to the foregoing described crime of rape, both victims positively identified the defendant as the man who robbed John Everson and raped his wife. They recognized him from his height, form, complexion, voice, the color of his eyes and hair, some of his features, including a bridged nose, and his clothing.

John E. Everson and his wife, who was 20 years of age, were married March 20, 1948, in Sonoma County. They live in Piru, Ventura County. They were driving north on the Redwood Highway in their automobile on their honeymoon. The husband drove the car. On March 21st they passed Garberville, about fifty miles south of Fortuna, about 1:30 P.M. They were hungry and tired. They drove off the highway into Franklin Lane's Grove, and parked beside the roadway, where they ate their luncheon, and then went to sleep. It was a secluded spot, amid the trees and bushes. They were awakened by a man who approached and opened the right door of the car on the side where Mrs. Everson sat. They testified that he wore a bluish, gray hat, a pair of dark glasses, and a handkerchief covering his face below his nose. He was armed with a nickle-plated revolver. He wore a Navy jacket and fatigue trousers. He had light brown hair, tinged with gray over the temples. He was about five feet, ten inches tall. He pointed his revolver at Mr. Everson and demanded his money, in a brazen "Black Bart bandit" fashion. Everson handed him his wallet containing a lonely twenty-dollar bill. It was grumblingly accepted. The bandit then turned his attention to the wife, and, threatening both of them with his revolver, he proceeded to rape her in the presence of her husband. The wife protested and cried without avail. The man then demanded the keys to the car, saying "he didn't want them to make a quick get away." He hung the keys on a bush some distance up the road, and disappeared along an obscure trail.

[3] Mr. and Mrs. Everson found their keys, and drove back to Garberville, where they notified the officers of the rape and robbery, describing the man as best they could. They then visited a doctor for treatment of the wife. The defendant was not apprehended or arrested until after the previously-mentioned rape, which occurred June 8th. They were then notified of his arrest, and went to Humboldt County, where they saw the defendant and the clothes which he wore on the occasion of their hold-up. Both of the spouses positively identified him as the man who robbed them and raped the wife on March 21st. While there is some conflict with respect to certain unimportant details, the evidence of the identity of the defendant as their assailant is very persuasive. We conclude that the evidence adequately established his identity, and the commission of the crimes. The identity of a defendant may be established by proof of any peculiarities of size, appearance, similarity of voice, features or clothing. 20 Am.Jur. 325, sec. 350.

[4] The court did not err in consolidating for trial the separate charges against the defendant. That procedure was discretionary with the court. No abuse of discretion appears. The record discloses no objection to the consolidation of the two informations for trial. No motion for separate trials was made. In one information the defendant was separately charged in different counts with the crimes of rape and robbery growing out of the same transaction. Under such circumstances the statute authorizes the uniting of such different charges in separate counts of one indictment or information. Penal Code, sec. 954; People v. Avery, 64 Cal.App.2d 850, 853, 149 P.2d 758; 8 Cal.Jur. 193, sec. 268; 42 C.J.S., Indictments and Informations, § 180, page 1136. The code section last cited reads in part:

> "An indictment, information, or complaint may charge two or more different offenses connected together in their commission, * * * under separate counts, * * *."

[5, 6] Nor was that information improperly united with the second information against the same defendant, charging him with the commission of another rape upon a different woman in the same vicinity

and within about six weeks of the time when the first alleged rape was committed. Both informations included charges of rape committed by intimidating the victims by the use of a revolver. Both offenses belong to the same class of crimes. They might have been united under separate counts of one and the same information. They were therefore properly consolidated for trial. In the text of 8 California Jurisprudence, page 193, section 268, which is supported by adequate authorities, it is said:

"The Penal Code [Sec. 954] provides that if two or more indictments or informations are filed in cases where the charges may be charged in separate counts in one indictment or information, *the court may order them to be consolidated.*" (Italics added.)

In the case of People v. McClain, 55 Cal. App.2d 399, 130 P.2d 978, wherein the defendant was charged in different informations with crimes of the same class committed upon different persons on separate dates, the informations were consolidated for trial. On appeal the court said, 55 Cal. App.2d at page 402, 130 P.2d at page 980:

"The fact that the different crimes charged against the defendant were committed at different times and places does not deprive the trial court of power to order the consolidation of the informations for trial, if the offenses charged are of the same class of crimes. People v. Feigelman, 65 Cal.App. 319, 320, 223 P. 579. Clearly in the instant case the several indictments charged offenses of the same class of crimes and the trial court did not abuse its discretion in ordering the informations consolidated for the purpose of trial."

For discussion of offenses of the same class which may be properly united under separate counts in the same information or indictment, see People v. Bundte, 87 Cal. App.2d 735, 197 P.2d 823.

[7] Moreover, in the present case the defendant waived his right to separate trials of the charges of rape, by failing to object to the consolidation of the cases, and by failing to move for separate trials.

[8] The appellant is mistaken in asserting that the court failed to properly instruct the jury regarding the credibility of witnesses when it appears that their testimony is conflicting or erroneous with respect to the identification of the defendant by the clothing which he wore or his personal appearance at the time of the alleged rape. We find that the court instructed the jury as follows:

"In determining the credibility of a witness, you should consider whether his testimony is, in itself, contradictory; whether it has been contradicted by other credible witnesses, whether his statements are reasonable or unreasonable; whether they are consistent with other statements, or with facts established by other evidence, or admitted facts.

"You may also consider the witness' manner of testifying on examination; the character of his testimony; the bias or prejudice, if any, manifested by him; his interest or absence of interest in the action; his recollection, whether good or bad, clear or indistinct, concerning the facts to which he testifies; his inclination or motives; together with his opportunity of knowing of the facts whereof he speaks.

* * * * * *

"If any witness examined before you has wilfully sworn falsely as to any material matter, you may distrust his entire testimony."

The court also instructed the jury that it should examine the testimony of the prosecuting witnesses "with caution". The jury was very fully and fairly instructed upon every essential issue of the charges involved. We are directed to no error in the instructions, and we find none.

[9, 10] There is no merit in appellant's contention that the district attorney was guilty of prejudicial misconduct in propounding improper questions to the witnesses at the trial. No specific instances of such alleged improper questions are designated, and no reference to pages in the transcript where such questions appear is stated. The appellant merely makes the general statement that "The reporter's transcript shows a host of sustained objec-

tions to improper questions and the admonitions of the court to the jury to disregard them." It thus appears that if any improper questions were asked at the trial, the objections thereto were sustained and the jury was instructed to disregard them. We must assume, in the absence of specific assignments of such conduct, that the jury was not prejudiced thereby. Moreover, in the absence of authorities or references to the transcript where such alleged misconduct may be found, the general charge of prejudicial misconduct should be disregarded. People v. Serpa, 67 Cal.App.2d 327, 333, 154 P.2d 6.

For the foregoing reasons the motion for a new trial was properly denied.

The order denying a new trial and the judgment are affirmed.

ADAMS, P. J., and PEEK, J., concur.

91 Cal.App.2d 420

In re DOW'S ESTATE.

Civ. 14005.

District Court of Appeal, First District, Division 1, California.

April 26, 1949.

Rehearing Denied May 26, 1949.

Hearing Denied June 23, 1949.

1. Appeal and error 🔑76(2)

The rule providing that date of entry of order which is entered in minutes shall be date of its entry in minutes unless entry in minutes expressly directs that written order be prepared, signed and filed. in which case date of entry shall be date of filing of signed order, applies to appeals from minute orders. Rules on Appeal, rule 2(b) (2).

2. Executors and administrators 🔑35(16, 19)

The determination of petition for accounting and for revocation of letters of administration and for appointment of disinterested administrator required findings of fact, and until such findings were filed there could be no judgment from which to appeal, and hence minute order denying petition without findings of fact having been made was not appealable. Probate Code, §§ 522, 1230; Rules on Appeal, rule 2(b) (2).

3. Executors and administrators 🔑189

An agreement stating that widow had no community interest in property or assets of estate and providing that widow had right to participate in distribution of estate in accordance with will did not waive widow's right to family allowance and did not deprive widow of all rights in the estate other than right to participate in distribution.

4. Executors and administrators 🔑196

A widow who was granted family allowance from death of deceased to return of inventory did not waive right to make second application for family allowance by waiting several years after return of inventory before making second application.

5. Executors and administrators 🔑196

Where estate is ready for distribution, probate court cannot grant a new family allowance, and where prior order is made restricting allowance to limited period probate court cannot thereafter grant a family allowance unless conditions are changed since prior order was made.

6. Executors and administrators 🔑196

Whether conditions have changed since prior order restricting family allowance to limited period and propriety and extent of change are matters committed to discretion of the probate court to whom application is made for additional family allowance on ground of change of conditions since such prior order.

7. Executors and administrators 🔑196

The granting of additional family allowance after prior order restricting family allowance to limited period on ground that conditions had changed since prior order in that litigation involving an asset of the state was pending and that suit was threatened for removal of widow as administratrix and for return to estate of assets allegedly held by widow and on ground that estate was not in condition to be closed in that widow held unpaid judgment against estate and that there were unpaid attorneys' and administratrix' fees and legacy to widow under will, was not abuse of discretion.

8. Executors and administrators ⚿178

A family allowance of $500 per month until further order of court could be terminated at any time and so was not without limits, and was not unreasonable in view of circumstances of estate, widow's station in life and her needs generally.

9. Executors and administrators ⚿194(5)

Evidence was sufficient to show that estate was not insolvent and that family allowance of $500 to widow per month until further order of court would not impoverish estate.

10. Executors and administrators ⚿510(4)

An objection to form of administratrix' account could not be made for first time on appeal from decree settling account.

11. Executors and administrators ⚿507(1)

The probate court has a broad discretion in passing on accounts of administrators.

12. Executors and administrators ⚿510(4)

The absence of vouchers for payments made by administratrix was not fatal to allowance of account of administratrix, where probate court's attention was not called to absence of vouchers. Probate Code, §§ 925, 929.

13. Executors and administrators ⚿507(2)

A decree settling the first account of administratrix did not require findings other than findings in decree that service was made of notice of settlement of accounts. Probate Code, § 1200.

14. Executors and administrators ⚿510(4)

An item in administratrix' account could not be questioned for first time on appeal from decree settling account.

15. Executors and administrators ⚿184

Widow's delay in collecting amount ordered as family allowance does not forfeit right to such allowance.

16. Executors and administrators ⚿219

A personal judgment which creditor of estate obtained against administratrix who signed statement that estate would pay indebtedness in one year in order to get back administratrix' valuable rug which creditor was holding for indebtedness was an indebtedness of estate and administratrix was entitled to reimbursement for paying such indebtedness.

17. Executors and administrators ⚿510(4)

Contentions not brought to attention of probate court would not be considered on appeal from decree settling account of administratrix.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Edgar Laurence Dow, deceased, wherein Maxine Patricia Hutchinson appeals from a minute order of the probate court denying petition for accounting, for revocation of letters of administration and for appointment of disinterested administrator, and from decree settling the first account of the administratrix and supplement thereto, and from order granting respondent, Maxine B. Dow, widow of decedent, a family allowance.

Purported appeal from minute order dismissed, decree settling first account and supplement thereto and order for family allowance affirmed.

William A. White, of San Francisco, for appellant.

Jesse H. Miller, of San Francisco, for respondent.

BRAY, Justice.

There are two appeals by appellant, a daughter of decedent, from three orders of the probate court: (1) from the minute order dated March 29, 1948, denying the petition for accounting, for revocation of letters of administration, and for the appointment of a disinterested administrator; (2) from the decree settling the first account of the administratrix and supplement thereto, dated April 13, 1948; and (3) from the order dated May 13, 1948, granting respondent, widow of decedent, a family allowance.

No Appeal Lies From Minute Order.

Pursuant to section 522 of the Probate Code, appellant filed a "Petition for an Order Directing an Accounting for the Revocation of the Letters of Administration of Maxine B. Dow, and for the Appointment of a Qualified and Disinterested Administrator with Will Annexed." Respondent appeared in opposition to this petition, although she did not file any demurrer or answer. Section 522 provides that she "may" have done so. The section further provides "the issues shall be heard and determined by the court." Section 1230 provides: "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. * * * If no jury is demanded, the court must try the issues joined, and sign and file its decision in writing, as provided in civil actions. * * *" In Re Estate of Pendell, 216 Cal. 384, 14 P.2d 506, it was held that on a petition for removal of the executors and the appointment of an administrator with the will annexed, the above quoted language, which was then in sections 1716 and 1717 of the Code of Civil Procedure, requires written findings in the determination of issues of fact in probate proceedings, and particularly, in the determination of petitions of the kind in question. See In re Estate of Withington, 60 Cal.App.2d 105, 140 P.2d 491, to the same effect with reference to a petition for the removal of an administrator with the will annexed.

[1, 2] The court here made no findings of fact. All that appears in the record concerning its action on the petition is the minute order of March 29, which reads: "Petition of Maxine P. Hutchinson, to revoke letters of administration. Denied." In Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, at page 347, 182 P.2d 182, at page 190, it was held; "It is settled that where findings are essential there is no rendition of final judgment until findings are signed and filed. Supple v. Luckenbach, 12 Cal.2d 319, 84 P.2d 52." In construing rule 2(b) (2) of Rules on Appeal, which applies to appeals from minute orders, we held in Hirschberg v. Oser, 82 Cal.App.2d 282, 186 P.2d 53, that an appeal from the minute order did not lie if the proceeding was one in which a further or formal order was required. In the case at bar, as findings of fact are required, there could be no judgment until they were filed, and hence no judgment from which to appeal. As there is no appeal from the minute order, the appeal attempted to be taken therefrom must be dismissed.

This leaves two appeals to be considered: (1) from the order granting respondent a family allowance; and (2) from the decree settling the first account of the administratrix.

History.

Before considering the contentions raised, it is advisable to have in mind the history of the estate and the parties. In 1916, decedent, then a wealthy man 50 years of age, married respondent, then 17 years of age. One child (appellant) was the issue of this marriage. Decedent had children by a prior marriage. Decedent and respondent lived together until his death in 1930. The executor of decedent's will was the American Trust Company, which served as such executor from January 7, 1931, to April 5, 1932. (E. L. Dow, Jr., a son of decedent by the prior marriage, was also named as coexecutor, but declined to act.) On that date the executor resigned and Hiram W. Johnson, Jr., was appointed administrator with the will annexed, serving until 1937, when he resigned and the widow (respondent) became the administratrix with the will annexed. At its inception, the estate was insolvent, and remained so for many years. Whether it is now solvent is one of the issues in the case. In January, 1931, there was set aside to the widow as exempt from execution, certain household furnishings inventoried at $500, and she was granted a family allowance of $1000 per month from the date of the death of decedent to the return of the inventory. From this, she received $12,000. Household furnishings, which were evidently worth far more than their appraised value, and jewelry, were left in the will to the widow. The American Trust Company as executor obtained a declaration by the court that this property belonged to the widow personally. From the sale of this property and the one year's family allowance, the widow supported herself and the daughter, who was 13 years of age at her father's death, keeping the daughter in a private school until she finished high school grades.

During these years, the widow, in her personal capacity, pressed two claims involving the estate. In one action, referred to as the "Sutro" suit, she recovered a judgment against the then administrator of the estate, which now, together with interest, totals around $28,000.

The second claim concerned an alleged community property interest in some mining property, the "Mayflower Mine," title to which was in the name of E. L. Dow, Jr. In 1935 a settlement was entered into by Mrs. Dow, E. L. Dow, Jr., and the estate, approved by the probate court, under which each of the three parties mentioned received a one-third interest in the mine. The compromise agreement also provided that the estate should have certain shares of stock which had been claimed by E. L. Dow, Jr. The will provides for a testamentary trust, the income to be paid two-thirds to the widow and one-third to the daughter until January, 1952. Then the trust terminates, the corpus going one-third to the widow, one-third to the daughter, and one-third to the heirs of the decedent by the prior marriage. Under the compromise agreement above mentioned, it is claimed that E. L. Dow, Jr., and Gerald H. Dow surrendered to the widow and daughter all their claims under the will. The will contains a spendthrift clause, which it is not necessary to construe here.

When Mrs. Dow became administratrix in 1937, she selected her daughter's husband as her attorney. He remained such until about 1946, when Mrs. Dow claims he refused to file a petition for family allowance. The reasons for this refusal are disputed. Mrs. Dow then replaced him with another attorney. In 1946, Mrs. Dow succeeded in settling claims against the estate amounting to around $18,000 for a sum around $4000. About 1943, a purchaser was found for the mine property, who agreed to pay $300,000 for full title, payable $15,000 per year. The first payment was made in 1946, and a second payment later. No other payments have been made.

The most important asset of the estate is 4956½ shares of stock in River Farms Company, of which decedent was president at the time of his death. It is one of the largest reclamation projects in the world, located at Knight's Landing, near Woodland. The land, consisting of about 13,900 acres, is primarily devoted to the cultivation of grain and other agricultural products by the corporation itself. The stock has never paid any dividends; there seems some prospect now of dividends. In the last five years debts have been reduced by $850,000 and amount only to $25,000. Gross earnings for 1947 were $947,000, which was double the earnings the year before. Although the market price per share had been as low as fifty cents at the time of the original appraisement in the estate, it had risen to $12.50 or $15 at the time of the first hearing. At the hearing in May, 1948, Mrs. Dow testified that the most recent sale had been at $30 per share.

Family Allowance.

No application for family allowance, other than the preinventory one above mentioned, was made until April, 1947, when the administratrix petitioned for an allowance of $1000 per month, retroactive to December, 1931, when the first allowance terminated. On the hearing of this petition the court granted an allowance of $500 per month, restricted to six months beginning July 1, 1947. No appeal was made from this order.

On April 26, 1948, a third petition for family allowance was filed and on May 13 the court made its order allowing $500 per month commencing January 1, 1948, and continuing "until the further order of this Court." Appellant appealed from this order, contending: (1) That the time for settling the estate had arrived and therefore the court had no jurisdiction to grant a family allowance. (2) The second allowance, in 1947, is res judicata as to the claim for family allowance pending distribution. (3) The allowance was waived by the administratrix. (4) The court abused its discretion in granting the allowance as it is unreasonable, exorbitant and improvident.

Waiver.

[3, 4] This contention is based principally upon the contention that in the compromise agreement concerning the Mayflower mine, the widow expressly waived all rights except the right to receive under the will. However, an examination of that agreement does not show such a waiver. The only concession of any kind by Mrs. Dow appearing in the agreement is the following: "Said Maxine B. Dow hereby agrees that she has no community interest whatever in any of the property or assets of the Estate of Edgar L. Dow, deceased, and that all of said property and assets constitutes his separate property and estate." There is the following language: "Said first party, Maxine B. Dow shall have the right to participate in the distribution of the Estate of Edgar L. Dow, deceased, in accord with the terms of the will of said deceased, and no objection of any kind shall be made to such participation." The first paragraph above mentioned does not in any sense constitute a waiver of the widow's right to a family allowance. Nor does the second paragraph mean, as contended by appellant, that Mrs. Dow thereby agrees that her only right in the estate is to participate in the distribution. In re Estate of Howe, 88 Cal.App.2d 454, 199 P.2d 59, 60, cited by appellant in support of her contention that the above quoted language constituted a waiver of the right to family allowance, is actually authority for the construction we give. There, the court held that an agreement signed by the widow stipulating the amount of community property in the estate and the share she was to receive of it, "over and above, the amounts coming to her under the provisions of the" will, did not constitute an agreement that any portion of the community property share to be received by her should be charged with any part of the family allowance which she had received. In Re Estate of Yoell, 164 Cal. 540, 129 P. 999, a separation agreement signed by the husband and wife provided among other matters that "all claims as such heir, or as surviving husband and wife, respectively * * * is hereby expressly waived." 164 Cal. at page 545, 129 P. at page 1001. In holding that this constituted a waiver of the surviving wife's right to a family allowance, the court said, 164 Cal. at page 551, 129 P. at page 104: "The wife covenants that she has renounced and waived all claim which she has or may have as *heir* of the husband or as his *surviving wife*. It is only as heir and surviving wife that she could make her demand for a family allowance, a demand which she has solemnly renounced." It is obvious that there was no such waiver in the case at bar. As said in Re Estate of Gould, 181 Cal. 11, 14, 183 P. 146, 147: "An examination of the cases wherein it has been held that the wife had waived her statutory rights as widow reveals the fact that in each case the words used clearly imported an intention to surrender the very right afterwards claimed." Nor does the fact that the widow waited several years after the return of the inventory before applying a second time for a family allowance constitute any waiver by her or bar her from making such application.

Further Contentions.

[5] The three other contentions concerning the family allowance order will be considered together. It is conceded that the court cannot grant a new family allowance if the estate is ready for distribution, and that where a prior order is made restricting the allowance to a limited period, the court cannot thereafter grant a family allowance unless conditions are changed since the prior order was made. In re Estate of Nelson, 167 Cal. 321, 139 P. 692; In re Estate of Boselly, 179 Cal. 218, 176 P. 45. The court apparently considered when the second order was made that the estate was in a condition to be closed within six months. The questions to be considered are whether there is a changed condition and whether the estate is ready to be closed. Since the making of the second order an action has been filed against a title company as trustee for the estate, Mrs. Dow and E. L. Dow, Jr., and against Mrs. Dow and E. L. Dow, Jr., individually, by the McCormick estate, to quiet title to two mining claims which

constitute the gateway to the Mayflower mine. Respondent is of the opinion that this suit was instigated by the buyer, who is in arrears in the payment of the purchase price, to force a reduction in the price of the mine. The trustee has refused to defend unless indemnified for its expenses. Respondent and E. L. Dow, Jr., have retained a local lawyer to defend and he has been instructed to declare a forfeiture of the purchase agreement for failure of the buyer to make payments in accordance with its terms. Thus, there is a foreclosure proceeding, as well as the suit pending. At the time the court made the third allowance order, appellant was threatening respondent with litigation in a separate proceeding. This threat has been made good. On August 3, 1948, appellant filed in the superior court an action against Mrs. Dow both individually and as administratrix for (1) the revocation of her letters of administration; (2) an order reopening every account heretofore filed; (3) appointment of a disinterested administrator and for closing the estate; (4) the delivery to the new administrator of assets belonging to the estate which appellant claims respondent is withholding; (5) an order setting aside the judgment in the "Sutro" suit, and the judgment obtained by respondent based upon the compromise entered into with reference to the Mayflower mine.

[6] Appellant contended below that the administratrix was purposely delaying the administration of the estate in order to mulct it by a prolonged family allowance, and by increasing interest on her claims against the estate. Appellant testified that Mrs. Dow had told her she would do so. Mrs. Dow denied making such statement. All these matters were before the court and apparently the court did not believe that such was the purpose of the administratrix. Curtis v. Schell, 129 Cal. 208, 61 P. 951, 79 Am.St.Rep. 107, cited by appellant, is not in point, as it was based upon a situation in which on an application for a family allowance the widow fraudulently concealed material facts from the court. Whether a change of conditions has resulted and the propriety and extent of such change, are matters committed to the discretion of the trial court. In re Estate of Boselly, supra, 179 Cal. 218, 176 P. 45.

In re Estate of Coffin, 16 Cal.App.2d 532, 61 P.2d 81, is not controlling here. That case held, 16 Cal.App.2d at page 534, 61 P.2d at page 82, that in determining what is a reasonable family allowance "it is competent for the court to determine what is a reasonable time within which the estate should be settled and to fix the amount of the allowance accordingly," and then held that the petition of the widow for an additional allowance after the expiration of the time fixed "gave no good reason why the settlement of the estate had been delayed beyond" the period expressd in the order. Here the court held in effect that the delay in closing the estate (which it likewise found to be a necessary one), was good reason for a further family allowance.

In Re Estate of Ricaud, 57 Cal. 421, it was held that the fact that the real property claimed to belong to the estate was involved in litigation justified the court in holding that the estate was not ready for distribution. See also In re Burdick, 112 Cal. 387, 44 P. 734. In our case, although the title company, the present trustee or the testamentary trustee, might be able to conduct the litigation concerning the Mayflower mine, it was within the discretion of the trial court to hold that it was the duty of the administratrix to see this litigation to its conclusion. Moreover, the action now pending between appellant and respondent hereinbefore referred to, is an action for respondent's removal as administratrix and for a return to the estate of assets which it claims respondent is withholding from it.

[7] The trial court, in its discretion, held, in effect, that the foreclosure proceedings, the quiet title suit, and the threatened suit by appellant against respondent (which has materialized) constituted a change in conditions since the preceding allowance order was made. In addition to these matters there was the unpaid judgment held by respondent against the estate, unpaid attorneys' fees and administratrix' fees, and a legacy to respondent under the will. The court, in its discretion, held

that by reason of all of these, the estate is not in a condition to be closed. We cannot say that the court abused its discretion in either particular.

The Allowance Is Not Unlimited Or Unreasonable.

[8] Appellant contends that the allowance is unlimited and unreasonable. It is not without limit. Being merely "until the further order of this Court," it may be terminated at any time. The court stated at the time of making the order appealed from, that "if there is any unnecessary delay we will stop it." Nor can we say as matter of law that it is unreasonable. The probate court had before it the circumstances of the estate, the widow's station in life (at the time of her husband's death the household had four servants, a town car and a chauffeur), the condition of her health (she is suffering from a complicated ailment of both eyes), her lack of income, the prior awards, and her needs generally.

[9] Appellant contends that the estate is insolvent and that the payment of the family allowance for any extended period, plus the attorneys' and administratrix' fees, and the claim and legacy of the widow, will eat up the value of the estate. The testimony on this subject is conflicting. According to the widow, the value of the stock in the River Farms Company is $30 per share (at one time during the administration of the estate it had been as low as 50 cents per share), a total value of over $148,000; there was some $8800 in the bank, plus a one-third interest in the Mayflower mine, which seems to be of doubtful value. This evidence supports the court's conclusion that the estate is not insolvent and that a family allowance granted will not impoverish the estate. The action of the appellant in bringing the suit against the administratrix (which suit could have been brought just as well several years ago) in no wise hastens the closing of the estate.

Decree Settling First Account.

From her appointment in 1937 until after appellant filed the petition for order directing an accounting and for the revocation of letters of administration heretofore mentioned, the administratrix filed no account. On July 12, 1947, she filed a "First Accounting of Maxine B. Dow, Administratrix with the Will Annexed, and Sixth Accounting of Representative of Estate." Appellant filed exceptions to this account. On February 26, 1948, the administratrix filed a "Supplement to First Account of Maxine B. Dow as Administratrix with the Will Annexed." After a hearing the court, on April 13, made its decrees settling the first account of the administratrix and supplement thereto, in which it found the account and supplement to be true and correct, ratified and approved each item, and settled, allowed and approved the account and supplement. On appeal from this decree, appellant makes several contentions which will be considered seriatim.

The Account Is Not Insufficient In Fact And In Law.

[10, 11] The contention that the account is insufficient seems to be based partially on the form of the account and partially on the fact that when it was first filed, Mrs. Dow's counsel announced that it was filed "for the primary purpose of showing the Court the assets that are on hand" in connection with the then application for family allowance. However, counsel announced that an opportunity would be afforded appellant's counsel to object to the account when a petition for its approval was filed. This opportunity was given later, and objections were made and considered by the court, but at no time was an objection made to the form of the account. These specific objections will be taken up later, but it is now too late to attack the form of the account. The account sets forth the moneys received and paid out by the administratrix, together with a list of the assets of the estate. The court has a broad discretion in passing on accounts of administrators. We cannot say that as to the form of this account the court abused its discretion in approving it, particularly as no objection on that score was made to the probate court.

Vouchers.

[12] Section 925 of the Probate Code provides that "Except as hereinafter pro-

vided" vouchers must be filed for all payments made by the administrator. No vouchers were filed. In Re Estate of Hedrick, 127 Cal. 184, 59 P. 590, it was held, in effect, that the probate court was correct in disallowing contested items for which the administrator failed to produce vouchers. It is apparent, however, from a reading of the case, that the lack of vouchers was called to the attention of, and considered by, the probate court. In our case, the absence of vouchers was not objected to, or called to the attention of the court. Section 929 of the Probate Code, which is included in the phrase "Except as hereinafter provided" in section 925, provides: "If it appears that debts of the decedent have been paid without verified claims having been filed or presented and allowed and approved, and it shall be proven that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is solvent, the court, in settling the account, shall allow the sums so paid." In view of this section, and particularly of the failure of appellant to call the probate court's attention to the absence of vouchers, the absence of vouchers is not fatal to the allowance of the account.

Findings.

[13] Appellant contends that the decree settling the first account falls because there are no findings, citing In re Estate of Kauffman, 63 Cal.App.2d 655, 147 P.2d 11. But that case does not hold that findings are required in the settlement of an account. In that case, following a contest over certain accounts of the administrator, the judge filed a document referred to in the petition as the "memo." This document the court held to be merely the judge's opinion which the judge *intended* to be followed by "formal findings, decision, and judgment." 63 Cal.App.2d at page 660, 147 P.2d at page 14. It was comparable, said the court, to "the usual minute entries made by the clerk to guide in the preparation of a formal order." It pointed out that the only finding which the court is required to make is that service was made of notice of settlement of the accounts (in the case at bar such finding appears in the decree). Section 1200 of the Probate Code requires that the court shall so find "in its order." However, it held that the court might, as it did, require further findings. In Re Estate of McPhee, 156 Cal. 335, at page 337, 104 P. 455, Ann.Cas.1913E, 899, the court said: "Furthermore, it has been repeatedly decided that findings of fact and conclusions of law are not required in a proceeding for the settlement of an administrator's account. [Citing cases.]"

Particular Items.

The only specific items of the account which appellant attacks here are those hereinafter mentioned:

[14] Payment of $56.66 to Lillian Hansen. No objection in the probate court was made to this item, nor was the administratrix questioned concerning it. It cannot be raised here for the first time. In re Estate of Rohrer, 160 Cal. 574, 117 P. 672, Ann.Cas.1913A, 479.

[15] A withdrawal on July 20, 1946, of $1000. This the administratrix explained was the twelfth payment under the first family allowance. The court allowed $1000 per month from date of death, December 4, 1930, until the return of the inventory, December 21, 1931. The administratrix in 1931 drew the allowance for only eleven months. She drew the twelfth payment July 20, 1946. This withdrawal was within the amount allowed in the original order. Delay in collecting the amount awarded as family allowance does not forfeit the right to it. In re Estate of Nelson, 167 Cal. 321, 139 P. 692; In re Welch's Estate 106 Cal. 427, 39 P. 805.

[16] There is an entry "12/23/46 To Maxine B. Dow—reimburse for advances as settlement in full of creditor's claim of S & G Gump Company: * * * 759.60." Mrs. Dow explained that the Gump company had a claim of $485 or thereabouts, against the estate, for an indebtedness incurred during the life of the decedent, and for which the decedent was liable. In 1935 or 1936, Gumps held one of her valuable rugs for this indebtedness. To get her rug back she signed a statement that the estate would pay in one year. When it did not pay, Gumps obtained a

judgment against her (apparently a personal judgment) which with costs and attorneys' fees amounted to $759.60, which she paid. The probate court held that this was the indebtedness of the estate and that she should be reimbursed for paying it. Under the testimony, we cannot say that the court erred.

[17] Appellant contends that the administratrix has retained certain objects of art, and unusual items of furniture, which she has failed to inventory or account for. Respondent contends that these are included in the property set aside to her by court order early in the administration. Appellant now contends that these items were not included in that order or in the inventory. We cannot find that this matter was an issue in the lower court. In her formal exceptions to the account no mention is made of this subject. We can find no place in the record where the court was asked to determine whether or not these articles were included in the order. The record shows that at the hearings before the court everyone assumed that they were so included. Mrs. Dow was then questioned at great length concerning the sale of the various articles and the proceeds therefrom. There is nothing in the record before us, or, so far as we can find, brought to the attention of the probate court on the proceedings involved here, to show that they were not included in the order.

Appellant contends that respondent has failed to account properly for sums totaling $19,636.38, which it is claimed are proceeds from the mine. No such contention was made below. In fact appellant contends that $1908.46 of that sum is due because of certain findings in the trial court in the Mayflower mine case where the court entered judgment pursuant to the compromise agreement, and that "The probate department has taken no action based upon said findings of the trial department and no copy of said findings has been filed in the estate proceeding." Since these findings were not filed in the probate court, nor any of the contentions concerning the $19,636.38 called to the court's attention, no issue was raised over this question. Respondent explained the items of receipt and expenditure concerning the mine shown in her account, and concedes that due to an accounting made in another proceeding concerning adjustment of taxes and assessments on the mine, she owes the estate $262.55 and E. L. Dow, Jr., owes it $115.80, which amounts can readily be taken care of in her next account.

The purported appeal from the minute order of March 29, 1948, is dismissed. The decree settling the first account of the administratrix and the supplement thereto, dated April 13, 1948, and the order for family allowance dated May 13, 1948, are affirmed.

PETERS, P. J., and WARD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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91 Cal.App.2d 618

In re HORGAN'S ESTATE.

HORGAN v. McGEE.

Civ. 7591.

District Court of Appeal, Third District, California.

May 3, 1949.

1. Wills 🔑470

In determining testator's intent, the will must be construed by its four corners with all parts of the will construed in relation to one another.

2. Wills 🔑647

Under will devising apartment building to sister and niece for life on condition that specified apartment should be reserved for use of husband for life or until he should remarry, and that subject to "said life estate, said premises shall go" to another named person absolutely, devise to husband was a valid limitation and did not contain a condition in restraint of marriage. Civ.Code, § 710.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Proceeding in the matter of the estate of Myrtle Adams Horgan, also known as Mrs. J. H. Horgan and Myrtle G. Adams, deceased, on petition of Thelma Richmond McGee, executrix, for an order that James Henry Horgan, the surviving spouse of the deceased, was entitled to the use and benefit of certain property for the period of his natural life or until he should remarry. James Henry Horgan filed an answer and objections to the petition alleging that his interest in the property was absolute. From an order in accordance with the petition of the executrix, James Henry Horgan appeals.

Order affirmed.

Lawrence E. Mullally, of San Francisco, for appellant.

L. A. Mills and Mazzera, Snyder & DeMartini, all of Stockton, for respondent.

PEEK, Justice.

By her petition for final distribution of the Estate of Myrtle Adams Horgan, Deceased, the respondent executrix sought an order of the probate court decreeing that James Henry Horgan, the surviving spouse of said deceased, was entitled to the use and benefit of certain property more particularly described hereafter, for the period of his natural life or until he should remarry. The appellant Horgan filed an answer and objections to said petition alleging that his interest in said property was absolute and unconditional and subject to no condition whatever. The court made its order in accordance with the petition of said executrix, and from the order so entered appellant has taken this appeal.

It is his sole contention that the devise of said property to him imposed a restraint upon his remarriage and hence is void under section 710 of the Civil Code, which provides as follows: "Conditions imposing restraints upon marriage, except upon the marriage of a minor, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage."

The specific paragraph of the will wherein is found the particular language which forms the basis of the disagreement of the parties is as follows:

"Fourth: To my beloved sister and niece, respectively Biddie Richmond and Elizabeth Richmond Smith, in joint tenancy, or to the survivor of them, I give and device a life estate in and to M. A. H. the premises known as the Venetian Court Apartments, described as Lot Three (3) in Block One Hundred Forty-four (144), East of Center Street, being numbered and known as 1240 North Hunter Street, in the City of Stockton, California, including property either real, personal or mixed therein or about or appurtenant thereto, subject to existing encumbrances therein and subject to the following terms and conditions: There shall be reserved for the use and benefit of my beloved husband, James Horgan, for the period of his natural life or until he shall remarry, with right of termination at his option, the apartment including property either real, personal or mixed therein or about or appurtenant thereto, on the second story at the northeast corner thereof, now known as Apartment No. 1 in said Venetian Court Apartments. My said husband shall have the absolute privilege and right during the said time to use or otherwise benefit by the occupancy or tenancy of said apartment without cost to him for rent, taxes or otherwise; subject to said life estate, and premises shall go to and belong to Thelma Richmond McGee, absolutely. M. A. H."

In support of his contention appellant first refers to the language appearing in the devise above set forth that he was to have the use and benefit of apartment No. 1 "for the period of his natural life" and urges that such language gave him a life estate. He then refers to the language that "subject to said life estate, said premises shall go to and belong to Thelma Richmond McGee, absolutely" as substantiating such contention. Next it is urged that since a life estate was demised to him that the phrase "until he remarries" is a condition subsequent which would operate to deprive him of his life estate and hence is void under the foregoing provision of the Civil Code. Appellant further contends that since the residuary clause contained in the will left the remainder of the estate to Thelma Richmond McGee the phrase "subject to said life estate, said premises shall go to and belong to Thelma Richmond McGee, absolutely" does not refer to the life estate of decedent's sister and niece, since such reference would be repetitious. Appellant's contention in this latter regard is not tenable since it is equally applicable to his contention that the reference is to his interest. Appellant lastly argues that the phrase "said premises" refers to those last mentioned, namely, apartment No. 1.

Respondent's answer to such contention is that appellant was not given a life estate subject to a condition subsequent but was given the use of apartment No. 1 for the period of time measured by his natural life or until remarriage and that if the will is so construed such demise is valid under section 710 of the Civil Code. Respondent argues that the phrase "subject to said life estate, said premises shall go to and belong to Thelma Richmond McGee, absolutely" refers to the life estate of decedent's sister and niece specifically mentioned at the beginning of the devise and not to the interest of appellant in apartment No. 1 for the period of his natural life or until he shall remarry as contended by appellant. Respondent further refers to the fact that the will devised other property to appellant not subject to any such limitation and argues therefrom that if it was the intent of the testatrix to impose a condition restraining marriage that all such devises would have been so limited. From our examination of the entire will respondent's arguments appear to be well founded.

[1, 2] It is a general rule in relation to the construction of wills and one too well established to warrant citation, that in reaching a determination as to the intent of the testator the will must be construed by its four corners, with all parts of the will construed in relation to each other. It is therefore evident that adjudicated cases, other than enunciating such general rule, are of slight assistance since the intent of the testator may well, and often does, vary in each will. Thus the three cases cited and relied upon by both parties, In re Estate of Scott, 170 Cal. 65, 148 P. 221; In re Estate of Fitzgerald, 161 Cal. 319, 119 P. 96, 49 L.R.A.,N.S., 615; In re Estate of Alexander, 149 Cal. 146, 85 P. 308, 9 Ann.Cas. 1141, other than reiterating said general rule are of small value when applied to the instant case. However, such cases do approve said general rule which is stated as follows in 10 Cal.Jur., secion 6, pages 603–04: "An estate on condition is one which may be created, enlarged or defeated upon the happening or not happening of some contingent event. There is a well-organized distinction between an estate on condition subsequent and a limitation. In the former, the estate is given absolutely, but the title is subject to be divested by the happening or not happening of an uncertain event. The happening of the condition forfeits the estate given to the first taker, and gives the grantor or his heirs a right to terminate it by an entry. In the latter, the estate is granted until an event shall have arrived, and the happening of the event merely brings the estate to a close. *For example, in case of a testamentary disposition of property to one on condition he remains unmarried, the intent of the testator is that the language shall constitute a condition subsequent terminating the estate in fee and vesting it in others on his* marriage. *Such a condition is void as in restraint of marriage. On the other hand, a devise of property to one so long as he remains unmarried is a limitation and valid."* (Italics ours.)

Bearing in mind the necessity of considering the will as a whole and applying the rule above quoted to the particular devise here in question the conclusion seems inescapable that said devise is a valid limitation and does not contain a condition in restraint of marriage. To conclude otherwise does violence to the phrase appearing in the devise of apartment No. 1 "for the period of his natural life or until he shall remarry" which indicates that marriage was an event fixing the time of such period.

The order appealed from is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

BOMBERGER et ux. v. McKELVEY.

McKELVEY et al. v. BOMBERGER et al.

Civ. 7550.

District Court of Appeal, Third District, California.

April 28, 1949.

Rehearing Denied May 28, 1949.

Hearing Granted June 27, 1949.*

1. Contracts 🔑213(1)

Under agreement with purchaser to demolish a building on realty sold, providing as to time of performance only that such work should be finished 20 days before completion of new building to be erected on realty by purchaser, vendor could commence such demolition work at any time.

2. Damages 🔑62(4)

Either party to contract has power to stop performance on the other side by explicit directions to that effect, subjecting himself to such damages as will compensate other party for such breach, and party thus forbidden to continue performance cannot go on and thereby increase the damages.

3. Contracts 🔑168

A contract pertaining to buildings or other improvements contains implied covenant that contractor shall be given possession of the premises to enable him to perform his contract.

4. Contracts 🔑314

Where owner of premises serves notice upon contractor to keep off the premises, he thereby breaches implied covenant that contractor shall be given possession of premises to enable him to perform his contract and prevents contractor from performing.

5. Contracts 🔑314
Damages 🔑62(4)

Purchasers by notifying vendors not to enter upon land sold breached their implied covenant to give vendors possession to enable them to perform agreement to demolish a building on such land and prevented vendors from performing such agreement, but vendors could not thereafter increase the damages for which purchasers became liable by reason of their breach by proceeding with demolition work in defiance of such notice.

6. Damages 🔑40(2), 124(1)

Where purchasers breached implied covenant to give vendors possession of land purchased to enable vendors to perform agreement to demolish a building thereon by notifying vendors not to enter upon the land, purchasers became liable for vendor's loss of profits under agreement or other loss sustained by reason of being prevented from performing under contract, but not for the full amount of contract price. Civ. Code, § 3300.

7. Damages 🔑40(2)

Where vendors proceeded to demolish building on realty sold pursuant to agreement with purchasers notwithstanding notice from purchasers not to enter upon the premises for such purpose, though such notice constituted a breach of implied covenant to give vendors possession of premises to enable them to perform their agreement, vendors were accountable to purchasers for damages sustained by purchasers, such as loss of rentals for building demolished. Civ.Code, § 3300.

◆

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by John W. Bomberger and wife against D. P. McKelvey to recover purchase price of realty and agreed amount for cancellation of lease, wherein defendant and another filed a counterclaim and cross-complaint against named plaintiff and others to recover damages for demolition of a building on the realty. From a judgment in favor of plaintiffs and cross-defendants, defendant and cross-complainants appeal.

Judgment reversed and cause remanded for further proceedings in accordance with opinion.

Edward T. Taylor, of Modesto, for appellants.

Vernon F. Gant, of Modesto, for respondents.

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* Subsequent opinion 220 P.2d 729.

PEEK, Justice.

The record on this appeal discloses that appellant D. P. McKelvey entered into a contract to purchase from respondents John W. Bomberger and Veva Porter Bomberger, his wife, certain real property, to-wit: Lots 13 to 16 in Block 59, all located in the City of Modesto. The two corner lots, 15 and 16 were improved with a building occupied by the respondents Hill, which they had leased from the Bombergers at a monthly rental of $300. Appellants' purpose in purchasing the Bomberger property, in addition to lots 5 to 12 in the same block, was to construct a building upon a portion and improve the remainder for parking facilities, all of which they planned to lease to a chain store. Among other things, the contract of purchase provided that it was subject to the temporary occupancy of the Hills at a rental of $300 per month as long as the occupancy continued, and that the entire transaction was subject to the satisfactory conclusion of the negotiations involving all of the lots. At about the same time said appellants entered into a contract with respondents whereby respondents agreed to demolish the building then occupied by the Hills so that this space could be used as a parking lot for the proposed market building. Said demolition agreement contained no provision as to the time when respondents were to commence the razing of the building but only provided that such demolition was to be completed at least twenty days prior to the completion of the proposed market building. Appellants agreed to pay the Hills $4000 for the cancellation of the unexpired term of their lease, in accordance with instructions given by them to the escrow holder. Said instructions were later amended to provide that said sum would be payable to the Hills when they voluntarily vacated the building and surrendered the lease subject to a $300 per month credit to be deducted by appellants for each month of occupancy prior to the completion of another structure to be erected for them by the Bombergers. Before respondents Bomberger entered the premises and began the demolition of the building appellants notified them by letter that construction of the proposed market building was "* * * not contemplated in the immediate future, and that until you should receive further written notice from me I should not want you to dismantle or demolish, in whole or in part, the existing improvements on Lots 15 and 16 (the building occupied by the Hills). You may be sure that I will notify you in ample time for you to have the improvements on Lots 15 and 16 dismantled or removed not later than 20 days prior to the completion of improvements (proposed market building) on Lots 5 to 10." Respondents answered this letter stating that they had already commenced construction of the new building to be occupied by the tenant; that they had expected to use some of the material from the old building in the construction of the new building, and that they were proceeding with arrangements to wreck the building. In a subsequent letter respondents informed appellants that as soon as the Hills vacated the old building they would proceed with its demolition.

To this letter appellants replied as follows: "* * * I desire to give you written notice that until such a time as you should receive from me (in the future) written instructions to the contrary you, or your agents or employees, are not to dismantle, demolish, or in any way whatsoever molest any improvements on this property. You are further notified that you, your agents or employees, are not to enter upon said premises or any part thereof in any manner whatsoever other than as customers of Mr. Fred L. Hill, the tenant thereof. For any known violations in these instructions redress at law will be had."

Despite the receipt of the foregoing notice and in defiance thereof respondents proceeded to demolish the building. Upon discovery of respondents' action, appellants instituted a proceeding in declaratory relief wherein they offered to pay respondents the difference between the cost of the demolition and the contract price and in addition sought an injunction restraining respondents from razing the building. The injunction was denied and respondents continued with the wrecking, thereby making the declaratory relief action moot. Thereafter appellants refused to pay and the present action was instituted by respondents to recover the alleged contract price as damages and to recover as assignors on Hills' cause of action for appellants' failure to pay the agreed amount for the cancellation of the lease.

To the foregoing action appellants filed a counter-claim and cross-complaint seeking to recover damages for the alleged wrongful action of respondents in demolishing the building after receipt of the foregoing notices not to do so. Upon the issues so framed the case proceeded to trial before the court sitting without a jury. The court made findings of fact favorable to respondents, and judgment was entered accordingly in favor of respondents. It is from this judgment that appellants appeal.

[1] It is to be noted that the original contract contained no provision as to the time respondents could proceed with the demolition of the building. The only provision as to time of performance was that such work should be finished twenty days prior to the date of the completion of the proposed market building. A reasonable interpretation of said provision would appear to be that respondents could commence such work at any time. Thus the basic question presented is whether respondents could do so immediately even after notification from appellants not to commence the demolition until notified by appellants.

Before discussing the legal principles applicable to the issue so raised it is pertinent to first note that the argument of respondents, that appellants were "estopped" from changing their position to the detriment of respondents, is inapplicable under the situation presented herein and that the finding of the trial court that appellants were so estopped is unsupported by the evidence.

[2-4] The rule is well established that either "* * * party to a contract has the power to stop performance on the other side by explicit direction to that effect, subjecting himself to such damages as will compensate the other party for the breach, Richardson v. Davis, 116 Cal.App. 388, 390, 2 P.2d 860, 861; Woodruff v. Adams, 134 and that the party thus forbidden cannot go on and thereby increase the damages." Cal.App. 490, 495, 25 P.2d 529. It is the further rule that a contract pertaining to buildings or other improvements contains an implied covenant that the contractor shall be given possession of the premises to enable him to perform his contract. Gray v. Bekins, 186 Cal. 389, 199 P. 767. Therefore, when the owner of the premises serves notice upon the contractor to keep off the premises which, for the purpose desired, is as effective as physical restraint, he thereby breaches said implied covenant and prevents the contractor from performing. Crawford v. Pioneer Box & Lumber Co., 105 Cal.App. 760, 288 P. 694.

[5] It follows from the foregoing that when appellants gave notice to respondents not to enter upon their land they thereby breached their implied covenant to give respondents possession and prevented respondents from performing since they could not enter upon the property without becoming trespassers. Respondents, having been thus forbidden to proceed with the work, could not perform in defiance of such notice and thereby increase the damages for which appellants became liable by reason of their breach. Richardson v. Davis, supra.

[6, 7] From an examination of the judgment entered herein awarding respondents the full contract price as damages and denying any recovery to appellants, it is apparent that the foregoing rules were not followed by the trial court. Section 3300 of the Civil Code provides in part that, "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Hence, while the acts of appellants made them liable to respondents said liability did not go into the full amount of the contract price as agreed upon, to-wit: $3500, as found by the trial court, but went only to respondents' loss of profits under said agreement, or what other loss, if any, respondents sustained by reason of appellants preventing their performance under the

contract, which loss might necessitate consideration of the Hills' tenancy of the new building to be erected by respondents. However, as respondents were under a duty to mitigate damages, and consequently could not arbitrarily proceed as they did, they thereby became accountable to the McKelveys for any damages thereby sustained by said appellants, such as the loss of rentals they would have received under the Hills' lease were it not for the demolition of the building by respondents.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

ADAMS, P. J., and THOMPSON, J., concur.

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91 Cal.App.2d 689

CHAPMAN et al. v. MUNICIPAL COURT, CITY OF LOS ANGELES, LOS ANGELES COUNTY.

Civ. 17010.

District Court of Appeal, Second District, Division 3, California.

May 6, 1949.

Hearing Denied June 30, 1949.

1. New trial 🔑155

Order granting new trial was void where it was made more than 60 days after service of notice of entry of judgment. Code Civ.Proc. § 660.

2. New trial 🔑161(1)

Trial courts may impose reasonable terms on granting or denying motions for new trials in actions tried by jury as well as those tried by a court.

3. New trial 🔑161(4)

Order on plaintiff's motion for a new trial that, if consent to judgment against defendants was not filed on specified date, motion would be granted, but would be denied if consent was filed within required time, amounted to a granting of new trial, where defendants did not consent to entry of judgment against them within the required time.

4. New trial 🔑161(4)

Where trial court in ruling upon a motion for new trial grants or refuses a new trial upon a condition, the compliance or noncompliance with the condition within the time fixed by order operates as an absolute grant or denial of new trial, and status of parties become finally fixed as of that date.

5. New trial 🔑163(1)

Where a trial court makes and causes to be entered a conditional order granting or denying a motion for a new trial, its jurisdiction is exhausted, and thereafter it cannot modify the order except for mistake in the entry of order.

6. New trial 🔑161(4)

Where order on plaintiff's motion for new trial amounted to a granting of new trial on a specified date where defendants did not consent to entry of judgment against defendants within time fixed by order, subsequent order purporting to grant plaintiff's motion for a new trial because of failure of defendants to consent to entry of judgment within required time was inoperative regardless of whether it was made prior to expiration of 60 days from service of entry of judgment in which time orders for new trial are required by statute to be entered. Code Civ.Proc. § 660.

7. New trial 🔑163(1)

The present tense should be used in making a conditional order either granting or denying a new trial.

8. Prohibition 🔑3(5)

District Court of Appeal could entertain proceeding for writ of prohibition to prevent a municipal court from proceeding further in an action in which a motion for a new trial had been granted, in which proceeding, validity of order granting new trial was attacked, notwithstanding superior court on appeal had affirmed order granting new trial.

◆

Proceeding in prohibition by Russell K. Chapman and Eileen L. Chapman, against

Municipal Court, City of Los Angeles, County of Los Angeles, State of California, to restrain respondent court from proceeding with retrial of an action in which motion for new trial had been granted, and in certiorari to annul order granting new trial.

Demurrer to petition sustained, alternative writ of prohibition discharged, and petition for writ of prohibition and certiorari denied.

Caryl Warner, of Los Angeles, for petitioners.

Harold W. Kennedy, Co. Counsel, Wm. E. Lamoreaux, Deputy Co. Counsel, and Leon Seltzer, all of Los Angeles, for respondents.

VALLÉE, Justice.

Petitioners seek a writ of prohibition to restrain the respondent court from proceeding with a retrial of an action entitled "Nathan Posner v. Russel K. Chapman, et al.," No. 853969, in the Municipal Court of the City of Los Angeles, in which a motion for new trial had been granted upon plaintiff's motion after a judgment had been rendered in favor of defendants. Petitioners also seek a writ of certiorari. An alternative writ of prohibition was issued by this court.

Judgment was rendered for the defendants, petitioners here, in Posner v. Chapman on June 4, 1948. June 9, 1948, petitioners served written notice of entry of judgment on the plaintiffs. The plaintiffs moved for a new trial. On August 2, 1948, the court entered the following order: "Upon motion for a new trial, it is ordered that if defendants file consent to judgment against him [them] for sum of $250.00 motion will be denied. Consent to be filed by August 5. If consent not filed, motion will be granted." No consent was ever filed by the defendants. On August 16, 1948, the court made an order to the effect that since the consent had not been filed by defendants "it is ordered that Motion of Defendant [Plaintiff] for a New Trial is granted." Petitioners appealed to the Superior Court from the order of August 2nd. The order was affirmed. A retrial of the case has been set.

A demurrer to the petition has been filed on the ground that it does not state facts sufficient to entitle petitioner to a writ of certiorari or to a writ of prohibition.

No point is made here that the court had no authority to impose the condition contained in the order. Petitioners contend that the order of August 2nd was not one either granting or denying a new trial, but was merely an indication of what the court would do in the future; that the order of August 16, 1948, was void in that it was entered more than 60 days after service of notice of entry of judgment, Code Civ. Proc., sec. 660; that the motion for new trial, not having been acted upon within 60-day period, was denied by operation of law, and that the municipal court has no jurisdiction to try the cause.

[1] The order of August 16th was void since it was made after the 60-day period for the determination of motions for new trial. However, petitioners' further argument that the motion for new trial had not been acted upon by the court within the 60-day period and, hence, was denied by operation of law, cannot be sustained. The motion had been acted upon and determined by the order of August 2nd, as hereinafter appears.

[2] It is standard practice in California for trial courts to impose reasonable terms and conditions on granting or denying motions for new trials in actions tried by a jury as well as those tried by a court. Rice v. Gashirie, 13 Cal. 53; Brooks v. San Francisco & N. P. Railway Co., 110 Cal. 173, 42 P. 570; Engle v. Farrell, 75 Cal. App.2d 612, 620, 171 P.2d 588; Hayne, New Trials, pp. 864, sec. 166 et seq.

[3, 4] The order of August 2nd is a conditional or alternative order, which amounted to a granting of a new trial in the event the defendants (petitioners here) should not consent by August 5th to a judgment against them in the sum of $250; and upon failure of the defendants to so consent, the order became final. August 5th was within the 60-day period It is well settled in California, as well as in other jurisdictions, that when, in ruling upon a motion for a new trial, the court grants or refuses

a new trial upon a condition, the compliance or noncompliance with the condition within the time fixed by the order operates as an absolute grant or denial of the new trial, and the status and rights of the parties become finally fixed and determined as of that time. Brown v. Cline, 109 Cal. 156, 41 P. 862; Holtum v. Greif, 144 Cal. 521, 78 P. 11; Taber v. Bailey, 22 Cal.App. 617, 135 P. 975; Gloria v. A Colonia Portuguesa, 128 Cal.App. 640, 642, 18 P.2d 87; Jennings v. Superior Court, 134 Cal.App. 300, 305, 25 P.2d 246; Sherman v. Mitchell, 46 Cal. 576, 577, 578; Garoutte v. Haley, 104 Cal. 497, 38 P. 194.

Jennings v. Superior Court, 134 Cal.App. 300, 25 P.2d 246, 247 (hearing by Supreme Court denied), is similar to the present case in that the same contentions advanced by petitioner here were advanced there, and the order granting a new trial was worded in the future tense. Plaintiff had judgment in the trial court. One of the defendants made a motion for new trial on March 2, 1932. On April 18, 1932, the court, while passing on the motion, found that the judgment in the action contained an erroneous statement. He ordered counsel for the plaintiff to file a modified judgment, or "in case the plaintiff refuses or fails to do so, a new trial must necessarily be granted. In case the plaintiffs do accept this modified judgment, a motion for a new trial will be overruled." The plaintiff did not comply with the condition. The judge who made this order was subsequently defeated for re-election to office. On January 9, 1933, a defendant in the action filed its notice of motion to set the cause for trial. On February 21, 1933, a judge other than the one who made the order of April 18, 1932, ordered that defendant's motion be granted and the case set for trial on April 21, 1933. The plaintiff petitioned the District Court of Appeal for a writ of prohibition. The court held, 134 Cal.App. at page 304, 25 P.2d at page 247: "When Judge Gregory on April 18, 1932, while passing on the motion for new trial, found that the judgment in the action contained an erroneous statement, he ordered counsel for plaintiff (petitioner here) to file a modified judgment, or 'in case the plaintiff refuses or fails to do so, a new trial must necessarily be granted. In case the plaintiffs do accept this modified judgment, a motion for a new trial will be overruled.'

[5] "'The well-settled rule is that, when a trial court makes and causes to be entered a conditional order granting or denying a motion for a new trial, its jurisdiction is exhausted, and thereafter it has no power to change or modify the order except for inadvertence or mistake in the entry thereof (Holtum v. Greif, 144 Cal. 521, 78 P. 11; United Railroads v. Superior Court, 170 Cal. 755, 151 P. 129, Ann.Cas. 1916E, 199; Compton v. Northwest Engineering Co., 116 Cal.App. 523, 2 P.2d 1014); and that, unless the party upon whom the condition is imposed complies with such condition within the limitation of time fixed therefor, the alternative portion of the order becomes operative and final at once, at the expiration of such period of time. Holtum v. Greif, supra; Brown v. Cline, 109 Cal. 156, 41 P. 862; Taber v. Bailey, 22 Cal.App. 617, 135 P. 975. Two cases in point from other jurisdictions wherein additional authorities are cited are Bourne v. Moore, 77 Utah 184, 292 P. 1102, and Plecas v. Devich, 72 Utah 578, 272 P. 197.' Gloria v. A Colonia Portuguesa et al. [128 Cal.App. 640], 18 P.2d 87, 88. The conditional order in the cited case was worded in the present tense, it is true, and while the order before us was worded in the future tense, which is objected to by petitioner, who contends that because of the wording thereof it was necessary that another motion for new trial be made, after a consideration of the circumstances under which it was pronounced, we are convinced that a new trial was thereby granted, in the event the condition thereby imposed was not fulfilled."

In Brown v. Cline, 109 Cal. 156, 41 P. 862, it was held that an order granting a new trial on condition that the moving party pay the costs of his adversary within a stated time, is to be construed as an order denying a new trial upon noncompliance with the condition; and, after the expiration of the time limited for complying with the condition, the court has no power to make a further order granting an unconditional new trial. The court said, 109 Cal. at page 159, 41 P. at page 863: "The case must be treated, therefore, as if no payment or attempted payment had been made, and as if at the end of the five days [the expiration of the time for complying with the condition] the motion for a new trial had been denied. Garoutte v. Haley [104 Cal. 497], 38 P. 194."

In Holtum v. Greif, 144 Cal. 521, at page 524, 78 P. 11, 12, the court held that: "The power of the court to make an order for a new trial conditional upon payment of costs by the moving party is unquestioned, and a failure to perform the condition converts the order into a denial of the motion. Garoutte v. Haley, 104 Cal. 497, 38 P. 194; Brown v. Cline, 109 Cal. 156, 41 P. 862."

[6] In Taber v. Bailey, 22 Cal.App. 617, 135 P. 975, 979, defendant made a motion for new trial. On February 19, 1912, the court made an order which provided that in the event plaintiffs, within 20 days, filed their consent to a modification of the judgment, the motion for new trial "shall be denied" and in the event of the failure of plaintiffs to file their consent "within such time, then the motion for a new trial shall be granted." Within two days thereafter plaintiffs filed their written consent. The court said, 22 Cal.App. at page 624, 135 P. at page 979: "The effect of this was to make operative the order of the court as a denial on that day of the motion for a new trial. * * * In this case the order was that the motion for a new trial '*shall* be denied' in the event that plaintiffs file their consent, etc. Strictly speaking, the use of the future tense was perhaps proper, but at any rate it was a conditional order, and, under the decisions, the order immediately became effective when the consent was filed." For cases in other jurisdictions, see: Bonelli v. Jones, 26 Nev. 176, 65 P. 374, 375; Idaho Farm Development Co. v. Brackett, 44 Idaho 272, 257 P. 35, 37; Harrington v. Butte, A. & P. Ry. Co., 39 Mont. 22, 101 P. 149, 150; Adams Express Co. v. Gregg, 23 Kan. 376; Winningham v. Philbrick, 56 Wash. 38, 105 P. 144, 145; Green v. Russell, 71 Wash. 379, 128 P. 645; Harris v. Central of Georgia Ry. Co., 103 Ga. 495, 30 S.E. 425; Chambers' Adm'r v. Bass, 18 Ind. 3; Bourne v. Moore, 77 Utah 184, 292 P. 1102; Plecas v. Devich, 72 Utah 578, 272 P. 197. Upon petitioners' failure to comply with the condition imposed by the order within the time limit set forth therein, the alternative portion of the order became operative and final and the moving party was thereupon granted a new trial. The order of August 16th, even if it had been made prior to the expiration of the 60-day period, would have been inoperative and of no force and effect. Brown v. Cline, 109 Cal. 156, 159, 41 P. 862; Holtum v. Greif, 144 Cal. 521, 526, 78 P. 11.

[7] The present tense is the proper and should be the only tense used in making a conditional order either granting or denying a new trial. See, Hyams v. Simoncelli, 41 Cal.App.2d 126, 128, 106 P.2d 68; Gloria v. A Colonia Portuguesa, 128 Cal.App. 640, 642, 18 P.2d 87. The courts, in some instances, in phrasing orders conditionally granting or denying new trials, have used the future tense. See, Brown v. Cline, 109 Cal. 156, 158, 41 P. 862; Krebs v. Los Angeles Ry. Corp., 7 Cal.2d 549, 551, 61 P.2d 931; Taber v. Bailey, 22 Cal.App. 617, 624, 135 P. 975; Jennings v. Superior Court, 134 Cal.App. 300, 303, 25 P.2d 246; Secreto v. Carlander, 35 Cal.App.2d 361, 363, 95 P.2d 476; Engle v. Farrell, 75 Cal.App.2d 612, 619, 171 P.2d 588; Bonelli v. Jones, 26 Nev. 176, 65 P. 374; Idaho Farm Development Co. v. Brackett, 44 Idaho 272, 257 P. 35. The latter practice is slovenly draftsmanship, creates confusion, breeds further litigation, and should be discouraged.

[8] Respondent questions the power of this court to entertain a proceeding in prohibition or certiorari in which the validity of an order of the municipal court is attacked after affirmance on appeal by the superior court. We are of the opinion that we had jurisdiction to issue the alternative writ of prohibition under the authority of Gorbacheff v. Justice's Court, 31 Cal.2d 178, 187 P.2d 407.

The demurrer to the petition is sustained. The alternative writ of prohibition heretofore issued is discharged. The petition for a peremptory writ of prohibition and for a writ of certiorari is denied.

SHINN, P. J., and WOOD, J., **concur.**

Hearing denied; SHENK, J., **dissenting.**

91 Cal.App.2d 729

O'REILLY v. JOHNSON.

Civ. 16767.

District Court of Appeal, Second District, Division 1, California.
May 10, 1949.

1. Novation 🔑1

A contractor's remark, that person addressed would be assured interest on money advanced by him pursuant to their oral agreement to buy, repair, and sell house and divide profits, was neither an offer, nor contract, and hence not a "novation". Civ. Code, §§ 1530–1532.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Novation".

2. Novation 🔑1

A novation must have all elements of original contract. Civ.Code, §§ 1530–1532.

3. Novation 🔑7

Whether new agreement amounts to novation is question of intention, and all parties' intention that agreement should constitute novation must clearly appear. Civ. Code, §§ 1530–1532.

4. Joint adventures 🔑4(1)

Payee's acceptance of check, offered in payment of amount advanced by him pursuant to oral agreement with maker to buy, repair, and sell house and divide profits, with interest on such amount from date of purchase, did not indicate payee's intent to waive his rights to accounting of proceeds of maker's sale of house and payment of equal share of profits.

5. Appeal and error 🔑1071(6)

The trial court's failure to find on all material issues raised by pleadings and evidence is ground for reversal of judgment, unless findings are waived.

6. Joint adventures 🔑5(2)

In action for accounting of proceeds of defendant's sale of house for purchase and repair of which plaintiff advanced money under oral agreement for division of profits from sale thereof, burden was on defendant to prove that he made accounting.

Appeal from Superior Court, Los Angeles County; Otto J. Emme, Judge.

Action by P. S. O'Reilly against John S. Johnson for accounting of the proceeds of the sale of a house and half the profits earned in a joint venture of the parties in the purchase, repair, and sale of the house. Judgment for defendant, and plaintiff appeals.

Reversed and remanded.

Paul R. Hutchinson, of Los Angeles, for appellant.

Barry Sullivan, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment.

The action is for an accounting and one-half of the profits earned in a joint venture of plaintiff and defendant.

The answer in addition to a general and special denial alleges an affirmative defense of estoppel in that plaintiff had accepted payment of a certain sum in full settlement, also that the contract had been fully performed by defendant.

The facts as recited by appellant are as follows:

"Plaintiff was a doctor. Defendant was a contractor. They orally agreed that plaintiff would put up the capital and they would buy a house, fix it up, sell it and divide the profit. The house was purchased in January, 1945, at a cost of $4,300.00. Plaintiff advanced $4,020.00 of the purchase price, and defendant advanced the remaining $280.00.

"Defendant took title to the property in his own name. Plaintiff contended that title was to have been taken in their joint names, and that defendant breached their agreement by taking title alone without plaintiff's consent. Defendant testified that it was agreed that title was to be taken in his name. The court made no finding on this point. Nevertheless, in this way defendant controlled the sale of the property and eventually the proceeds of the sale.

"Defendant moved into the property and worked on its improvement while carrying on other work. He lived in the house until it was sold in August, 1946. That was for a period of approximately twenty months.

"The house was sold for $9,000.00, and yielded a net of $8,467.32 after commission and costs of sale. The defendant received all of that money.

"Plaintiff alleged that defendant failed and refused to render him an accounting or pay plaintiff his proportionate share of the profit. Defendant denied this, but the evidence shows that at no time did he ever render plaintiff an accounting of the profits of the joint venture. In fact the joint venture, the contribution of the parties, the gross profit, and the receipt of that profit by defendant are all admitted by the evidence or found to be true by the findings.

"Defendant's theory of the case now is that no accounting of profits or findings thereon are necessary because, he contends, there was a novation. He pleaded as a special defense that after the house was sold he sent to plaintiff his check for $4,431.65, which plaintiff accepted without any objection 'as a cancellation of the former agreement and as a satisfaction of his claim against said defendant.'

"In awarding judgment to defendant, the trial court made the following findings: After the gross proceeds of the sale were received by defendant there arose 'an honest dispute as to the way said profits should be divided. On October 25, 1946, the defendant offered the plaintiff the sum of Four Thousand and Twenty Dollars ($4,020.00), the amount which plaintiff had invested in said property with interest thereon at 6% per annum from the date of the purchase and enclosed a cashier's check in the sum of Four Thousand Four Hun-Hundred and Thirty-One Dollars and Sixty-five cents ($4,431.65), said sum being the Four Thousand and Twenty Dollars ($4,020.00) plus interest for twenty months at 6% per annum; that prior to this offer, the defendant promised the plaintiff that he, the defendant, would guarantee the plaintiff the return of money the plaintiff had invested in the property plus interest. The plaintiff accepted said offer, cashed the check and accepted the proceeds therefrom; that this executed agreement is a novation of any agreement entered into by the plaintiff and defendant in January 1945 concerning the buying and selling of said property.'"

[1, 2] There is no evidence in the record to establish a novation either directly or indirectly. The only evidence that suggests a novation is the testimony of defendant. In this connection defendant testified:

"I told Dr. O'Reilly that I had lost money on that deal any way I figured it out * * * and that I thought he was entitled to the interest on the money, and regardless of what I got for it I would assure him the interest on his money."

There is no testimony that plaintiff replied to the remark; there is no evidence of any conversation on the subject. And plaintiff denied that the remark was made.

As appellant correctly points out, "the remark made by defendant was neither an offer, nor a contract, and hence not a novation. A novation must have all the elements of an original contract. The law of novation is codified and its interpretation is clear.

"'Novation is the substitution of a new obligation for an existing one.' (Civil Code, sec. 1530.)

"'Novation is made: 1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation * * *' (Civil Code, sec. 1531.)

"'Novation is made by contract and is subject to all the rules concerning contracts in general.' (Civil Code, sec. 1532.)

[3] "'Whether a new agreement amounts to a novation is always a question of intention; and intention on the part of all parties that such agreement should constitute a novation must clearly appear.'" 20 Cal.Jur. 249; Douillard v. Woodd, 20 Cal.2d 665, 128 P.2d 6; Columbia Casualty Co. v. Lewis, 14 Cal.App.2d 64, 57 P.2d 1010; Bank of America v. Pacific Ready-Cut Homes, 122 Cal.App. 554, 10 P.2d 478.

The business relations between plaintiff and defendant had their beginning in the following manner as related by plaintiff and conceded by defendant. Plaintiff testified:

"A. I operate the Glendale Emergency Hospital, and practice traumatic surgery.

"Q. You are not a contractor? A. No.

"Q. Or a real estate broker? A. No, sir.

"Q. How long have you known John S. Johnson, the defendant? A. I believe—it is my recollection as near as I can fix it about 1940.

"Q. And under what circumstances did you meet him, and how intimately and how closely do you know him? A. His brother worked for me as maintenance man around the hospital, and also on various other jobs where I built houses; and when I built an apartment, why, his brother—I gave the contract to his brother, and he brought Mr. Johnson in to work with him, and that is where I first met him. It was about a year prior to the war. It would be about 1940.

"Q. Did you have any other business relationships with the Johnson family? A. With the other brother, yes, Emmett.

"Q. Was John S. Johnson present on any of those deals? A. No.

"Q. When did you first discuss a business relationship with the defendant? A. It was in the latter part of December of 1944.

"Q. Where did this conversation take place? A. In my office.

"Q. Was anybody else present? A. Not that I recollect.

"Q. What was said between you and Mr. Johnson at that time relative to any business relationship between you? A. I told him that his brother was leaving my employment to go south, and that I had several prospective pieces of property that I wanted to purchase and get fixed up, and put back on the market, and asked him if he was interested in going into the project with me.

"Q. What did he say? A. He said he was."

[4] When the transaction was completed and when plaintiff sought an accounting, the result was as above outlined. Plaintiff accepted the check as a matter of right and not as the beneficiary of defendant's magnanimity. In no sense did the acceptance of the check by plaintiff indicate an intent to waive the further right to an honest accounting and an equal share of the profits of the transaction.

As above noted, there is no evidence to support the court's finding and conclusion as to a novation.

The court also failed to find on other material issues as contended by appellant. For example, plaintiff's action was for an accounting and the findings contain no reference to this important issue. And findings were not waived. "It has been repeatedly affirmed that where a court renders a judgment without making findings upon all material issues of fact, the decision is against law, and constitutes ground for * * * reversal upon appeal, provided it appears that there was evidence introduced as to such issue and the evidence was sufficient to sustain a finding in favor of the party complaining." 24 Cal.Jur. 940.

[5] "The failure to find on all material issues raised by the pleadings and evidence is ground for reversal, unless findings have been waived." Parker v. Shell Oil Co., 1946, 29 Cal.2d 503, 512, 175 P.2d 838, 844; Fairchild v. Raines, 1944, 24 Cal.2d 818, 830, 151 P.2d 260; Dieterle v. Bekin, 143 Cal. 683, 77 P. 664."

[6] Appellant's exception to the finding that at the time the check was sent there was, "an honest dispute as to the way said profits should be divided" and its relation to the law of accord and satisfaction need not be considered although it should be noted it is not without merit. The burden to prove the accounting was on defendant.

For the foregoing reasons the judgment is reversed and the cause remanded for a new trial.

WHITE, P. J., concurs.

DRAPEAU, J., did not participate.

91 Cal.App.2d 678

WARREN v. CITY OF LOS ANGELES et al.

Civ. 16843.

District Court of Appeal, Second District,
Division 2, California.

May 6, 1949.

Hearing Denied June 30, 1949.

1. Appeal and error ⚷930(1)

On defendant's appeal the evidence must be viewed in the light most favorable to plaintiff.

2. Appeal and error ⚷996, 1001(1)

Where different conclusions may be reasonably drawn regarding the dangerous character of a defect in a street, the determination of such question is a matter of fact to be decided by the trier of fact whose conclusion, supported by substantial evidence, will not be disturbed on appeal.

3. Municipal corporations ⚷767

A hole two inches deep and ten inches square in city street in which water and oil accumulated could not be held as a matter of law a trivial or minor defect that imposed no liability on city for injuries resulting therefrom.

4. Municipal corporations ⚷817(1)

A municipality is liable for damages resulting from a defective condition existing in one of its streets in the absence of actual knowledge or notice of the dangerous condition where a presumption of constructive notice has been created from the existence of the dangerous condition for an unreasonable length of time.

5. Appeal and error ⚷999(3)

It is a question of fact for the trier of fact to determine under all the circumstances in evidence whether a dangerous condition in street has existed for sufficient length of time to constitute constructive notice and also whether a reasonable time to remedy the condition has elapsed.

6. Municipal corporations ⚷819(1)

Evidence that other accidents have occurred at the same place is some evidence that condition in street is dangerous.

7. Appeal and error ⚷1001(1)

Where a dangerous condition in street had existed for more than two months, jury's finding of fact that defendant city had constructive notice of such defect was supported by substantial evidence.

8. Appeal and error ⚷1001(1)

Proof that dangerous condition in street had existed for more than two months and that during the preceding two or three months other persons had slipped and fallen at the place, constituted substantial evidence and sustained jury's implied finding that the defective condition of the street was a dangerous one.

9. Appeal and error ⚷1001(1)

In action against city for damages sustained from fall on sidewalk, there was substantial evidence that the grease and water which was on the sidewalk and on which the plaintiff stepped came from hole in adjacent street.

10. Appeal and error ⚷882(12)

Appellant could not complain of instruction that defendant municipality would be liable under the general doctrine of negligence where an instruction requested by the defendant contained the same vice.

11. Appeal and error ⚷1170(9)

The giving of an instruction on general negligence was not prejudicial to defendant city in view of fact that jury was told that all instructions must be read together and that before defendant could be held liable the city must have had either actual or constructive notice of defect which was the cause of the accident, and alleged error must be disregarded. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by Amos B. Warren against City of Los Angeles and others for damages for injuries sustained by plaintiff as result of a fall upon the sidewalk. From a judgment for plaintiff, the named defendant appeals.

Judgment affirmed.

O. O. Collins and John R. Allport, both of Los Angeles, for respondent.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Leonard Husar, Deputy City Atty., and John F. Feldmeier, Deputy City Atty., all of Los Angeles, for appellant.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for injuries sustained by plaintiff as the result of a fall upon a sidewalk in the city of Los Angeles, defendant City appeals.

Facts.

[1] The evidence being viewed in the light most favorable to plaintiff (respondent) the facts in the instant case are:

On September 10, 1946, about 12:05 p. m. plaintiff was walking on the sidewalk on the west side of Main Street in defendant city approximately 2 or 3 feet from the west curb. He stepped on a fan shaped wet spot about 2 feet wide and 3 feet long, the narrow end of which was toward the curb. This wet spot consisted of grease and water. The heel of his shoe came in contact with it and he slipped and fell on his side with the result that he suffered personal injuries. For two or three months prior to and at the time of the accident there was a hole in the street, approximately 10 inches by 10 inches and 2 inches deep containing water and oil. The wet spot on the sidewalk upon which plaintiff fell was caused by automobiles passing over the hole in the street and causing the fluid collected therein to splash onto the sidewalk.

Defendant city had inspectors whose duty it was to inspect the streets and sidewalks of the city including the area where the accident occurred.

Questions.

First: *Did the defective condition in the street, consisting of a hole 10 inches square in which water and oil accumulated, constitute merely a trivial and minor defect in the street so that defendant city was not liable for injuries which might result?*

[2, 3] This question must be answered in the negative. Where, as in the instant case, different conclusions may reasonably be drawn regarding the dangerous character of a defect in a street, the determination of such question is a matter of fact to be decided by the trier of fact whose conclusion, supported by substantial evidence, will not be disturbed on appeal. (Balkwill v. City of Stockton, 50 Cal.App.2d 661, 667, 123 P.2d 596.) In the instant case it cannot be said as a matter of law that a hole 10 by 10 inches in a street is a trivial or minor defect. Therefore, the jury's determination supported as it is by substantial evidence that the hole in the street in the present case was not a minor or trivial defect is binding on this court.

The conclusion of the jury conforms to the holding in the following cases: In Balkwill v. City of Stockton, supra, the defect which was held not to be trivial or minor consisted of two holes a few inches apart, approximately 4 to 5 inches long, 2 inches wide, and from ½ to 2 inches in depth; in Sheldon v. City of Los Angeles, 55 Cal.App.2d 690, 131 P.2d 874, it was held that a depression in a sidewalk varying from ⅓ to 1½ inches, as illustrated in a picture reproduced on page 691 of the opinion of 55 Cal.App.2d, 131 P.2d 874, was neither a trivial nor minor defect; likewise in Owen v. City of Los Angeles, 82 Cal. App.2d 933, 187 P.2d 860, a hole in the pavement from 2 to 3⅓ inches deep, 4 to 6 inches wide, and 9 to 11 inches in length, was held to be neither a minor nor trivial defect as a matter of law. (See also Ackers v. City of Los Angeles, 40 Cal.App. 2d 50, 104 P.2d 399.)

Nicholson v. City of Los Angeles, 5 Cal. 2d 361, 54 P.2d 725, and Whiting v. City of National City, 9 Cal.2d 163, 69 P.2d 990, are not applicable to the facts of the present case because such cases were reversed on the ground that the defendants had no actual notice of the defects and that constructive notice thereof would not be presumed from the mere fact that the defects had existed for short periods of time prior to the accidents. (Balkwill v. City of Stockton, supra, 50 Cal.App. at page 669, 123 P.2d 596.)

Second: *Did defendant have notice (1) of the defective condition in the street, and*

(2) that such defect was of a dangerous character?

[4–7] This question must be answered in the affirmative and is governed by these rules:

1. A municipality is liable for damages resulting from a defective condition existing in one of its streets in the absence of actual knowledge or notice of the dangerous condition where a presumption of constructive notice has been created from the existence of the dangerous condition for an unreasonable length of time. (Sheldon v. City of Los Angeles, supra, 55 Cal.App.2d at page 693, 131 P.2d 874.)

2. It is a question of fact for the trier of fact to determine under all the facts and circumstances in evidence whether the dangerous condition in the street has existed for sufficient length of time to constitute constructive notice and also whether a reasonable time to remedy the condition has elapsed. (Cressey v. City of Los Angeles, 10 Cal.App.2d 745, 747, 53 P.2d 172.)

3. Evidence that other accidents have occurred at the same place is some evidence that the condition there existing is dangerous. (Barker v. City of Los Angeles, 57 Cal.App.2d 742, 747, 135 P.2d 573.)

Applying the foregoing rules to the facts of the instant case it is evident that, since the dangerous condition had existed for more than two months, the jury's finding of fact that defendant had constructive notice of the defect in the street is supported by substantial evidence. (Sheldon v. City of Los Angeles, supra, 55 Cal.App.2d at page 693.) In addition, there was evidence that during the preceding two or three months other persons had slipped and fallen at the same place. Such evidence, under rule 3, supra, constituted substantial evidence to sustain the jury's implied finding that the defective condition of the street was a dangerous one. (George v. City of Los Angeles, 51 Cal.App.2d 311, 315, 124 P.2d 872.)

Third: *Was there substantial evidence that the grease and water which was on the sidewalk and on which plaintiff stepped came from the hole in the street?*

[8] This question must be answered in the affirmative. A witness testified that shortly before 10 a. m. on the day of the accident an automobile passed over the hole in the street and splashed a portion of the fluid which was in the hole onto the sidewalk. In addition, plaintiff testified that the liquid upon which he stepped, slipped and fell was water, oil and grease. Such evidence clearly supported the implied finding of the jury that the cause of plaintiff's accident was his stepping upon a greasy fluid which had been splashed onto the sidewalk from the hole in defendant's street.

Fourth: *Did the trial court commit prejudicial error in instructing the jury as follows?*

"Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person.

"* * * that the source of the greasy water or oil was immaterial as the question to be decided was 'whether or not any negligence on the part of the defendant contributed proximately in any degree to cause this accident' and that 'if the defendant in this action were guilty of negligence which contributed proximately to the happening of it they are liable even though someone else, who has not been sued, may have also contributed to it.'

"* * * The burden is upon the plaintiff to prove by a preponderance of the evidence that a defendant was negligent and that such negligence was a proximate cause of injury to the plaintiff."

[9] This question must be answered in the negative. Defendant's contention

that the instruction set forth above was erroneous because in effect it instructed the jury that defendant municipality would be liable under the general doctrine of negligence may not be urged by it for the reason that the law is established that a party may not complain of error in an instruction given at the request of his adversary where an instruction requested by the party urging error contained the same vice. (George v. City of Los Angeles, supra, 51 Cal.App.2d at page 319 et seq., 124 P.2d 872.)

In the present case, defendant asked and the court gave an instruction which in essence was substantially the same as the one to which it now objects. It read thus: "It is a matter of common knowledge that no sidewalk is perfect, and that irregularities in the surface of sidewalks exist not only in the City of Los Angeles but in all cities. The City of Los Angeles is not required to keep its sidewalks in perfect condition or free from all irregularities in the surface thereof. The City of Los Angeles is only required to exercise ordinary care in maintaining its sidewalks in a reasonably safe condition for public travel for persons using such sidewalks with ordinary care for their own safety."

[10, 11] In addition, though the giving of the instruction on general negligence constituted error (Owen v. City of Los Angeles, 82 Cal.App.2d 933, 942, 187 P.2d 860), we are of the opinion that such error was not prejudicial to defendant in view of the fact that the jury was told that all instructions must be read together and that before defendant could be held liable, the city must have had either actual or constructive notice of the defect which was the cause of the accident. Since the error was not prejudicial, it will be disregarded pursuant to the mandate of Article VI, section 4½, of the Constitution of the State of California.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; SHENK, EDMONDS, and SPENCE, JJ., dissenting.

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91 Cal.App.2d 582

MOST WORSHIPFUL SONS OF LIGHT GRAND LODGE ANCIENT FREE AND ACCEPTED MASONS, JURISDICTION OF CALIFORNIA, et al. v. SONS OF LIGHT LODGE NO. 9 et al.

Civ. 13948.

District Court of Appeal, First District,
Division 1, California.
May 3, 1949.

1. Appeal and error ⟹80(4)

A judgment ordering grand lodge to account to subordinate lodge which had withdrawn from grand lodge all sums of money paid by subordinate lodge to grand lodge over several years as initiation fees, dues, taxes and assessments was interlocutory and not appealable.

2. Appeal and error ⟹82(2), 440

An order which purported to change interlocutory judgment ordering accounting to final judgment and which was entered on motion which sought appointment of referee to take such accounting and which was filed after appeal from such judgment was void as beyond jurisdiction of court, and was not res judicata on such appeal, and was not appealable as a special order after final judgment, and was subject to change at any time before entry of final judgment. Code Civ.Proc. §§ 473, 663, 663a.

3. Judgment ⟹660½

Failure to appeal from void order purporting to change interlocutory judgment to final judgment did not affect rights of parties to judgment.

4. Appeal and error ⟹481

Appellate court denying without prejudice a petition for supersedeas in connection with appeal from interlocutory judgment did not impliedly rule that such judgment was final, and hence denial was not res judicata on appeal from interlocutory judgment that such judgment was final.

5. Appeal and error ⟹481

Except in most unusual cases, denial of petition for supersedeas without prejudice is not res judicata of anything.

Appeal from Superior Court, City and County of San Francisco; Stanley Murray, Judge.

Action to recover lodge paraphernalia and other items by The Most Worshipful Sons of Light Grand Lodge Ancient Free and Accepted Masons, Jurisdiction of California, a non-profit corporation, and others against Sons of Light Lodge No. 9 and others, and J. S. Pough, alias. Sons of Light Lodge No. 9 and others filed a cross-complaint. From the judgment, the plaintiffs and J. S. Pough appeal.

Appeal dismissed.

Goldstein, Lewis & Barceloux, of San Francisco, for appellants.

Hagerty, Schneider & Abrams, Sol A. Abrams and Anthony E. O'Brien, all of San Francisco, for respondents.

PETERS, Presiding Justice.

This is a motion by respondents to dismiss an appeal on the ground that the judgment appealed from is interlocutory and therefore not appealable.

The present motion affects but one of the two appeals now pending between these parties. It appears from the record that respondents had been affiliated with appellants in a grand lodge and subordinate lodges of a Negro Masonic fraternity. Respondents withdrew their affiliation from appellants, claiming that the latter had falsely and fraudulently represented that they were the lawful exclusive Masonic lodges in California for Negroes. Upon such withdrawal the respondents became affiliated with another grand lodge and retained and refused to give up certain assets of the lodges involved. Appellants thereupon commenced an action to recover from respondents the lodge paraphernalia, books, bank accounts, money, etc., claimed by appellants, and to restrain them from using the lodges' names. Respondents cross-complained for $100,000 damages for fraud, and for an accounting for all sums of money received by appellants from respondents as initiation fees, dues, taxes and assessments. After a lengthy trial the court entered a "memo judgment" in favor of respondents "for an accounting as prayed" and denying any relief to appellants. Thereafter, findings and conclusions of law were signed and filed. So far as pertinent here, after reciting the facts giving rise to the controversy, and after finding that appellants were guilty of fraud in various detailed respects, it is found that appellants have possession of the records showing the payments made by respondents, and that respondents have no records from which said amounts can be computed. Findings are then made denying any relief to appellants. It is then found that, although respondents were damaged by the fraud of appellants, sufficient competent and material evidence was not introduced by respondents from which the extent thereof can be computed. The judgment thereafter entered reads as follows:

"* * * It is ordered, adjudged and decreed as follows:

"1. That the plaintiffs and cross-defendants are entitled to and shall take nothing by their amended complaint on file herein.

"2. That plaintiffs and cross-defendants and cross-defendant Pough shall be and hereby are ordered to account to defendants and cross-complainants for all sums of money received by plaintiffs and cross-defendants and cross-defendant Pough, or any of them, in the form of initiation fees, dues, taxes, and assessments from said individual defendants and cross-complainants and members of defendant and cross-complainant lodges. That upon said accounting plaintiffs and cross-defendants and cross-defendant Pough, and all of them, shall be charged interest on said sums of money so received by them, and that upon said accounting defendants and cross-complainants shall be and hereby are adjudged entitled to receive from plaintiffs and cross-defendants and cross-defendant Pough the amounts of money so found to be received by plaintiffs and cross-defendants and cross-defendant Pough, or any of them." It is the appeal from this judgment that respondents now seek to have dismissed.

From the papers filed on this motion, it appears that, after the notice of appeal was filed, respondents applied to the Superior Court for an order appointing a referee to take the accounting. Thereafter, a different trial judge than had entered the judgment denied the application and, in addition, recited in his order that the judgment involved "is not an interlocutory judgment, and does not provide or contemplate for the further taking of an accounting by either a Court or a referee or master, and said judgment is a final determination of the matter * * * and is a final judgment, and said motion for reference is hereby denied." In their points and authorities in support of the motion to dismiss, respondents state that no copy or other notice of the entry of this order was ever served upon their attorneys. It is admitted that respondents have not appealed from this last order.

Respondents base their present motion on the contention that the original judgment ordering an accounting was interlocutory and not final. With this contention we must agree. This precise problem has recently been passed upon by Division Two of this court in David v. Goodman, 89 Cal.App.2d 162, 200 P.2d 568, 569. In that case the appellate court dismissed the appeal on its own motion even though both parties to the appeal strongly argued that the judgment involved was a final judgment. The trial court there canceled a partnership agreement and directed an accounting and division of profits by a judgment final in form and, as here, without providing for the appointment of a referee. The appellate court held that the judgment was interlocutory and not appealable. The judgment there involved was substantially similar to the one here involved. Its pertinent parts read as follows:

"II. That the defendant and cross-complainant shall forthwith account for and pay and return to plaintiff and cross-defendant herein, any and all monies [sic] or other property belonging to said business which was obtained or retained or appropriated by him or converted to his own use or invested by him in real estate or other property of any kind or character, other than * * *

"III. Pending such complete accounting by defendant and cross-complainant and the return by him to plaintiff and cross-defendant of all monies [sic] and property belonging to said business and obtained, or retained or appropriated by him, said defendant * * * shall be and he is hereby enjoined * * * from parting with, * * * any property * * *.

"IV. That when defendant * * * shall have fully and satisfactorily accounted to plaintiff * * * for such monies [sic] and other property belonging to said business, and when said monies [sic] and property shall have been paid and returned to plaintiff * * *, said defendant and cross-complainant shall be allowed and paid a sum equal to one-half (½) of the net profits earned by said business * * * from the 9th day of March, 1946, to the 4th day of November, 1946, less any monies [sic] received by or paid to said defendant * * *".

The appellate court first discussed the general law applicable as follows, 89 Cal. App.2d at page 165, 200 P.2d at page 570: " 'An appeal lies only from a final judgment unless an appeal from an interlocutory decree or judgment is expressly authorized by law.' Bakewell v. Bakewell, 21 Cal.2d 224, 226-227, 130 P.2d 975, 977. 'There can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy.' Stockton etc. Works v. Glen's Falls Ins. Co., 98 Cal. 557, 577, 33 P. 633, 637; Nolan v. Smith, 137 Cal. 360, 361, 70 P. 166; Bank of America v. Superior Court, 20 Cal.2d 697, 701, 128 P.2d 357. A judgment is final 'when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.' Doudell v. Shoo, 159 Cal. 448, 453, 114 P. 579, 581. 'The general test for determining whether the judgment is final is "that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." Lyon v. Goss, 19 Cal.2d 659, 123 P.2d 11, 17.' Bakewell v. Bakewell, supra, 21 Cal.2d page 227, 130 P. 2d page 978."

In applying these rules to the judgment before it the appellate court stated, 89 Cal. App.2d at page 166, 200 P.2d at page 570: "It is clear that the judgment appealed from does not finally determine all rights of the parties in controversy. Plaintiff prayed for an accounting by defendant as well as for a determination of the validity of the agreement between the parties. An accounting was ordered but in no way settled. * * * The accounting and determination of profits left to be done are more than a mere execution of what was determined or a ministerial compliance with the terms of the decree."

The Court then pointed out that, since the decision of Gunder v. Gunder, 208 Cal. 559, 282 P. 794, it has been settled that a decree fixing the basic interests of the parties, ordering an accounting, and referring the accounting to a referee is not an appealable order. The Court then went on to cite and quote from many cases holding that the failure to order a reference does not make the order a final one. See Gianelli v. Briscoe, 40 Cal.App. 532, 181 P. 105; McAllen v. Souza, 7 Cal.App.2d 130, 45 P.2d 832; Standard Steam Laundry v. Dole, 20 Utah 469, 58 P. 1109; Musser v. Edmunds, 23 Utah 425, 64 P. 1105; Lodge v. Twell, 135 U.S. 232, 10 S.Ct. 745, 34 L. Ed. 153. The Court then concluded its discussion of this point as follows, 89 Cal. App.2d at page 169, 200 P.2d at page 572: "Under the above authorities we are constrained to hold that the judgment is interlocutory and * * * nonappealable. Appellant's contention that the judgment is final though objectionable for uncertainty and respondent's contention that it is final but leaves open the necessity of special orders after final judgment to carry the judgment into effect are both without merit. 'It is not the form of the decree but the substance and effect of the adjudication which is determinative.' Lyon v. Goss, 19 Cal.2d 659, 670, 123 P.2d 11, 17. Although the form may seem that of a final judgment it leaves important parts of the controversy undecided and orders determination of these points by the parties. In the case before us, as well as in McAllen v. Souza, supra, Standard Steam Laundry v. Dole, supra, and Musser v. Edmunds, supra, the order to the parties to account and to determine certain issues must be considered as implying a reservation of jurisdiction to make, if necessary on motion, further decisions, as to these points. Reservation of further action can be made as effectively by implication as by express language. Poland v. Loud, 113 Me. 260, 93 A. 549, 550. Such possible further decisions cannot be considered as special orders after final judgment, as in substance the judgment before us is not final and the further decisions which may be required will decide essential parts of the case as brought into court. Zappettini v. Buckles, 167 Cal. 27, 138 P. 696, on which the parties rely, and other cases of the same kind are not in point, as what was left to be done was more ministerial in character than the accounting here ordered. In Gunder v. Gunder, supra, the Zappettini case is distinguished because no accounting was involved, and in Hollar v. Saline Products, Inc., 3 Cal.2d 80, 82, 43 P.2d 273, 274, it was held not only that the Zappettini case might be distinguished 'but even if this were not so, said case would have to be considered as modified to conform to the holdings referred to, i.e., the Gunder case.'"

[1] This reasoning is conclusive here. In the instant case the accounting ordered in the judgment is not a mere mathematical computation. It will require an ascertainment of the amounts paid by respondents to appellants over several years as initiation fees, dues, taxes, and assessments. The dates of all such payments must be ascertained. The respondents have kept certain bank accounts of the lodge, and whether such accounts include any of the disputed amounts must be ascertained. These are judicial questions. They should be passed upon before the case is reviewed on appeal, so that the entire controversy can be settled on one appeal. Incidentally, one of appellants' main points urged on the appeal is that the judgment is void for uncertainty because it fails to fix the amount due from appel-

lants to respondents. This indicates that even in appellants' minds further judicial action is required before the rights of the parties will be finally determined. For this, and the other reasons heretofore given, it must be held that, as a matter of law, the judgment is interlocutory and not appealable.

This brings us to a discussion of the second major point involved, and that is the legal effect (if any) of the order made by the trial court subsequent to the taking of the appeal to the effect that the judgment was a final judgment. It is appellants' position that the Superior Court had jurisdiction to interpret its judgment, that it has done so, and that such interpretation has become final and is now res judicata. Such contentions are all unsound.

[2, 3] As already pointed out, the judgment entered was, as a matter of law, interlocutory in nature. After the denial of the motion for a new trial, the lower court had no power to modify or to change the nature of that judgment, except, perhaps, by proper motion made under §§ 473, 663, or 663a of the Code of Civil Procedure. Admittedly, no motion was ever made under those sections. What was done was to file an application for the appointment of a referee. When that motion came on for hearing the trial court had no jurisdiction to change the judgment already entered from an interlocutory one to a final one by a mere declaration to that effect. It was limited to a granting or denial of the request to appoint a referee. It could have appointed a referee, or it could have ordered the accounting directed by the judgment, to be taken by the court. But it had no jurisdiction to determine that the judgment was a final one, when, as a matter of law, it was interlocutory. Its determination to that effect was simply beyond its jurisdiction and void. Dolan v. Superior Court, 47 Cal.App. 235, 190 P. 469. Failure to appeal from such a void order in no way affected the rights of the parties. Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001; see, also, Felton Chemical Co. v. Superior Court, 33 Cal.App.2d 622, 92 P.2d 684. Moreover, since the order purporting to modify and change the judgment from an interlocutory to a final one was void, it did not change the nature of the judgment, and therefore was not a special order after final judgment. It was therefore nonappealable and may be changed at any time before entry of a final judgment.

Appellants place great reliance on Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15, in support of their contention that the ruling on the application for the appointment of a referee that the judgment was a final one is now res judicata. That case properly held that a ruling made on an application to modify a divorce decree, which ruling had become final, was res judicata. This power was exercised pursuant to the express provisions of § 137 of the Civil Code conferring jurisdiction on the Superior Court to modify divorce decrees at any time insofar as they relate to support. In passing on such an application the trial court obviously has the power to interpret the decree in order to determine what it is being asked to modify. The case has no application at all to the controversy now before this court.

[4, 5] Appellants also point out that, some time ago, they petitioned the appellate court for a writ of supersedeas in connection with the appeal. In that proceeding respondents opposed the petition, on several grounds, one being that the judgment was interlocutory. The petition was denied without prejudice to its renewal. It is now urged that if the judgment is interlocutory, the court should have dismissed the appeal of its own motion, and, by failing to do so, impliedly ruled that the judgment was a final one. The denial of the petition for supersedeas without prejudice cannot be so construed. Such a denial, except in most unusual cases, of which this is not one, is not res judicata of anything. Funeral Dir. Ass'n v. Bd. of Funeral Dirs., 22 Cal.2d 104, 136 P.2d 785; McDonough v. Garrison, 68 Cal.App.2d 318, 156 P.2d 983.

For the foregoing reasons the motion to dismiss the appeal from the judgment in S.F. Superior Court Action 356, 496 is granted.

WARD and BRAY, JJ., concur.

STEFFEN v. REFRIGERATION DISCOUNT CORPORATION.

Civ. 16440.

District Court of Appeal, Second District, Division 1, California.

April 27, 1949.

Rehearing Denied May 18, 1949.

Hearing Denied June 23, 1949.

1. Mortgages ⚷298(1)

Proof that on default in payment of notes secured by mortgages the mortgagor invoked acceleration clauses and declared entire amount of principal and interest due and refused releases essential to refinancing unless all unearned interest was paid sustained finding that interest was paid under duress.

2. Payment ⚷87(2)

The test of "duress" at its harshest is what would have influenced the conduct of a reasonable man.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Duress".

3. Appeal and error ⚷1008(1)

Whether a particular person acted as a reasonably prudent person is ordinarily a question for the trier of the facts.

4. Evidence ⚷450(10)

Notes providing for payment of stated installments monthly "or more" and containing a provision for acceleration in case of default were ambiguous so as to admit parol evidence to explain them in respect of inclusion of interest in the principal sum.

5. Appeal and error ⚷1039(1)
Payment ⚷89(4)

In action to recover unearned interest paid under duress where no count of complaint pleaded the facts found by the court to constitute duress, the counts were defective and plaintiff could not rely upon the common count, but failure to plead the facts constituting duress found by the court was harmless where the findings supported the judgment and the evidence supported the findings on the matter of duress and the facts were admitted and the defendant was advised of plaintiff's theory. Const. art. 6, § 4½.

6. Pleading ⚷193(5)

Where a common count is joined with another count or other counts and refers to the same transaction or transactions, if the other counts do not state a cause of action the common count must fall with them.

7. Appeal and error ⚷1170(5)

When the case has been fully tried, and no prejudice to the appellant from the failure of the complaint to state a cause of action appears, the case should not be reversed because of defect in the pleadings. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Carl H. Steffen against Refrigeration Discount Corporation to recover unearned interest paid to defendant under duress. From a judgment for plaintiff for $12,410.28 with interest thereon, the defendant appeals.

Judgment affirmed.

Sims & Wallbert and James H. Sims, all of Los Angeles, for appellant.

Samuel Reisman, of Los Angeles, for respondent.

DOOLING, Justice assigned.

Defendant appeals from a judgment in favor of plaintiff in the principal sum of $12,410.28 with interest thereon. The principal amount represents what the trial court found to be unearned interest on three promissory notes secured by mortgages paid to defendant by the plaintiff under duress.

Taking the three notes in their inverse chronological order as they are pleaded in the complaint, the evidence is without conflict that on or about October 1, 1943 plaintiff borrowed $60,000 from defendant; that interest at 4% per annum for four years was calculated on the sum borrowed, amounting to $9600, and a promissory note given by plaintiff to defendant for the combined amounts of the principal and interest so calculated, i. e. in the principal sum of $69,600 payable in monthly instalments of

$1450 or more. This promissory note was secured by a mortgage on a parcel of real property and by a chattel mortgage.

In similar fashion on September 27, 1943 plaintiff borrowed from defendant the sum of $10,000, interest was calculated on this sum at 4% per annum for four years in the amount of $1600 and a promissory note given for the aggregate sum of principal and interest, i. e. in the principal sum of $11,600 payable in monthly instalments of $241.67 or more. This note was secured by a mortgage on a second parcel of real property.

On August 27, 1943 plaintiff borrowed $30,000 from defendant at 5% per annum calculated for 4 years, and gave his promissory note for $36,000, the aggregate of principal and interest so calculated, payable in monthly instalments of $750 or more. This note was secured by a mortgage on a third parcel of real property.

All three notes contained a provision that in case of default in the payment of any instalment the whole sum of principal and interest should become due at the option of the holder. Plaintiff fell into arrears and defendant taking advantage of these acceleration provisions declared the full amounts of the three notes to be due and payable. Faced with the threat of foreclosure of the security for all three notes plaintiff arranged to sell the parcel of real property securing the promissory note for $69,600 and opened an escrow for the purpose, among others, of paying off the balance due on that note from the purchase price deposited in the escrow and thereby securing a release from defendant of the mortgage. Defendant demanded the full balance due on the face of the note without any allowance for unearned interest and this was paid by the escrow holder.

Plaintiff also arranged to refinance the other two promissory notes and opened an escrow for each into which the new lender deposited the amount of his loan. Defendant in each of these cases likewise demanded the full balance without allowance for unearned interest before it would release the mortgages and these amounts were paid to it.

[1] The trial court found that in each case the unearned interest was paid under duress. The evidence sufficiently supports this finding. Under the modern relaxation of the harsh common law rules relating to duress, foreshadowed in this state in Oswald v. City of El Centro, 211 Cal. 45, 292 P. 1073, 71 A.L.R. 899, and explicitly stated in Young v. Hoagland, 212 Cal. 426, 298 P. 996, 75 A.L.R. 654, we have no doubt that the evidence supports the conclusion of the trial court that the amounts of unearned interest paid to defendant to secure the releases of the three mortgages on plaintiff's three parcels of property were paid under duress or what is called in some of the cases "illegal business compulsion." Millsap v. National Funding Corp., 57 Cal.App.2d 772, 780, 135 P.2d 407, 411.

Plaintiff was threatened with foreclosure and the loss of the mortgaged properties. He could only sell or refinance if as a contemporaneous part of one entire escrow transaction in each case he could secure a release of the mortgage involved in that transaction. The case falls exactly within the language of the court in La Telle v. American Trust Co., 64 Cal.App.2d 830, 834, 149 P.2d 385, 387:

"There can be no doubt that Wilbe was entitled to a cancellation of the deed of trust upon payment of the amount actually owed the bank. The bank erroneously compelled him to make an overpayment. This overpayment was an involuntary one made under business compulsion in order that Wilbe would not lose his sale of the property. Under elementary principles such involuntary overpayment may be recovered."

Appellant attempts to persuade us that the quoted language is an ill-considered dictum. It concerned the very sum involved in the action in the La Telle case, and it accords with the conclusion of the courts of other jurisdictions that the requirement of an overpayment by the mortgagee in order to secure the release of a mortgage is actionable duress. Union Cent. Life Ins. Co. v. Erwin, 44 Okl. 768, 145 P. 1125; First Nat. Bank v. Sargent, 65 Neb. 594, 91 N.W. 595, 59 L.R.A. 296; Kilpatrick v. Germania Life Ins. Co., 183

N.Y. 163, 75 N.E. 1124, 2 L.R.A.,N.S., 574, 111 Am.St.Rep. 722; Reed v. Boagni, La. App., 142 So. 171; Fout v. Giraldin, 64 Mo. App. 165; 5 Williston on Contracts, Rev. Ed., sec. 1618, p. 4522; and cf. Rowland v. Watson, 4 Cal.App. 476, 88 P. 495; Ezmirlian v. Otto, 139 Cal.App. 486, 34 P.2d 774.

Appellant insists that the evidence did not show the time within which the three transactions were required to be closed and that respondent might have litigated the question of the amounts due to appellant before making the payments. The sale or refinancing of mortgaged property to pay off the existing mortgage where foreclosure is threatened is, under the most favorable circumstances, a delicate matter. The debtor mortgagor operating under the probable loss of his property is in no position to take unnecessary risks by engaging in protracted litigation over the amount due to the mortgagee who is threatening to foreclose. Unless he makes the sale or refinances the loan he will lose his property by foreclosure even though he succeeds in reducing the amount of the judgment. He must sell or refinance to save his property and he can only sell or refinance if as a part of the same transaction he secures a satisfaction of the existing mortgage.

[2, 3] The action in the instant case was commenced by the filing of a complaint in April 1946 and two years later the litigation is still pending in the courts. It is highly unlikely that a prospective purchaser or lender would have patiently waited for more than two years while respondent was litigating with appellant. The test of duress is, at its harshest, what would have influenced the conduct of a reasonable man, Young v. Hoagland, supra, 212 Cal. 426, 431, 298 P. 996, 75 A.L.R. 654, and many courts have relaxed the rule to make the test the state of mind induced in the particular person. 17 Am.Jur., Duress and Undue Influence, sec. 11, pp. 883–885. Taking the harsher test of the effect on the mind of the average reasonable man we cannot say that the evidence does not support the court's finding that the overpayments herein recovered were made under duress. Whether the individual acted as a reasonably prudent person is ordinarily a question for the trier of the facts. Young v. Hoagland, supra, 212 Cal. 426, 431–432, 298 P. 996, 75 A.L.R. 654.

In suing to recover the unearned interest respondent relies on the principle thus stated in 36 Am.Jur., Mortgages, sec. 386, p. 882:

> "On the ground that the retention of unearned interest beyond the time of the payment of the debt would be unconscionable, it has also been held that the remittance of such unearned interest is a requisite for the enforcement of an acceleration clause. Thus, it has been held that a stipulation in a mortgage given to secure a fixed sum representing the aggregate of the principal of a debt and the interest thereon for the period of the mortgage, that on default by the mortgagor in the performance of certain conditions the whole sum secured shall become due, will not be enforced except upon the cancelation of the unearned interest."

The second sentence of the above quotation is exactly our case. The rule therein announced is supported by Williams' Heirs v. Douglass, 47 La.Ann. 1277, 17 So. 805; Unity Plan Finance Co. v. Green, 179 La. 1070, 155 So. 900, 904–905; Cissna Loan Co. v. Gawley, 87 Wash. 438, 151 P. 792, 794, L.R.A.1916B, 807, Ann.Cas.1917D, 722; Holman v. Hollis, 94 Fla. 614, 114 So. 254; and cf. Dugan v. Lewis, 79 Tex. 246, 14 S. W. 1024, 12 L.R.A. 93, 23 Am.St.Rep. 332.

[4] Appellant cites no cases to the contrary but it insists that the notes are unambiguous on their face, do not show that any interest was included in the principal and the evidence to the contrary is therefore violative of the parol evidence rule. We cannot agree that the notes are unambiguous. They all provide for payments of stated instalments monthly "or more". The "or more" provision is apparently without purpose unless by the payment of a larger sum than the stated amount the respondent could thereby stop the running of interest on the overpayment. See Kenney v. Los Feliz Investment Co., Ltd., 121 Cal.App. 378, 9 P.2d 225. The first note while providing in terms for no interest except on principal unpaid at maturity pro-

vides: "principal and interest payable in installments of Fourteen Hundred and Fifty Dollars or more on the 1st day of each calendar month * * * and continuing until said principal and interest have been paid." The question at once arises what "interest"? All three notes contain substantially the same provision for acceleration. We quote from the first note: "Should default be made in payment of any installment when due the whole sum of principal and interest shall become immediately due at the option of the holder of this note"; from the second: "Should default be made in payment of any installment of principal or interest when due, the whole sum of principal and interest shall become immediately due at the option of the holder"; and from the third note: "Should default be made in payment of any installment of principal and interest when due the whole sum of principal and interest shall become immediately due etc." The question suggests itself in each case what "interest", since each note only provides for the payment of interest on unpaid principal from maturity. We are satisfied that each note is ambiguous on its face so as to admit parol evidence to explain it.

[5, 6] The complaint was in four counts, a separate count pleading the facts as to each note and its payment, and a common count purporting to embrace all three transactions. In no count were the facts found by the court to constitute duress pleaded. In this respect the three counts which pleaded the facts of the three transactions were defective in not pleading duress. Respondent attempts to rely on the common count as stating a cause of action but he cannot well do so in view of the settled rule that where a common count is joined with another count or other counts and refers to the same transaction or transactions if the other counts do not state a cause of action the common count must fall with them. Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 489, 110 P.2d 396; Spencer v. Crocker First Nat. Bank, 86 Cal.App.2d 397, 406, 194 P.2d 775; Modlin v. Walter's Fur Shop, 83 Cal.App.2d 384, 390, 188 P.2d 805.

[7] However the failure of the complaint to state a cause of action is not fatal to the judgment in the absence of prejudice to appellant. The findings support the judgment and the evidence supports the findings on the matter of duress. At the trial the appellant was advised that counsel for the respondent was relying on duress or business compulsion and Young v. Hoagland, supra, and La Telle v. American Trust Co., supra, were cited to the court. The facts on which duress was found were not only not disputed but were admitted by counsel for appellant. Under these circumstances the rule announced in Baker v. Miller, 190 Cal. 263, 267–268, 212 P. 11; Bonney v. Petty, 125 Cal.App. 527, 530, 13 P.2d 969; and Ades v. Brush, 66 Cal.App.2d 436, 444, 152 P.2d 519, is properly applicable, that when the case has been fully tried and no prejudice to the appellant from the failure of the complaint to state a cause of action appears the case should not be reversed because of a defect in the pleadings. Const. Art. VI, sec. 4½. The facts were fully developed on the trial, the appellant was not misled but was fully advised of respondent's theory of duress and no purpose would be served by a reversal when after proper amendment to the complaint the same judgment might be expected.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

91 Cal.App.2d 607

PEOPLE v. BATSFORD.

Cr. 2563.

District Court of Appeal, First District,
Division 2, California.
May 3, 1949.

1. Infants ⚷20

Verdict of guilty for violating section 288 carried with it implication that jury found from defendant's acts and conduct that his intent was that of arousing, appealing to or gratifying lust or passions or sexual desires of defendant or of child as described in such section and that he had a wicked state of mind with reference to such acts. Pen.Code, §§ 21, 288.

2. Criminal law ⚷438

In prosecution for violation of section 288, where acts complained of occurred during taking of photographs of girls involved, and defendant claimed that the pictures were artistic and not obscene, admitting the photographs in evidence was proper where they corroborated the testimony of each girl respecting defendant's conduct with the other girl and with herself. Pen.Code, §§ 288, 311–314.

3. Criminal law ⚷438

In prosecution for violation of section 288, that pictures which defendant took might tend to excite the indignation and prejudice of the jury against defendant was not sufficient reason for excluding them where they were otherwise admissible. Pen.Code, § 288.

4. Criminal law ⚷857(1)

In prosecution for violation of section 288, that jury in reaching a verdict deliberated for only one hour and six minutes did not indicate bias against defendant on the ground that such time was wholly insufficient for proper consideration of the evidence. Pen.Code, § 288.

◆

Appeal from Superior Court, Alameda County; Edw. J. Tyrrell, Judge.

Sterling Batsford was convicted of a violation of Penal Code, § 288, and he appeals.

Affirmed.

Sterling Batsford in pro. per.

Fred N. Howser, Atty. Gen., and David K. Lener Deputy Atty. Gen., for respondent.

GOODELL, Justice.

This is an appeal from a judgment of conviction and from an order denying a new trial.

An indictment in ten counts was returned, accusing appellant of ten violations of section 288 of the Penal Code and alleging two prior convictions of felonies, with time served on each. Appellant pleaded not guilty, admitted one of the priors, a burglary in 1928 in Los Angeles County, and denied the other, which was for assault to murder in the State of Florida in 1922, wherein a conditional pardon was granted.

The jury found appellant guilty on all ten counts and found against him on the Florida conviction.

Appellant was represented at the trial by the public defender, but on this appeal he presents his own case.

Three girls were involved, two aged 10 and one aged 12.

Appellant lived in Oakland in two basement rooms. His testimony shows that he was interested in photography and for some time had spent all his spare time and money on that pastime; that he owned considerable photographic equipment and had had to learn to do his own developing because commercial developers had refused to handle the kind of pictures which he took. He had in his apartment a large collection of photographs of varieties and types which do not lend themselves to public view. Secs. 311–314 Penal Code. In his closing brief he states frankly that he possessed a "large number of photographs which appellant had taken over a period of a year * * * (two albums of pictures, one suit case of pictures, eleven large size pictures in frames, and two lampshades of pictures) * * *."

On December 29, 1947 two girls who were playing on the street accepted his invitation to visit his apartment to take some pictures. The first thing he did was to show them some of his collection of photographs. Thereafter they posed with him and photographs were taken and he admits touching the body of each of the girls but claims that he did so only in arranging their positions while posing.

Appellant claims the evidence is insufficient to sustain the verdict. Also that his conduct "was professional, impersonal, and devoid of any lewd expressions or actions." Nine pictures were introduced in evidence in various ones of which these girls appear and in some of which appellant also appears. In taking the pictures the girls assisted, one handling the camera while the other posed with appellant, then the other likewise.

On January 3, 1948 the two girls revisited the place. The third girl visited appellant's apartment later and substantially the same procedure was followed as with the other two.

Appellant complains that the introduction of these nine pictures by the prosecution had the effect of inflaming the jury against him. It must be admitted that the pictures did not help his case. But they corroborated the testimony of each girl respecting appellant's conduct with the other girl and with herself.

[1-3] In criminal cases "The intent or intention is manifested by the circumstances connected with the offense * * *." Sec. 21, Penal Code. The verdict of course carries with it the implication that the jury found from appellant's acts and conduct that his intent was that described in section 288; that, as said in People v. McCurdy, 60 Cal.App. 499, 502, 213 P. 59, 60, he had "a wicked state of mind * * * with reference to the act or acts." See, also, People v. Bronson, 69 Cal.App. 83, 86, 230 P. 213; People v. Hunt, 17 Cal.App.2d 284, 286, 61 P.2d 1208. The photographs were properly admitted in evidence. Indeed they were not objected to. Under appellant's own theory they were admissible, since he contends that they were artistic, not obscene, and the only way that question could be answered was by examining them. The authorities hold that such photographs are admissible, People v. Linton, 102 Cal.App. 608, 283 P. 389; People v. Doggett, 83 Cal.App.2d 405, 188 P.2d 792, and the fact that they might tend to excite the indignation and prejudice of the jury is not a sufficient reason for excluding them. People v. Balestieri, 23 Cal. App. 708, 139 P. 821; People v. Saenz, 50 Cal.App. 382, 195 P. 442. Appellant himself introduced in evidence a panel containing eight pictures of adult women.

[4] The jury deliberated for one hour and six minutes, and that time, appellant claims, was wholly insufficient for a proper consideration of all the evidence on as many as ten counts. There was nothing complicated about the evidence. It was singularly free from complexity, rendered so by appellant's admissions and by the pictures.

Appellant in his opening brief states that he is not a lawyer and asks this court to supply the citations of authorities on the several points which he is not able to supply. We have carefully gone over the transcript and briefs with this in mind but it must be said that there are no authorities to support his position.

There is no merit whatever in the appeal.

The judgment of conviction and the order denying a new trial are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

91 Cal.App.2d 389

In re ROMINE'S GUARDIANSHIP.

Civ. 7581; Sac. 5968.

District Court of Appeal, Third District, California.

April 22, 1949.

1. Guardian and ward ⚷25

Where father was actively engaged in naval service during war and could not maintain suitable home for child, and so consented to appointment of guardian for child, and agreed to pay her $25 a month for maintenance of child, and thereafter father remarried and established a home, had adequate income to support child, was a fit person to assume custody, guardian was not related to child, father's petition to terminate guardianship and to restore child to his custody was properly granted. Probate Code, § 1580.

2. Guardian and ward ⚷25

Where one, other than a parent, has been appointed guardian of a minor child, and parent subsequently seeks by petition to terminate guardianship as no longer necessary and to recover custody of child, sound discretion of trial court in terminating guardianship and awarding custody to parent may not be disturbed on appeal if findings to that effect are supported by proof of the fitness of the parent, best interest of child, and lack of necessity for continuing guardianship. Probate Code, § 1580.

3. Guardian and ward ⚷25

Fact that father who, while actively engaged in naval service during war, permitted appointment of guardian for child because he could not maintain a suitable home for child, failed to pay guardian monthly installments that he had agreed to pay for maintenance of child, after guardian refused to surrender custody of child to him, or fact that father once consented that guardian might adopt the child, which she refused to do, did not constitute abandonment of child by father so as to preclude him from having guardianship terminated and custody of child restored to him. Probate Code, § 1580.

4. Appeal and error ⚷169

Generally, an issue not presented by the pleadings may not be considered for the first time on appeal.

5. Appeal and error ⚷882(3)

Where a case has been tried on a definite theory and on particular issues, a different theory should be disregarded.

6. Parent and child ⚷2(4)

The intention of a parent permanently to abandon his child must clearly appear before he may be deprived of its custody on that account.

◆

Appeal from Superior Court, Placer County; Lowell L. Sparks, Judge.

Proceeding in the matter of the guardianship of the person and estate of Edward Kenneth Romine, a minor, wherein E. A. Romine filed a petition to terminate the guardianship of Justine V. Pingree, as guardian of the minor child of the petitioner, and to restore the minor to the custody of the petitioner. From the judgment in favor of the petitioner, the guardian appeals.

Judgment affirmed.

Russell A. Harris and John A. Montgomery, Jr., both of Sacramento, and John R. Couzens, of Auburn, for appellant.

T. L. Chamberlain, of Auburn, and William Kinley, of Long Beach, for respondent.

THOMPSON, Justice.

Justine V. Pingree, the former guardian of the person and estate of Edward Kenneth Romine, a minor child, has appealed from a judgment rendered under Section 1580, subdivision 8, of the Probate Code, terminating her guardianship on the ground that it is no longer necessary, and restoring the child to the custody of his father.

It is contended the judgment is not supported by the evidence for the asserted reasons that the father is unfit to have the custody and control of his minor child, and that he abandoned the child by consenting to its adoption, and by failure to pay installments for its maintenance.

The respondent is a Lieutenant in the United States Navy. During the late war he was engaged in naval battles in the Pacific. He was a survivor of the sinking of the U.S.S. Wasp. He was formerly married to Betty Lee Romine. As the issue of that marriage, the child, Edward Kenneth Romine, was born. The child is eight years of age. In 1940 this respondent was granted a divorce from his wife Betty, and the custody of the child was awarded to him. For the reason that the father was actively engaged in naval service for the Government and, therefore, could not maintain a suitable home for the child during the war, or give it his personal supervision, he consented to the appointment of appellant as guardian. The appellant is not related to the child. She was appointed as guardian October 30, 1942. The respondent agreed to pay her $25 per month for its maintenance, and did so until September, 1943, after he had made demand for custody of the child. After the war was over and he was assigned to land duty and had established a home at Long Beach, he then again demanded custody of the child, which was refused. In the meantime the appellant performed excellent service in properly caring for the child, for whom she acquired genuine love and affection.

After repeated and futile demands for the custody of the child, the father filed the petition in Placer County, October 14, 1947, to terminate the guardianship on the ground that it was no longer necessary, and to recover the custody of the child. The appellant appeared personally and by attorney at the hearing to oppose the application, but failed to file an answer to the petition or written opposition thereto. Oral and documentary evidence was adduced. The court adopted findings to the effect that appellant had been duly appointed guardian with the consent of the father for the reason that he was then actively engaged in war as a naval officer, and was therefore unable to furnish the child a home or suitable supervision; that the guardian was appointed to act as such "until the war was over"; that the respondent is an officer of the United States Navy, and has now been assigned to shore duty, and has established a suitable home at Long Beach; that he is a fit and proper person to assume the custody and care of his minor child, and that the guardianship of the minor is therefore no longer necessary. Judgment was rendered accordingly, terminating the guardianship and awarding the custody of the child to the father. From that judgment the former guardian has appealed.

[1] The findings and judgment are abundantly supported by the evidence. It is true that, in the emergency of respondent's active naval duties during the war, and because he then had no suitable home or opportunity to supply the child with proper care and supervision, he agreed to the appointment of said guardian and to pay her $25 per month for its maintenance; that he then consented that the guardian might adopt the child, which she failed and refused to do; that he paid all installments for maintenance, withholding such payments only after he had demanded and been refused custody of the minor child.

But it is also true that the conditions which existed at the time of the appointment of the guardian have materially changed. The father is now remarried and is living with his present wife at Long Beach, where they have established a home. He has an adequate income to support the child. The court found that he is entirely fit and proper to assume the custody of the child. That finding is supported by substantial evidence, although there is some conflict in that regard. The spouses desire the custody of the child. Although the former guardian is entirely fit and capable of properly caring for the child, as she has done in the past, she is not related to the child. Under such circumstances the father is entitled to the custody of his minor son in preference to such person.

[2] When one, other than a parent, has been appointed guardian of a minor child, and a parent subsequently seeks by petition under Section 1580 of the Probate Code, to terminate that guardianship as no longer

necessary, and to recover custody of his child, the sound discretion of the trial court in terminating the guardianship and in awarding the custody of the child to its father may not be disturbed on appeal when the findings to that effect are supported by proof of the fitness of the father, the best interest of the child and the lack of necessity for continuing the guardianship. In re Guardianship of White, 84 Cal.App. 2d 624, 628, 191 P.2d 466; In re Guardianship of Case, 57 Cal.App.2d 844, 135 P.2d 681. In the present proceeding no abuse of discretion on the part of the trial court appears. The evidence is entirely satisfactory that the father is fit and qualified in every respect to assume the custody of his child; that he possesses a suitable home and adequate income; that it is for the best interest of the child, and that there is now no necessity for continuing the former guardianship. Indeed, under the circumstances of this case, we are unable to perceive how the court could have properly determined otherwise In the White case, supra, quoting with approval from In re Guardianship of Case, supra, it is said [84 CalApp.2d 624, 191 P.2d 469]:

> "'* * * Since the father is competent and has therefore the preferential right to have the custody of his child, even though he were impecunious, the court is powerless to maintain the grandmother as guardian of his person.'"

[3] Nor do we think there is merit in appellant's contention, raised for the first time on appeal, that the father abandoned his child by failure to pay the guardian certain installments for maintenance after she refused to surrender custody of the child to him, or by once consenting that she might adopt the child, which she refused to do, or for any other reason appearing in the evidence, or at all.

[4-6] The issue of abandonment was not raised by the pleadings or at the trial. There was no finding on that subject. It is apparent that if such finding had been adopted it would have been adverse to the appellant. As a general rule an issue not presented by the pleadings may not be considered for the first time on appeal. Munfrey v. Cleary, 75 Cal.App.2d 779, 784, 171 P.2d 750. Where a case has been tried on a definite theory and upon particular issues, a different theory, urged for the first time on appeal, should be disregarded. There is no showing of abandonment in this case. The intent of the father to abandon the child does not appear. A mere offer under stress and adverse conditions to permit the adoption of a child, which offer is refused, furnishes slight evidence of an intention to permanently abandon the child. The refusal to pay installments of maintenance under the circumstances of this case is not evidence of abandonment. The court found that the father consented to the guardianship only "until the war was over." The father assumed that when the war was over, and the emergency no longer existed, the guardianship would terminate, and he would be entitled to restoration of the custody of his son. The circumstances of this case clearly indicate that it was not the intention of the father to abandon his child. He was merely seeking proper temporary care of the child in the stress of a disrupted family and the emergency of a world war. Numerous cases hold that the *intention* of a parent to permanently abandon his child must clearly appear before he may be deprived of its custody on that account. In re Estate of Akers, 184 Cal. 514, 521, 194 P. 706; In re Cordy, 169 Cal. 150, 154, 146 P. 532, 534; In re Kelly, 25 Cal.App. 651, 659, 145 P. 156; In re White, 54 Cal.App.2d 637, 640, 129 P.2d 706; In re Edwards, 117 Cal.App. 667, 4 P.2d 560; In re Eichelberger, 79 Cal.App. 525, 250 P. 201; 46 C.J. 1349, sec. 206.

With due respect and full credit for the commendable manner in which the appellant served the best interest and welfare of the child during her guardianship, we are convinced the trial judge properly and lawfully terminated the guardianship and awarded the child to the custody of his father in accordance with the evidence in this case.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

91 Cal.App.2d 811

WASHINGTON v. WASHINGTON.

Civ. 16891.

District Court of Appeal, Second District,
Division 2, California.
May 13, 1949.

1. Divorce 🔑69

Where husband left wife in 1930 without explanation, requiring her to support herself and three children, and wife testified she had not filed action sooner because financially unable to do so, wife was not precluded by long delay from demanding divorce on ground of desertion. Civ.Code, §§ 95, 99.

2. Divorce 🔑109

Where wife sought divorce on ground of desertion and showed that husband without explanation and without cause left her to support herself and three minor children, burden was on husband to introduce evidence to prove that wife consented to separation and, upon failure of husband so to do, wife was entitled to finding that she did not consent. Code Civ.Proc. §§ 1869, 1981; Civ.Code, §§ 95, 99.

Appeal from Superior Court, Los Angeles County; A. W. Ashburn, Judge.

Action by Phyllis Elizabeth Washington against Jeremiah Calvin Washington for divorce. From the judgment, plaintiff appeals.

Judgment reversed with directions.

Wellborn, Mitchell, Barrett & Rodi, of Los Angeles (Frank C. Hubbard, of Los Angeles, of counsel), for appellant.

No appearance for respondent.

McCOMB, Justice.

From a judgment denying plaintiff's application for a decree of divorce on the ground of desertion, she appeals.

The undisputed facts are these:

Plaintiff had lived in the county of Los Angeles, state of California, for about twenty-five years prior to February 19, 1948, the date the present action was filed. She and defendant were married February 21, 1923. On November 11, 1930, defendant without explanation and without any apparent cause took his belongings and left plaintiff to support herself and the three minor children of the parties, stating to plaintiff that he was going away and that she was capable of taking care of the family. Thereafter plaintiff did not see or hear from defendant until 1935, when the county authorities brought him from Arizona because of his failure to provide for his minor children. On this date plaintiff saw defendant for one half hour and he agreed to take the two boys and provide for them, but upon his return to Arizona he failed to do so and plaintiff has not seen him since.

For the last three Christmases defendant has called on the telephone and asked about his children and whether the boys were home from the service. He has not provided any support for plaintiff or the children since he left.

Plaintiff testified that she had lived in Los Angeles for twenty-five years but had not filed this action sooner because having to support herself and her children she was financially unable to do so. Her daughter testified that her mother had lived in Los Angeles county to her knowledge for twenty-one years prior to the filing of the complaint; that her father had left her mother when the witness was two or three years old and had not lived with her mother since the time he left; that he made no explanation as to where he had been nor had he returned to plaintiff; that she had seen him only once in 1944, when she graduated from high school; and that at such time he did not make any attempt to communicate with her mother.

Upon this state of the record the trial judge denied an interlocutory decree of divorce for the following reasons: (1) Long delay in bringing the action; (2) lack of proof of nonconsent to the separation; and (3) lack of corroboration of proof of nonconsent to the separation.

Questions for Determination

First: *Was there adequate explanation of plaintiff's long delay in filing the present action for divorce?*

[1] This question must be answered in the affirmative and is governed by this rule: Where the failure to commence an action for divorce is because plaintiff is without funds with which to prosecute such an action, such reason is sufficient excuse for the delay. (Dee v. Dee, 87 Cal.App. 17, 20, 261 P. 501.)

In the present case plaintiff's uncontradicted testimony disclosed that the reason she had failed to file an action for divorce sooner was because of the fact that she did not have sufficient funds with which to commence such an action. Therefore under the above stated rule her delay in filing the action was adequately explained by her testimony that she was financially unable to bring an action for divorce.

Second: *Was there lack of proof of nonconsent to the separation?*

This question must be answered in the negative and is governed by this rule: Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation (C.C.P., sec. 1869),[1] but the party holding the affirmative of the issue must produce evidence to support it, and if such evidence is not produced the finding must be against such party. (C.C.P. sec. 1981;[2] see also Morrison v. Morrison, 20 Cal. 431, 432; Melone v. Ruffino, 129 Cal. 514, 519, 62 P. 93, 79 Am. St.Rep. 127; Dirks v. Cal. Safe Deposit etc. Co., 136 Cal. 84, 87, 68 P. 487.) Wilful desertion as a ground for divorce "is the voluntary separation of one of the married parties from the other with the intent to desert." (Sec. 95, Civil Code.)

[2] In the present case defendant had the affirmative of the issue, to wit, to introduce evidence to prove that plaintiff consented to the separation,[3] and defendant having failed to introduce any evidence, there was a failure of proof on the issue, and plaintiff was entitled to a finding that she did not consent to the separation. (See Thomas v. Thomas (133 Pa.Super. 12), 1 A.2d 686; Westfall v. Westfall (148 Pa. Super. 477), 25 A.2d 614; Bates v. Bates (153 Pa.Super. 133), 33 A.2d 281; Jones v. Jones (160 Pa.Super. 358), 51 A.2d 521; Keller v. Keller (160 Pa.Super. 480), 52 A.2d 373.)

Third: *Was there lack of corroboration of proof of nonconsent to the separation?*

In view of our answer to the second question above, this question becomes immaterial since the burden of proof was on defendant and not with plaintiff, and plaintiff was not required to introduce evidence corroborating her nonconsent to the separation.

The judgment is reversed and the trial court is directed to enter a decree in accordance with the prayer of plaintiff's complaint.

MOORE, P. J., concurs.

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[1] Section 1869, Code of Civil Procedure reads in part as follows: "Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, * * *."

[2] Section 1981, Code of Civil Procedure reads: "The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side."

[3] Section 99 of the Civil Code reads: "Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion."

91 Cal.App.2d 572

WOODS et al. v. PACIFIC GREYHOUND LINES et al.

Civ. 7568.

District Court of Appeal, Third District, California.

May 2, 1949.

1. Appeal and error ⚿1031(1)

Where District Court of Appeal was unable to determine whether alleged irregularities of procedure were prejudicial to appellants because transcript of evidence was not before court, court could not presume that alleged irregularities were prejudicial to appellant in determining whether motion for new trial was properly denied. Const. art. 6, § 4½.

2. Appeal and error ⚿883

Where plaintiffs consented in open court to excuse a juror after jury was sworn to try civil action but before submission of cause for determination of verdict, and consented to submission of cause to remaining 11 jurors, plaintiffs were barred from objecting on appeal to the verdict by only 11 jurors. Const. art. 1, § 7; Code Civ.Proc. § 194.

3. Jury ⚿32(2)

A trial of a civil action by a jury consisting of less than 12 members is authorized by agreement in open court. Const. art. 1, § 7; Code Civ.Proc. § 194.

4. Appeal and error ⚿201(2), 237(1)

Plaintiffs could not contend for first time on appeal that reasons stated by trial judge in sustaining plaintiffs' objections to question propounded to a witness by defendant's attorney were prejudicial, where plaintiffs' attorney did not complain of statement of reasons and did not ask that statement be stricken from the record or that jury be instructed to disregard statement. Const. art. 6, § 4½.

5. Appeal and error ⚿1170(6)

Statement of trial judge, in response to query of defendant's attorney, as to why question asked a traffic officer as to whether officer preferred charges against bus driver was improper and misconduct as stated by plaintiffs' attorney on objection to question, to effect that belief of officer as to whether bus driver had violated motor vehicle code was of no concern, but that inferences as to officer's belief could be drawn if question was answered either affirmatively or negatively, was not prejudicial to plaintiffs. Const. art. 6, § 4½.

6. Trial ⚿98

A trial judge, in passing upon competency of proffered evidence to which objection has been made, may give a reason for his ruling on objection if reason is not expressed in language or manner which is prejudicial. Const. art. 6, § 4½.

7. Appeal and error ⚿1170(6)

Where one juror allegedly showed other jurors a table specifying distances within which motor vehicles could be stopped when traveling at various speeds, but plaintiffs' affidavits in support of plaintiff's contention that showing of table rendered verdict invalid did not aver that any juror read table, or commented on its contents, or gave table any consideration, showing of table would be held not to be prejudicial to plaintiffs. Const. art. 6, § 4½.

8. New trial ⚿143(1)

Affidavits of members of jury which rendered verdict in action for injuries, which did not show that verdict was secured by chance rather than by independent judgment of individual jurors, were incompetent to impeach verdict, regardless of whether jurors who signed affidavits concurred in rendering verdict or dissented from verdict.

9. New trial ⚿145

Juror could not circumvent rule precluding impeachment of verdict by juror's personal affidavit or oral testimony relating to misconduct in jury room, by informing plaintiffs' attorney by telephone of juror's alleged misconduct, and thus render juror's statement competent to impeach verdict by the hearsay affidavit of plaintiffs' attorney.

◆

Appeal from Superior Court, Sacramento County; B. F. Van Dyke, Judge.

Action by Charlie Woods and Luella Woods against Pacific Greyhound Lines (a corporation), and Miller Eugene Nunnely, for injuries resulting from collision between automobile and bus in which plaintiffs were passengers. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

Thomas C. Perkins, of Sacramento, for appellants.

Gerald M. Desmond, of Sacramento, for respondent.

THOMPSON, Justice.

Plaintiffs brought suit for damages for personal injuries sustained as the result of an automobile collision, while they were riding as passengers in a Greyhound bus on the public highway in Sacramento County. The cause was tried with a jury which returned a verdict for defendants. A motion for new trial was denied. Judgment was rendered against plaintiffs. From that judgment this appeal was perfected.

The transcript of evidence is not before this court. The appellants contend that the court erred in denying the motion for new trial, and that the court erred in excusing one juror at his own request, after the evidence was completed, but before the cause was submitted to the jury for determination. It is urged the excusing of that juror was prejudicial error, notwithstanding the fact that plaintiffs consented in open court to his discharge and to the submission of the cause to the remaining eleven jurors. It is also asserted the trial judge and the attorney for defendants were guilty of prejudicial misconduct in discussing, in the presence of the jury, the admissibility of certain evidence to which plaintiffs had objected, and to which the objection was sustained. The exhibition by one juror to his fellow jurors in the jury room of a printed Standard Oil Company card, which had not been received in evidence, showing the distances within which automobiles may be stopped when traveling at various rates of speed, is urged as reversible error.

[1] We are of the opinion the motion for a new trial was properly denied. In the absence of a transcript of the testimony, we are unable to determine whether the alleged irregularities of procedure were prejudicial. Const., Art. VI, Sec. 4½. We may not presume they were prejudicial.

[2] The excusing of a juror on his own motion, after the jury was sworn to try the cause, but before its submission for determination of the verdict, was not reversible error under the circumstances of this case. The juror was excused and the cause submitted to the remaining eleven jurors by the express stipulation of plaintiffs' attorney in open court. Plaintiffs expressly waived their right to have that juror participate in the consideration and return of the verdict. A party may not deliberately consent to excuse a juror who has been sworn, and to submit the cause to the remaining eleven jurors, speculating on a favorable verdict, and then, after an adverse verdict has been returned, for the first time challenge the lack of twelve jurors.

[3] A trial of a civil action by a jury consisting of less than twelve members is authorized by agreement in open court. Const., Art. I, Sec. 7; C.C.P., Sec. 194; Hitchcock v. Caruthers, 82 Cal. 523, 526, 23 P. 48; 31 Am.Jur., Sec. 99, p. 631. Plaintiffs are barred from objecting to the verdict by only eleven jurors. Ten of them voted for the verdict which was returned.

[4, 5] The appellants assign as prejudicial error the reasons stated by the judge in sustaining plaintiffs' objection to a question propounded to a traffic officer. Defendants' attorney asked the officer this question, "Now, you didn't prefer any charges against the driver of the bus, did you?" In response to the plaintiffs' objection on the grounds that it was "improper and misconduct," defendants' attorney inquired, "Why is it?" The judge replied: "I think it is, * * *. We are not concerned here with whether or not any charges were brought, any more than we would be with the disposition of charges that were brought. * * * The trouble with it is this: the inferences that might be drawn if a charge was made, for instance, would be that the officer believed there had been a violation of the Motor Vehicle Code; and the inference would be

if no charges were brought, that the officer believed no violation had been shown. But we are not concerned here at all with the belief of the officer in either direction." The objection to the unanswered question was sustained. Plaintiffs' attorney did not complain of the foregoing statement of the trial judge of his reason for sustaining the objection. He did not ask that it be stricken from the record, or that the jury be instructed to disregard it. Plaintiffs thereby waived their contention for the first time on appeal that it was prejudicial. The statement appears to be perfectly fair, proper and impartial. We are satisfied that it could not have prejudiced the jury. In re Estate of Golden, 4 Cal.2d 300, 309, 48 P.2d 962; Paolini v. City and County of San Francisco, 72 Cal.App.2d 579, 588, 164 P.2d 916; Blaeholder v. Guthrie, 17 Cal. App. 297, 300, 119 P. 524; 24 Cal.Jur. p. 731, sec. 20.

[6] It is not improper for a trial judge, in passing upon the competency of proffered evidence to which an objection has been made, to give his reason for the ruling, provided it is not expressed in language or manner which is prejudicial. Ries v. Reinard, 47 Cal.App.2d 116, 120, 117 P.2d 386; McCullough v. Langer, 23 Cal.App.2d 510, 521, 73 P.2d 649; 53 Am.Jur., sec. 79, p. 77; 64 C.J., sec. 98, p. 94. The challenged language in this case is not prejudicial. Furthermore, the plaintiffs waived their objection to the alleged prejudicial nature of the court's statement of his reason for sustaining the objection to the question propounded, by their failure to assign it as prejudicial or to ask the court to instruct the jury to disregard it. Rogers v. Foppiano, 23 Cal.App.2d 87, 95, 72 P.2d 239; Kershaw v. Tilbury, 214 Cal. 679, 690, 8 P.2d 109; Cope v. Davison, 30 Cal.2d 193, 203, 180 P.2d 873, 171 A.L.R. 667.

[7] The appellants contend that the verdict is invalid because one juror "showed" to other jurors in the jury room a card or table prepared by the Standard Oil Company, specifying the distances within which motor vehicles may be stopped when traveling at various speeds. Three affidavits in support of that contention appear in the transcript. But it does not appear they were presented to the trial court on the motion for new trial, or at all. They are merely marked as filed in the trial court. We shall, however, assume they were presented to the trial court on motion for new trial. Two of the affidavits are signed and sworn to by members of the jury, although it does not appear from the record whether either or both of them concurred in the verdict. The briefs seem to concede that one of them concurred in the verdict, and that the other affiant dissented thereto. It is apparently assumed by the briefs that the verdict was rendered by a ten to one vote of the jurors, and that one of the affiants was the only juror who dissented thereto. The transcript fails to show that the jury was polled, or how they stood numerically. The third affidavit is signed and sworn to, on information and belief, by an attorney for plaintiffs. No affiant avers that any juror read the card, or commented on its contents, or gave it any consideration. There is no statement that the card had any effect upon the independent judgment of any juror. Since neither the transcript of evidence nor the instructions to the jury are before this court, we are unable to determine whether the time card had any bearing whatever upon any issue involved in the case. If not, the mere showing of the card to the jurors in the jury room would be immaterial and harmless. In the absence of evidence to the contrary, we must assume there was no issue regarding the efficiency of the brakes of the machines involved in the collision or the ability to stop the machines within the distances prescribed by Section 670 of the Vehicle Code. There is absolutely no averment or showing that the card affected the independent judgment of any juror, or that it was prejudicial.

[8] Moreover, the affidavits are incompetent to impeach the verdict which was duly and regularly returned by the jury. The appellants concede that a verdict may not be impeached by the affidavits of jurors who concur in rendering it. But they assert that rule does not apply to a member of the jury who dissents thereto. We cannot agree with that contention. The established rule appears to be otherwise.

The application of the rule that a verdict of a jury may not be impeached by the subsequent affidavits or evidence of members of the jury whether they concurred in the verdict rendered or dissented thereto is stated in Crabtree v. Western Pacific Railroad Company, 33 Cal.App.2d 35, at page 48, 90 P.2d 835, at page 842, as follows:

"* * * It is therefore the uniform rule in this and other jurisdictions to reject affidavits or oral evidence of either concurring or dissenting jurors which tend to contradict, impeach or defeat their verdict, except to show that the verdict was secured by chance as distinguished from the independent judgment of individual jurors. Saltzman v. Sunset Telephone & Telegraph Co., 125 Cal. 501, 58 P. 169; Toomes v. Nunes, 24 Cal.App.2d 395, 75 P.2d 94; Sec. 657, subd. 2, Code Civ.Proc.; 24 Cal. Jur. 877, sec. 126; 97 A.L.R. 1038, note; 6 So.Cal.Law Rev. 246."

The Saltzman case, cited in the above case, gives the reasons for adhering strictly to that rule in support of the sanctity of verdicts, the secrecy of the deliberations of jurors, and the danger of subsequent collateral attacks prompted by ulterior motives, corruption or deliberate changes of minds. With respect to the application of the rule to dissenting jurors, as well as to those who concur in the verdicts, the Supreme Court said in that case [125 Cal. 501, 58 P. 170]:

"* * * And such reports [of the conduct of jurors in the jury room] would be more likely to be made by dissenting jurors who had been heated by earnest debate and defeated by the final vote. * * * And the stability of judicial determinations would be as much imperiled by liability to attack by dissenting jurors as by the others."

[9] The affidavit of plaintiffs' attorney, based on information which he received by telephone from one of the jurors, that the time table had been "showed" by that juror to his fellow jurors in the jury room is likewise incompetent to impeach the verdict. If a member of the jury may not impeach the verdict by his personal affidavit or oral testimony, certainly he may not circumvent the rule by informing an attorney of the appellants by means of a telephone of his alleged misconduct as a juror and thus render his statement competent by the hearsay affidavit of some other affiant. Siemsen v. Oakland, S. L. & H. Electric Ry., 134 Cal. 494, 497, 66 P. 672; Noble v. Key System, Ltd., 10 Cal.App.2d 132, 143, 51 P.2d 887. In the Siemsen case, supra, in which a conductor who was not a member of the jury made an affidavit to impeach the verdict, based on an alleged conversation which he had with a member of the jury, and which affidavit was rejected as incompetent, the court said [134 Cal. 494, 66 P. 673]:

"* * * This affidavit was properly refused admission in evidence. While it is not in terms an affidavit by a juror impeaching his own verdict, it is an affidavit of admissions made by a juror to the same effect. If the juror himself would not have been permitted to make affidavit directly to these facts, clearly the affidavit by another, of his declarations and admissions, offered for the same purpose, would be equally inadmissible. What the juror could not do directly could not thus indirectly be effectuated However the rule may be in other states, it is settled in this beyond controversy that a juror may impeach his own verdict upon no other ground than that designated by the Code. [Citing authorities.]"

The trial court was in a far better position to determine, on the motion for new trial, whether the plaintiffs were prejudiced by the conduct of jurors, court or counsel, of which complaint is made, than is this court, yet the motion was denied. That is particularly true in this case, since the evidence is not before this court.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

PACIFIC INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 16907.

District Court of Appeal, Second District, Division 3, California.

May 4, 1949.

Hearing Granted June 30, 1949.*

1. **Administrative law and procedure 🔑791**
Workmen's compensation 🔑1939

Whether compensation claimant at a given time by reasonable care and diligence could have known of his ailment and that it was attributable to his employment is primarily one of fact for the commission, whose finding will not be disturbed where it is supported by substantial evidence, but the question becomes one of law when from the facts only a single inference and one conclusion may be drawn. Labor Code, § 5405.

2. **Administrative law and procedure 🔑795**
Workmen's compensation 🔑1939

The court is charged with the duty of determining whether or not the Industrial Commission has exceeded its jurisdiction by making any of its findings contrary to the evidence or without supporting substantial evidence.

3. **Administrative law and procedure 🔑784**
Workmen's compensation 🔑1939

Findings of fact of the Industrial Commission, like those of the trial court, may be set aside and an award based thereon annulled if the findings are contrary to the evidence read as a whole, or without any meritorious support in the evidence.

4. **Administrative law and procedure 🔑789**
Workmen's compensation 🔑1939

On review of Industrial Commission's award, the award will be set aside if no reasonable man could have reached the conclusion the commission reached.

5. **Workmen's compensation 🔑1682**

Admitted facts and inferences that could reasonably be drawn therefrom showed that compensation claimant more than six months prior to filing his claim knew that tuberculous condition had become aggravated by reason of his employment. Labor Code, § 5405.

6. **Workmen's compensation 🔑1207**

Where injury for which compensation is sought is latent and of a progressive nature, it is deemed to occur when ascertainable disability results. Labor Code, § 5405.

7. **Workmen's compensation 🔑1211**

Where a disability result is delayed, the injury is correspondingly delayed and the right to compensation in such case accrues when incapacity occurs. Labor Code, § 5405.

8. **Workmen's compensation 🔑1205**

The prescriptive date against a claim for aggravation of pre-existing tuberculosis runs from the period of the culmination of an injury.

9. **Workmen's compensation 🔑1939**

Industrial Commission's finding that claim for aggravation of pre-existing tuberculosis was not barred by statute of limitations was contrary to the evidence, arbitrary, capricious, and in excess of the powers of the commission and could not be sustained. Labor Code, § 5405.

Petition by Pacific Indemnity Company to review an order of the Industrial Accident Commission of the State of California, awarding compensation for injury to C. J. Rotondo.

Award annulled.

Herlihy & Herlihy, of Los Angeles, for petitioner.

T. Groezinger and Robert Ball, both of San Francisco, for respondents.

VALLEE, Justice.

The Industrial Accident Commission awarded respondent, C. J. Rotondo, compensation for injury which he claims arose out of and in the course of his employment, consisting of aggravation of pre-existing tuberculosis. The commission found that Rotondo first learned that the tuberculosis was an active disabling condition connected with his employment on November 16, 1944. In this proceeding to review the award, petitioner contends that Rotondo first learned that fact a long time prior to November 16, 1944, and that the claim is barred by the statute of limitations. Respondents' assertion that this point was not raised by petitioner in its petition for a rehearing is in error. The application for adjustment of claim was filed with the commission February 9, 1945.

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* Subsequent opinion 214 P.2d 530.

In May of 1941 Rotondo was employed by Cal-Aero Academy as a flight instructor. He became ill at work in May of 1942. At that time he "had been coughing quite a bit," developed a fever of 103, had a peculiar rattling in the chest, chills and sweats. He was off work and confined in a hospital for about two weeks under the care of Dr. Coughlin who thought he was suffering from bronchial pneumonia. On June 27, 1942, while flying at an altitude of 9,000 feet, he again became ill, coughing and hemorrhaging blood from his nose and mouth. Immediately after landing he left for home. In the evening he saw Dr. Titus who told him he had tuberculosis, cautioned him not to do any flying, and suggested that he go to a hospital. Later that evening he had another hemorrhage. He went to a hospital where he received medication and bed rest for two weeks. While there he coughed up sputum which contained blood and mucus. On July 7, 1942, he went to Pottenger Sanitarium, an institution for the treatment of tuberculosis. There, on July 8, 1942, he was examined by Dr. Pottenger, who told him he had active tuberculosis, a cavity in his upper right lung, an old lesion of his upper left lung, and that he should stop work. He prescribed bed rest and nourishment. Dr. Pottenger testified that the condition originated from the old lesion in the left lung.

Rotondo testified that while in the sanitarium he "studied a little about tuberculosis and, naturally, I know that that is the foremost cure, if there is going to be a cure, is just simple bed rest and good nourishing food." He remained at Pottenger Sanitarium until October 25, 1942. At the time he left, Dr. Pottenger told him, "That it takes a much longer time to get well of tuberculosis than the time you are in the sanitarium and it would take them at least a year to finish up and get well and what he should do during that period is rest a great deal and go to bed early and not overwork. In fact, no work at all, if possible." At that time he had practically no bacilli in his sputum. In 1924 his sister had died from tuberculosis at the age of 19, while he and she were living in the same household. For several years Rotondo had had pleurisy pains over the right chest.

Rotondo stayed at home resting until January 3, 1943, at which time he returned to work. He was told by his superior that he would not have to fly right away and was assigned radio communication duty at the control tower. Dr. Pottenger did not recommend that Rotondo go to work but told him that just sitting in the control tower would be all right. Dr. Pottenger testified: "If all he had to do is sit in the tower and direct, I felt sure he could do it," and that "Flying would be something that you would not recommend to any person with tuberculosis because there is danger." Two weeks later Rotondo was assigned by his superior to his former position as flight instructor, flying about the same number of hours, six days a week, as he did prior to his illness on June 27, 1942.

In July of 1942 and many times in 1943, Dr. Pottenger told Rotondo what the effect of exertion and working would be on him. Rotondo understood his "warnings against work." In September of 1942, Rotondo felt that he was entitled to compensation for his condition but did not file a claim at that time. Beginning in May or June of 1943, he flew day and night, 9 to 12 hours, flying to altitudes of about 16,000 feet with a cruising speed around 120-135 an hour. In June of 1943, he felt fatigued and had colds after flights. An X-ray taken August 7, 1943, showed a "[n]ew infiltration in lower lobe of right lung." He had bacilli in his sputum again in August of 1943.

In January or February of 1944, shortly after rocking the wing of a plane up and down, Rotondo felt catches in his chest, coughed and spit up blood. In February of 1944, he noticed the cough had definitely increased, which he attributed to the fact that he was working long hours. An X-ray taken March 13, 1944, showed "[i]nfiltration continues about the same in lower right lung, but in the left lung, without the hilus [roots], is a recent infiltration." On March 21, 1944, Dr. Pottenger told him that a "[s]light density which showed near the base of your right lung has not yet healed so you must take good care of yourself." During this period Dr. Pottenger told him "that he had an additional extension at the right base and for him to continue work would necessitate that he take it very easy." In May of 1944, shortly after a flight, while hand-cranking a plane on the job, he felt a peculiar catch in his chest and half an hour later coughed and spit up blood. Rotondo testified that at that time he "was tired, coughing a little, and just generally run down." On June 19, 1944, Dr. Pottenger told Rotondo, "You still have 12cc of sputum in three days with 20 baccili per field. Last time you had 300 baccili per field. That little cavity in the lower portion of the lung is giving you this secretion. We must watch it carefully to be sure that nothing happens to allow the disease to extend," and that "It would be better if you could come back to the sanitarium for a little while." Rotondo knew then that he had a cavity and that he needed to rest to prevent its further growth. He decided to take a rest.

On July 27, 1944, he informed his superior that he was not feeling well, would take time off to rest, and he quit his employment. At that time his superior asked him to take another class. Rotondo told him that he "wasn't feeling well," that he did not feel up to it, and that he "was taking off." He said to his superior, "If I feel better and you need instructors, I will come back and take a class through or take several classes through."

On August 6, 1944, his last salary was paid and he accepted it "as termination salary." On November 16, 1944, Rotondo was again examined by Dr. Pottenger who told him his tubercular condition was again active. Rotondo testified that he first knew he "had an active T. B. infection" when he "had the hemorrhage June 27, 1942," and that he thought it was inactive when he returned to work in January of 1943. He also testified that November 16, 1944, was the first time after January of 1943 he knew and became aware that "he had a cavity caused by a T. B. infection" and that his condition was active.

Dr. Pottenger testified that "Mr. Rotondo was probably never free from active tuberculosis from the time he had his first hemorrhage in 1942," that "if he had stayed in that tower and worked along there in that way, he might never have broken down," that his condition was quiescent only in October, November and December of 1942, and that it never completely healed from its inception.

About September 30, 1946, Rotondo gave a history to Dr. Hayes of spitting blood after he exerted himself on several occasions while an instructor in aeronautics at Cal-Aero Academy.

Labor Code, section 5405, at all times involved, read: "The periods within which may be commenced proceedings for the collection of medical, disability or other benefits provided by either Article 2 or 3, or both, of Chapter 2, of Part 2 of this division are, except as otherwise provided in this division, as follows: (a) *Six months from the date of injury,* or from the date of the last payment of any compensation, or agreement therefor, or the expiration of any period covered by such payment. * * *" No compensation was ever paid Rotondo and no agreement for payment of compensation was ever made.

[1-4] The parties agree that "the date of the injury" must be deemed to be the time when "by the exercise of reasonable care and diligence it is discoverable and apparent [to the employee] that a compensable injury was sustained in performance of the duties of the employment." Marsh v. Industrial Acc. Comm., 217 Cal. 338, 351, 18 P.2d 933, 938, 86 A.L.R. 563; Alford v. Industrial Accident Comm., 28 Cal.2d 198, 203, 169 P.2d 641. Whether the claimant at a given time, by the exercise of reasonable care and diligence, could have had discoverable knowledge of his ailment and that it was attributable to his employment is primarily one of fact for the commission, Alford v. Industrial Accident Comm., supra, whose finding will not be disturbed where it is supported by substantial evidence. S. A. Gerrard Co. v.

Industrial Acc. Comm., 17 Cal.2d 411, 414, 110 P.2d 377. However, it becomes one of law when, from the facts, only a single inference and one conclusion may be drawn. San Diego Trust & Savings Bank v. San Diego, 16 Cal.2d 142, 153, 105 P.2d 94, 133 A.L.R. 416; Perguica v. Ind. Acc. Comm., 29 Cal.2d 857, 859, 179 P.2d 812. We are "charged with the duty of determining whether or not the commission has exceeded its jurisdiction by making any of its findings contrary to the evidence or without supporting substantial evidence." National Auto, etc., Co. v. Ind. Acc. Comm., 80 Cal.App.2d 769, 772, 182 P.2d 634, 636, and authorities there cited. In West v. Industrial Acc. Comm., 79 Cal. App.2d 711, at page 718, 180 P.2d 972, 977, it was said: "While it is the province of the commission to determine the credit and the weight to be given the evidence, the commission may not disregard facts established by the evidence. Bussey v. Industrial Acc. Comm., 1938, 26 Cal.App.2d 211, 212, 79 P.2d 169; Moquin v. Industrial Acc. Comm., 1939, 33 Cal.App.2d 511, 516, 92 P.2d 413. Findings of fact of the commission like those of a trial court may be set aside and an award based thereon annulled if the findings are contrary to the evidence, read as a whole, or without meritorious support in the evidence. Nielsen v. Industrial Acc. Comm., 1934, 220 Cal. 118, 122, 29 P.2d 852; [Id., Cal.Sup., 30 P.2d 995]; Pacific Palisades Ass'n v. Menninger, 1933, 219 Cal. 257, 267, 26 P.2d 303; Williams v. Kidd, 1915, 170 Cal. 631, 642, 151 P. 1 [Ann.Cas.1916E, 703]; Smith v. Belshaw, 1891, 89 Cal. 427, 430, 26 P. 834. Stated otherwise the rule of review is that an award of the commission will be set aside if no reasonable man can reach the conclusion the commission reached. Engels Copper Min. Co. v. Industrial Acc. Comm., 1920, 183 Cal. 714, 717, 192 P. 845, 11 A.L.R. 785."

The evidence, without conflict, shows the following: For several years prior to May of 1942, Rotondo knew that he had pains in the right chest. In June of 1942 he knew that flying brought on coughing and spitting of blood. He knew that his sputum contained blood and mucus. He was told **not to** do any flying. He knew on July 8, 1942, that he had active tuberculosis, an old lesion in his left lung, a cavity in his right lung, and that he had to stop work. He was confined in a sanitarium for tuberculars for nearly four months. While there he made some study of tuberculosis and learned that if there was going to be a cure, he had to have bed rest. When he left the sanitarium on October 25, 1942, he knew that it would take at least a year for him to get well, that he should rest a great deal and not work at all if possible.

Rotondo returned to work on January 3, 1943. He knew then that he was not well. He knew then that Dr. Pottenger let him return to work solely because he would sit in a control tower and not exert himself. Notwithstanding his knowledge of his condition and the effect of exertion and flying upon him, he returned to his old job as flight instructor within three months after he left the sanitarium, working more strenuously and exerting himself more arduously than before he first was taken ill. He knew what the effect would be upon his condition. From May or June, 1943, on, he flew 9 to 12 hours a day at high altitudes. After these flights he was fatigued and had colds. He knew on August 7, 1943, that he had a new infiltration in his right lung. He knew when he left Pottenger Sanitarium in October of 1942 that he had practically no bacilli in his sputum and he knew in August of 1943 that he had a return of the bacilli. In January or February of 1944, and again in May of 1944, he had exactly the same symptoms as he had previously—fatigue, catches in his chest, coughing, and spitting of blood. He knew on March 13, 1944, that the infiltration in his lower right lung continued about the same and that there was a recent infiltration in his left lung. On May 21, 1944, he knew that his right lung had not yet healed and that he must take good care of himself. In May of 1944 he was tired, coughing and generally run down. On June 19, 1944, Dr. Pottenger told him that there was a cavity in one of his lungs and wanted him to go back to the sanitarium. On July 27, 1944, more than six months before he filed his claim, he terminated his employment because of his condition. During all of the time he knew that his sister had died of tuberculosis.

[5] One conclusion only can be drawn from the foregoing facts and from the inferences which reasonably may be drawn therefrom: That Rotondo, more than six months prior to filing his claim with the commission, knew that his condition had become aggravated and that such aggravation was attributable to his employment. To say that the finding that the claim is not barred by the statute of limitations is supported by substantial evidence, is to substitute sympathy for reason. The commission has no such powers; neither has this court. The fact that Rotondo testified that the first time after January of 1943 he knew he had a cavity caused by a T. B. infection was on November 16, 1944, does not create a conflict in the evidence. The test is not when he knew, but when he should have known by the exercise of reasonable care and diligence.

[6-8] Where injury is latent and of a progressive nature it is deemed to occur when ascertainable disability results. If a disability result is delayed, the injury is correspondingly delayed. The right to compensation in that case accrues when incapacity occurs. Marsh v. Industrial Acc. Comm., 217 Cal. 338, 345, 346, 18 P.2d 933, 86 A.L.R. 563. Incapacity occurred and ascertainable disability resulted at least as early as July 27, 1944, the date when Rotondo terminated his employment because of his condition, which he knew was caused by his occupation. The prescriptive date runs from the period of the culmination of the injury. National Automobile Ins. Co. v. Indus. Acc. Comm., 4 Cal.2d 632, 51 P.2d 1097; Alford v. Industrial Accident Comm., 28 Cal.2d 198, 204, 169 P.2d 641; Travelers Ins. Co. v. Indus. Acc. Comm., 32 Cal.App.2d 643, 645, 646, 90 P.2d 327; American Solvents & Chemical Corp. v. Indus. Acc. Comm., 14 Cal.App.2d 169, 57 P.2d 954; see, also, Madison v. Wedron Silica Co., 352 Ill. 60, 184 N.E. 901, 902; Marler v. Grainger Bros., 123 Neb. 517, 243 N.W. 622, 624; Bergeron's Case, 243 Mass. 366, 137 N.E. 739; Johnson v. London Guarantee & Accident Co., 217 Mass. 388, 104 N.E. 735.

[9] The finding that the claim is not barred by the statute of limitations is contrary to the evidence. It is arbitrary, capricious and in excess of the powers of the commission. It cannot be sustained.

Award annulled.

SHINN, P. J., and WOOD, J., concur.

91 Cal.App.2d 739

PEOPLE v. CAHILL.

Cr. 4301.

District Court of Appeal, Second District,
Division 1, California.
May 10, 1949.

Hearing Denied June 9, 1949.

Forgery ⚷44

Evidence supported conviction of forgery.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Edward Cahill was convicted of forgery and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and James A. Doherty, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment.

Defendant was charged by information with the offense of forgery and tried by the court; a jury was duly waived.

As recited in appellant's brief: "The case involves a check that was given to a man in a beer place and apparently bore the indorsement of the appellant. The check was made out in the name of a woman who was in the hospital and who had from time to time advanced money to the appellant. Appellant denied that he had written the check or that he had any intent to defraud. He said that another man had gotten the check from Mrs. Iler upon his request to her for a loan of a couple hundred dollars, and that this man had brought the check to him and that he had indorsed and had given it back to the man." The check purporting to have been signed by Adah L. Iler was for $200.00, payable to defendant Cahill.

The evidence reveals that Mrs. Iler and defendant had been friends for years; that defendant also was a friend of Mrs. Iler's husband. On August 30, the defendant and one Nelson approached Charles W. Brock who was sitting at a bar near the Farmers Market and presented the check in question seeking his assistance in getting it cashed. Nelson said to Brock, "This is a good friend of mine, will you get me some money because I can't cash it here." Brock took the check and said, "I will O. K. it and stand back of it. * * * Go across the street and cash it. Take it to the Farmers Market. Mrs. Barber will cash it." Mrs. Barber cashed the check. Defendant and Nelson spent the remainder of the day and night drinking.

It is defendant's story that Nelson supposedly obtained the check from Mrs. Iler; that defendant sent Nelson to Mrs. Iler with a note requesting a loan of $200.00 and that Nelson returned with the check; defendant believed it genuine and indorsed it. Defendant also testified:

"Q. And you were in San Quentin for some time, were you not? A. Yes.

"Q. You wrote to Mrs. Iler from San Quentin asking for money, did you not? A. I did.

"Q. How much did you ask for? A. $100.00.

"Q. Did you get it? A. I did.

"Q. When you asked Mr. Nelson to go to Mrs. Iler did you believe that she would loan you the money? A. I did; otherwise I would have never sent Mr. Nelson.

"Q. When he returned did you believe that was the check of Mrs. Iler? A. I did.

"Q. Then did you cash that check yourself? A. I did not.

"Q. Who cashed the check? A. Mr. Nelson cashed the check. * * *"

All of the evidence refutes defendant's fantastic explanation.

Appellant contends on appeal that the evidence is insufficient to support the judgment; that prejudicial error resulted from the court's rulings on the admission and exclusion of evidence.

It is sufficient to note that the record totally fails to support appellant's contentions. The appeal is without merit.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; SCHAUER, J., dissenting.

91 Cal.App.2d 662

LEVITT v. GLEN L. CLARK & CO. et al.

Civ. 16846.

District Court of Appeal, Second District,
Division 2, California.
May 4, 1949.

1. Contracts 🔑342

Party relying on invalidity of contract, in absence of appropriate affirmative allegations of the nullity thereof, must allege facts constituting such condition and, if terms of contract do not disclose such character, he must negative the existence of any circumstance whereby contract could be held valid.

2. Appeal and error 🔑173(6)

Invalidity of contract will not be considered on appeal, if not raised in trial court.

3. Appeal and error 🔑173(6)

Defense that agreement to pay stated commission for services in procuring for defendant the right to purchase specified brands of whiskey violated maximum price regulation and was contrary to public policy could not be raised for the first time on appeal from judgment for commissions, where agreement was not illegal on its face and such defense was not raised by pleadings or supported by any evidence. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

4. Evidence ⚷60

Private transactions are presumed to have been fair, regular and legal. Code Civ.Proc. § 1963, subds. 19, 33.

5. Appeal and error ⚷173(6)
Contracts ⚷136

A contract clearly illegal on its face may be declared invalid at any stage of the trial or on appeal.

6. Contracts ⚷342

Where facts alleged in complaint do not indicate illegality of contract sued on, defendant must allege such illegality and negative the existence of every fact by whose presence the contract would be valid.

◆

Appeal from Superior Court, Los Angeles County; John J. Ford, Judge.

Action by Henry D. Levitt against Glen L. Clark & Co. and another to recover commissions allegedly due plaintiff under contract of employment to procure for defendant the right to purchase specified brands of whisky. From a judgment against named defendant only, named defendant appeals.

Judgment affirmed.

Roland G. Swaffield, of Long Beach, for appellant.

Russell H. Pray, of Long Beach (Eric A. Rose, of Long Beach, of counsel), for respondent.

MOORE, Presiding Justice.

From a judgment against the corporate defendant only it has appealed on the ground that the contract of the parties violated master price regulation #445, promulgated pursuant to the federal Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

In January, 1945, respondent agreed to procure for appellant the right to purchase specific brands of whisky from agents of a Canadian distillery for which service respondent was to receive a commission of 50 cents for each case of such liquor thereafter delivered to appellant.

Subsequently, appellant paid respondent 50 cents per case for certain brands of whisky purchased from and delivered to it by such agents. But a dispute arose over respondent's claim of $3500 as commission on 7000 other cases of whisky purchased by appellant from such agents. The court found that respondent was entitled to commissions on 3500 such cases and that appellant became indebted to respondent in the sum of $1750 on or about November 1, 1946. It is now contended that by reason of the violation of regulation #445 appellant's contract was contrary to public policy, consequently invalid and therefore cannot support the judgment.

[1-3] Such defense was not raised by the pleadings, was not supported by any evidence, and was not the subject of findings. In the absence of appropriate affirmative allegations of the nullity of a contract it is incumbent upon him who maintains its invalidity to allege facts constituting such condition, and if its terms do not disclose such character he must negative the existence of any circumstances whereby it could be held valid. Bernard v. Sloan, 2 Cal.App. 737, 748, 84 P. 232; Gelb v. Benjamin, 78 Cal.App.2d 881, 884, 178 P.2d 476. When the invalidity of a contract has not been raised in the trial court it will not be considered on appeal. King v. Meyer, 35 Cal. 646, 649; Grimes v. Nicholson, 71 Cal.App.2d 538, 542, 162 P.2d 934; Title Insurance & Trust Co. v. Graham, 44 Cal.App.2d 660, 662, 112 P.2d 935; Heesy v. Vaughn, 31 Cal.2d 701, 710, 192 P.2d 753. Inasmuch as appellant did not plead the nullity of the commission agreement or the subsistence of the federal statute and the regulatory order, or otherwise present that issue to the court below, by virtue of the cited authorities this court is without authority to consider it now.

[4] Furthermore, not only did appellant fail to plead the invalidity of the contract, but also, it did not reckon with the presumptions favorable thereto. Private transactions are presumed to have been fair, reg-

ular and legal. Code Civ.Proc. sec. 1963, subds. 19, 33; 6 Cal.Jur. 487.

[5, 6] While it is true that a contract clearly illegal on its face affords cause for declaring its nullity at any stage of the trial or on appeal, yet such power is denied to all courts when the facts alleged in the complaint do not disclose such infirmity. In the latter event it is incumbent upon the defendant not only to allege the illegality but to negative the existence of every fact by whose presence the contract would be valid. Heesy v. Vaughn, 31 Cal.2d 710, 192 P.2d 753; Grimes v. Nicholson, 71 Cal.App.2d 542, 162 P.2d 934.

The authorities cited by appellant, Lovett v. Bell, 30 Cal.2d 8, 180 P.2d 335, and Pearson v. Hill, 86 Cal.App.2d 664, 195 P.2d 45, 47, do not support appellant's thesis. In the Hill case the contract disclosed "on its face an attempted evasion of the price control regulations" and the evidence amply proved that Hill intentionally charged plaintiff prices in excess of those prescribed by the maximum price regulation. The Bell case holds nothing pertinent to this discussion other than that the Emergency Price Control Act of 1942 and the regulations thereunder are within their scope the supreme law of the land.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

* * *

91 Cal.App.2d 734

GURKLIES v. GENERAL AIR CONDITIONING CORPORATION et al.

Civ. 16825.

District Court of Appeal, Second District, Division 1, California.

May 10, 1949.

Rehearing Denied May 27, 1949.

Hearing Denied July 7, 1949.

1. Automobiles 🔑197(7)

In determining whether an employee who has been involved in an accident while driving an automobile was acting within the scope of his employment, all relevant circumstances must be considered and weighed in relation to one another.

2. Appeal and error 🔑927(3)

On appeal from a judgment entered after granting of a nonsuit, District Court of Appeal must give to plaintiff's evidence all the value to which it was legally entitled and indulge in every legitimate inference which might be drawn therefrom in favor of plaintiff.

3. Automobiles 🔑197(7)

Where employee who was required to safeguard employer's tools put them in the back of his automobile on Friday evening because there was no place to lock tools up on the job, on Saturday he worked at employer's new plant where there was no place to store tools, and, after work on Saturday, employee made a social call at the home of his foreman, and, after starting home, employee was involved in a traffic accident, employee was not in "scope of employment" so as to render employer liable for injuries of one injured in the accident, and the ordinary "going and coming rule" was applicable.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Going and Coming Rule" and "Scope of Employment".

Appeal from Superior Court, Los Angeles County; Wilbur C. Curtis, Judge.

Action by Joe Gurklies against the General Air Conditioning Corporation and William Owen Adair to recover for injuries sustained by the plaintiff as result of the operation of an automobile by William Owen Adair while allegedly in course of his employment by the General Air Conditioning Corporation. From a judgment entered after the granting of nonsuit as to the General Air Conditioning Corporation, the plaintiff appeals.

Affirmed.

Dee B. Tanner, of Los Angeles, and Kenneth B. Hughes, of Inglewood, for appellant.

Bauder, Veatch & Gilbert, Reginald I. Bauder and W. I. Gilbert, Jr., all of Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal from a judgment entered after the granting of a nonsuit in a personal injury action brought against William Owen Adair, who was driving his own automobile when it was involved in an accident, and respondent, General Air Conditioning Corporation, employer of the defendant Adair. The nonsuit was granted as to respondent corporation upon the ground that at the time of the accident Adair was not driving his automobile in the course of his employment, but was returning to his home after his day's work.

It is urged by appellant that the court should have applied the doctrine of respondeat superior for the reason that, although the employee had finished his day's work and was returning to his home, the "going and coming" rule was not applicable because the employee was carrying in his automobile some tools which were used in his work and which, under the terms of his employment, he was required to safeguard whenever it was impracticable to return them to his employer's premises at the end of the day and before going home; that in such circumstances the employee should be deemed to be traveling in performance of a service for his employer even though he is then returning home.

Appellant appears also to contend that the driving of the automobile at the time of the accident, with or without tools, was in furtherance of the employer's business, urging that the employee "was fulfilling his contract obligation to his employer by having with him his automobile, at all times, ready to move from job to job and shop to job. It was just as necessary to his employer's business to take his automobile to the job as it was to use it there during the working day * * *." We are unable to follow appellant in this regard. The portions of the union contract quoted in the brief contain no requirement that the employee furnish an automobile—merely that he provide for himself "necessary transportation within the said limits" (8-mile radius from 7th and Broadway, Los Angeles) "from home to job or shop at starting time and from shop or job to home at quitting time," and the employer agreed to "provide or pay for all necessary additional transportation during regular working hours." There is no evidence that as a condition of his employment the employee was reguired to furnish an automobile, and except for the question raised by the fact that Adair was carrying company tools at the time of the accident, the case plainly appears to fall within the ordinary "going and coming rule."

On Friday, February 15, 1947, Adair was working on an outside job at a lighting fixture plant. Company tools, consisting of an electric drill and some block and tackle, were delivered by the employer to the job and charged to Adair. The job was not completed at the end of the day. There was no place to lock the tools up on the job, so Adair put the tools in the back of his automobile, intending to return to the job on Monday morning. He did not ordinarily work on Saturdays, but on Friday evening he was told to report for work the next day. On Saturday Adair worked at the location of his employer's new plant, where there was no place to store the tools which were still in his automobile. After work, Adair drove to the home of his foreman, where he had some drinks. After leaving the foreman's home and while driving to his own home, Adair was involved in a traffic accident which resulted in injuries to the plaintiff.

The evidence disclosed that when company tools were charged out to an employee, he was considered responsible for them. The foreman testified in part as follows:

"Q. * * * Now, when these employees received the responsibility of caring for company tools, was it customary that they carry those tools in their automobiles? A. Well, they were just responsible for them. It did not make any difference whether they carried them or left them on the job.

"Q. Well, was it customary to carry them in your car provided there was no place to keep them? A. Safe on the job?

"Q. Well, was that the prevailing custom? A. I imagine."

The foreman also testified:

"Q. * * * If the employee refused to accept these tools and refused to accept the responsibility for the care of these company tools, would he have been fired? A. Yes, if he could not do the job without them.

"Q. So that he was required to accept that responsibility in respect of these tools, is that correct? A. Yes, he was responsible.

"Q. And in accepting that responsibility it saved the company the expense of building a tool-shed or a place to lock those tools up on an outlying job outside the plant, is that true? A. Well, yes.

"Q. Or in lieu of that in sending out a company truck to pick up the tools after work, is that right? A. He is still responsible for the tools."

The employee, Adair, when asked if he knew of the contract provision that "No employee of the company shall be required, as a condition of his employment, to furnish an automobile for the transportation of the company tools," testified, "I don't know whether the rule existed, positively, or not. I did know if a man did not want to carry the tools he did not have to, but whether or not that would mean the loss of his job, I don't know."

Appellant urges that the responsibility imposed on Adair for the safekeeping of the company tools carried with it, of necessity, the transporting of these tools in his automobile; that the keeping of the tools in his automobile constituted a direct and substantial benefit to the employer. Appellant relies upon three cases, Tarasco v. Moyers, 81 Cal.App.2d 804, 185 P.2d 86, Robinson v. George, 16 Cal.2d 238, 105 P.2d 914, and Loper v. Morrison, 23 Cal.2d 600, 145 P.2d 1, in support of his contention that Adair, at the time of the accident, was traveling upon the highway in performance of a service for his employer and should therefore be deemed to be acting in the course and scope of his employment, even though he was then engaged in the purely personal business of returning home. None of the cited cases go to the extreme contended for by appellant under the facts presented here. Tarasco v. Moyers involved a farm hand who was required to return his tools each evening to the headquarters of his employer rather than leave them in the field, and who was furnished a residence at his employer's headquarters as part of his compensation. It was held that the employee was actually engaged in performing a part of his duties of employment in going to his allotted residence and in returning the tools. The servant was carrying the tools to a storage place as part of his job, and in returning to his allotted residence on the employer's premises he was performing an act incidental to his employment under the recognized "bunkhouse rule". Robinson v. George involved an exception known as the "special errand" rule, and in Loper v. Morrison the question was whether the employee had so far deviated from his route on a mission of his own as to indicate an abandonment of his employment.

[1] As stated in Loper v Morrison, supra, 23 Cal.2d at page 605, 145 P.2d at page 3, in deciding cases of this type the results reached in other decisions are helpful but not necessarily controlling, and "In each case involving scope of employment all of the relevant circumstances must be considered and weighed in relation to one another."

[2, 3] Giving to plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn therefrom in his favor, it nevertheless appears that under no possible view of the evidence could a verdict against the employer be supported. It is undisputed that at the time of the accident the employee had completed his day's work, had paid a social visit to the home of his foreman, and was on his way to his own home. While the safekeeping of the tools was a benefit to the employer and in furtherance of the employer's business, the operation of the vehicle upon the highway at the time of the accident was wholly without the scope of the employment. The logic of appellant's position would require that the employer be held responsible for all acts of the employee in driving for his own purposes on Saturday, over the weekend, and until he had removed the tools from his car. The transportation of the tools was a mere collateral incident to the purpose of the employee in transporting himself to his home, had no causal connection, direct or indirect, with the happening of

the accident, and affords no ground, in logic or justice, for holding the employer liable. True, the purpose of putting the tools in the car was to safeguard them for the employer, but the sole purpose of the employee in making the trip he was making at the time of the accident was to benefit himself. It cannot be said that the purpose of serving the employer's business actuated the employee to any appreciable extent or at all. For authorities which in analogous situations support the views here expressed see S. & W. Const. Co. v. Bugge, 194 Miss. 822, 13 So.2d 645, and annotation in 146 A.L.R. 1193.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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91 Cal.App.2d 727

GALE et ux. v. SEYMOUR et ux.

Civ. 16839.

District Court of Appeal, Second District,
Division 1, California.
May 9, 1949.

Cancellation of Instruments 🔑59

In action to cancel agreement on ground of fraud, where court found for defendants, and agreement provided that plaintiffs besides constructing a building and leasing it to defendants should provide a paved parking lot for use of defendants' customers court properly directed that plaintiffs pave parking lot within 30 days or else pay the defendants $600, the cost of paving the lot, and that defendants should expend such sum in having the lot paved.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Charles H. Gale and Nora S. Gale, husband and wife, against L. C. Seymour and Anna M. Seymour, husband and wife, to cancel an agreement whereby the plaintiffs were to construct a building and lease it to defendants fully equipped as a market and also to furnish a paved parking lot for use of defendants' customers. From a judgment for defendants, plaintiffs appeal.

Judgment affirmed.

Nathan Newby, Jr., of Los Angeles, for appellants.

Elmer J. Walther, of Los Angeles, for respondents.

WHITE, Presiding Justice.

Appellants entered into an agreement with respondents which included a provision that appellants should construct a building and lease it to respondents fully equipped as a market and which agreement further provided: "Lessor agrees to furnish a parking lot paved with macadam for the use of Lessee's customers, subject to reasonable regulations established by Lessor; that Lessee shall not be responsible for said parking lot." Appellants attempted to rescind and brought an action for cancellation of the agreement for fraud. The trial court found in favor of respondents and rendered judgment, from which this appeal is taken, and which included the following provision:

"That plaintiffs either pave the parking lot in the rear of said market, and adjacent thereto, with macadam, within thirty days from notice of entry of this judgment, and pay to defendants the sum of $92.00, or in the alternative pay to defendants the sum of $692.00, defendants to expend the sum of $600.00 thereof toward the paving said parking lot with macadam."

As stated in their brief, "appellants contend that the court exceeded its authority when it ordered the plaintiffs to either pave the parking lot or pay $600.00 to defendants toward paving the parking lot on the grounds that it was a mandatory injunction requiring the supervision of the court and that there was insufficient testimony to determine what would constitute paving." Appellants cite Stanton v. Singleton, 126 Cal. 657, 665, 59 P. 146, 47 L.R.A. 334, and Moklofsky v. Moklofsky, 79 Cal. App.2d 259, 262, 179 P.2d 628. These cases apply the rule that equity will not decree specific performance when the duty to be performed is a continuous one, extending possibly over a long period of time and requiring constant personal supervision and oversight by the court, and that contracts which stipulate for a succession of acts, when performance cannot be consummated by one transaction, are not enforceable in equity. The judgment here under attack does not fall within the prohibitions of these rules. It directs the doing of but a single act, the performance of which requires neither "constant personal supervision" by the court, Pacific Electric R. Co. v. Campbell-Johnston, 153 Cal. 106, 94 P. 623, 628, nor the exercise by the court of "special knowledge, skill, or judgment" in the oversight thereof. Stanton v. Singleton, supra, 126 Cal. 657, at page 665, 59 P. 146, 149, 47 L.R.A. 334. There is no merit to the claim of uncertainty. Evidence adduced at the trial showed that the area to be paved was the lot in the rear of the store. Moreover, appellants have no just cause for complaint, since the judgment is more favorable to them than they could legally demand, in that it gives them the alternative of either paving the lot as they agreed or paying, as damages, the reasonable cost of having it paved.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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91 Cal.App.2d 453

WILSON v. SAMPSON et al.

Civ. 7534.

Sac. 5937.

District Court of Appeal, Third District, California.

April 26, 1949.

Hearing Denied June 23, 1949.

1. Appeal and error ⇨1011(1)

Where evidence is conflicting, an appellate court must accept findings of fact of trial court if there is sufficient evidence to sustain such findings.

2. Appeal and error ⇨994(3), 1012(1)

The credibility of witnesses and weight of evidence, in action by allegedly incompetent person to set aside deeds and transfers of personalty, was for trial judge who saw and heard the witnesses.

3. Fraud ⇨50

Where a plaintiff pleads fraud, burden is on him to prove the fraud, and the presumption of law is against the fraud.

4. Deeds ⇨196(1)
Sales ⇨52(5)

In action to set aside deeds and transfers of personalty, on ground that plaintiff was mentally incompetent at the time they were made and that one of the defendants fraudulently induced them, presumptions favored plaintiff's competency.

5. Deeds ⇨211(3)
Sales ⇨52(7)

In action to set aside deeds and transfers of personalty, on ground that plaintiff was mentally incompetent at the time they were made and that one of the defendants fraudulently induced them, evidence that such defendant made love to the plaintiff, did not require finding that a confidential relationship existed between them.

6. Evidence ⇨547

In action to set aside deeds and transfers of personalty, on ground that plaintiff was mentally incompetent at the time they were made and that one of the defendants fraudulently induced them, evidence sustained finding that plaintiff was not mentally incompetent at time deeds were executed and transfers of personalty made, though the only physician who testified, testified to the contrary.

7. Evidence ⇨474(4)

In action to set aside deeds and transfers of personalty, on ground that plaintiff was mentally incompetent at the time they were made and that one of the defendants fraudulently induced them, opinions of defendants' witnesses that plaintiff was not mentally incompetent at time deeds were executed and personalty was transferred, were admissible, though such witnesses were not intimate friends of plaintiff. Code Civ.Proc. § 1870.

8. Appeal and error ⚷204(1)

Objection made for first time on appeal as to admission of testimony received at the trial without objection, could not be considered.

9. Deeds ⚷210
Sales ⚷52(5)

In action to set aside deeds and transfers of personalty, on ground that plaintiff was mentally incompetent, at the time they were made and that one of the defendants fraudulently induced them without consideration, evidence sustained finding as to financial condition of such defendant who contended that he had possessed certain sums of money which he had paid to plaintiff for deeds and personalty.

10. Deeds ⚷210
Sales ⚷110(2)

In action to set aside deeds and transfers of personalty, on ground that plaintiff was mentally incompetent at the time they were made and that one of the defendants fraudulently induced them without consideration, evidence sustained finding that such defendant had paid plaintiff for execution of deeds and transfers of personalty.

11. Appeal and error ⚷931(1), 989

On appeal, District Court of Appeal, must accept as true such evidence as supports the trial court's findings, and disregard conflicting evidence.

12. Trial ⚷377(2)

The sending to court after submission of cause for decision, of a letter written to one of the defendants by his brother-in-law was not error, where the sending of the letter, was in compliance with court's request to which plaintiff's counsel had made no objection.

13. Appeal and error ⚷1026

Alleged error in sending court a letter, after submission of cause for decision, was not prejudicial error, where evidence had been admitted during the trial to same effect as statements in the letter.

◆

Appeal from Superior Court, Solano County; Joseph M. Raines, Judge.

Action by Cecelia Wilson, an incompetent person, by and through her guardian, Irving Lambrecht, against William H. Sampson and others to set aside certain deeds and transfers of personalty. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Leo C. Dunnell, of Fairfield, and Elden C. Friel, of San Francisco, for appellant.

O'Hara, Randall, Castagnetto & Kilpatrick, of Vallejo, and Macklin Fleming, of San Francisco, for respondent.

ADAMS, Presiding Justice.

Cecelia Wilson, an alleged incompetent person, brought this action through the guardian of her person and estate, seeking judgment against William H. Sampson and his son, Raymond E. Sampson, and his son's wife, Shirley E. Sampson.

The amended complaint, which will hereinafter be referred to as the complaint, was in six counts. The first alleged that on April 27, 1946, plaintiff was the owner of Lot 13 in Block 461, in the city of Vallejo, referred to as the Tennessee Street property, and that on said date, and while she was incompetent and William H. Sampson knew it, she deeded said property to him without consideration.

The second count alleged that the Tennessee Street property was conveyed to said William H. Sampson while plaintiff was laboring under the false belief that she was being persecuted, and that said defendant, knowing her state of mind, falsely and fraudulently represented to her that if she would deed the property to him she would not be persecuted, and he would deed it back to her when he finished a garage which he was building on property on Pennsylvania Street in Vallejo; that she relied upon said defendant's representations, reposed trust and confidence in him, and deeded the property to him, but that he refused to reconvey it to her.

The third count alleged that on March 29, 1946, while plaintiff imagined she was being persecuted, and William H. Sampson knew her state of mind, he represented to her that if she would invest $3482.00 in property on Pennsylvania Street and take title in his son's name she would no longer be persecuted; that those representations were untrue to said defendant's knowledge, but that, relying upon them, she withdrew $3482.00 from her bank account, which money was used as a payment on account of the purchase price of said property, title thereto being taken in the names of Raymond and his wife, both of whom had knowledge of the foregoing facts; that defendant William H. Sampson represented to her that when he had completed the garage on said property he would cause the grantees to deed the property to her, but that they refused to do so.

The fourth count alleged plaintiff to be the owner of all of the real property above described, and she prayed that her title thereto be quieted.

The fifth count alleged that while plaintiff was of unsound mind and laboring under the false belief that she was being persecuted by gangsters and others, William H. Sampson, knowing her state of mind, falsely and fraudulently represented to her that if she would turn her properties over to him he would and could assist her so that she would no longer be persecuted; that she was at that time the owner of a promissory note and chattel mortgage upon certain furniture she had sold to one Bertha Kenner, which note and mortgage were of the reasonable value of $2000.00; that Sampson induced her to assign said note and mortgage to him on representation that he would collect the balance due and pay same to her, and that he would keep gangsters and members of the underworld from persecuting her; and that she did so assign the note and mortgage, but that said defendant then claimed to be the owner thereof, and that he paid her no consideration whatsoever for such assignment.

The sixth count alleged that about March 29, 1946, plaintiff was the owner of certain household furniture of the value of $2000.00 which William H. Sampson and Raymond E. Sampson moved to the Pennsylvania Street property on the false and fraudulent representation that they would fix a room for her on said premises in which she could live; that they knew said representations were false, and knew that she delivered the furniture to them in reliance thereon, but they did not fix the room, and used the furniture for themselves, claiming it as their own.

Defendants, joining in one answer, denied the allegations of the complaint with certain exceptions; denied the allegations of incompetency, and of fraudulent representations and lack of consideration.

The issues were tried by the court without a jury, in March, 1947, and resulted in a judgment for defendants. A new trial was denied, and this appeal followed, the first ground for reversal urged being that the trial court admitted hearsay evidence after the case had been submitted, and the second that the evidence does not support the findings.

Dealing with the latter ground first, the trial court found that on April 9, 1946, William H. Sampson paid $4000.00 in cash to plaintiff for an undivided one-half interest in the Tennessee Street property, and received a receipt from her, signed V. Wilson; and on the 25th of April he paid to her $2780.00 in cash and assumed a deed of trust for her remaining one-half of the property; that on March 18, 1946, defendant Raymond E. Sampson purchased from Ann Coletti the Pennsylvania Street property for $12,500.00, paid $5400.00 thereon on March 18, $600.00 on March 20, and assumed a deed of trust for the balance; that during the period from March 18 to March 20 he borrowed $3482.00 from plaintiff, and paid her back $3485.00 in cash on March 30; that plaintiff was at all times capable of making, executing and delivering deeds, was of sound mind, was fully capable of taking care of herself and her property, and her capacity in this respect was not impaired to such an extent as to render her susceptible to the influence of others in whom she had especial confidence and trust; that at no time did defendants or any of them promise to deed the above-described property back to plaintiff, nor did a confidential relationship exist between her and either William H. Sampson or Raymond E. Sampson; that plaintiff is not a person likely to be imposed upon by artful, designing persons; that William H. Sampson did not express love and affection for her nor did she repose especial confidence and trust in him; that William H.

Sampson was possessed of more than $7580.00; that at no time did defendants make any false or fraudulent representations to plaintiff concerning the above mentioned property nor threaten or use any force on her, and that the consideration paid for the above described parcels of real property was a fair market value.

Regarding the promissory note and chattel mortgage, the court found that William H. Sampson paid plaintiff $800.00 in cash for same on the 21st day of June, 1946; that said sum was the reasonable value of said note; and that the household furniture formerly located on the Tennessee Street property was sold at the time the real property therein was sold as a part of the consideration; and the conclusion was that plaintiff had no right, title, estate or interest in either of the parcels of property, the furniture, or the note or chattel mortgage.

[1] It may be conceded that in the main the evidence in the case is conflicting. But in such state of the record an appellate court must accept the findings of fact of a trial court if there be sufficient evidence to sustain them. Outram v. Taft Realty Co., 207 Cal. 212, 214, 277 P. 480; Hicks v. Reis, 21 Cal.2d 654, 659-660, 134 P.2d 788; Nielsen v. Frank, 117 Cal.App. 117, 120, 3 P.2d 607; Hughes v. Grandy, 78 Cal.App.2d 555, 566, 177 P.2d 939; Martter v. Byers, 75 Cal.App.2d 375, 381, 171 P.2d 101; Nichols v. Mitchell, 32 Cal. 2d 598, 600, 197 P.2d 550.

[2] The credibility of witnesses and the weight of evidence was for that judge who saw and heard the witnesses and was able to draw his own conclusions from their demeanor and conduct. People v. Chamberlain, 7 Cal.2d 257, 260, 60 P.2d 299.

[3] Where a plaintiff pleads fraud the burden is upon him to prove it, and the presumption of law is against it. Gundelfinger v. Mariposa, etc., Mining Co., 72 Cal.App.2d 540, 544, 165 P.2d 57; Adkins v. Potter, 211 Cal. 512, 519, 296 P. 285.

[4] And as for competency, presumptions are in favor of it. In re Estate of Gordon, 142 Cal. 125, 131, 75 P. 672; In re Estate of Perkins, 195 Cal. 699, 703, 235 P. 45; People v. Chamberlain, supra.

[5] We cannot say that there is no substantial evidence to sustain the findings. Even the evidence set forth in appellant's brief does not establish a confidential relationship between William H. Sampson and appellant as all it shows is that Sampson roomed at appellant's rooming house on the Tennessee Street property, sometimes helped her with her work, and that they frequently sat together and "talked very friendly." Appellant testified that Sampson made love to her, but even so, friendship, affection, and even intimacy existing between two parties does not constitute a confidential relationship. Meyer v. Zuber, 92 Cal.App. 767, 772, 268 P. 954; Jackson v. Corham, 98 Cal.App. 112, 116, 276 P. 391. No claim is made in appellant's briefs that a confidential relationship existed between appellant and the other two defendants.

[6] As for appellant's mental condition during the time when the foregoing transactions with defendants were had, while there is some evidence from which the conclusion might have been drawn that she was incompetent, the record is not lacking in evidence to the contrary. She had a bank account from which she drew money for which she secured cashier's checks, both before her transactions with defendants, and subsequent to the trial. Attorney Wallace Cox whom she had consulted in February, 1944, when the Kenner note was executed, and on April 8th and 9th, 1946, regarding the sale of a half interest in the Tennessee Street property and who prepared the deed for same, and whom she also consulted on April 26, 1946, regarding the assignment of the Kenner note, testified that she was in the same mental condition at all those times, and competent to transact business. Witness Roy L. Hartsook, who roomed at appellant's house from June, 1943, up to and including 1946, and who saw and talked with her nearly every day, gave a like opinion. Jack Justice and his wife, who leased the Tennessee Street property from Sampson after its

transfer to him, both testified that they visited the premises in June, 1946, with appellant and Sampson, three times, that appellant took them over the rooming house, told Mrs. Justice what her duties would be in caring for the roomers, and both testified that appellant was capable of transacting business "very definitely," and that she appeared "perfectly normal." Bertha Kenner, who first met appellant in 1941, went into the rooming house business with her in 1943, and then bought out appellant's half interest, and who saw her often in 1945 and 1946, testified that appellant was "very shrewd," was a "pretty smart woman," and "sane, very sane."

[7, 8] While appellant in her brief sets forth evidence to the contrary, including that of one doctor, the trial court was not compelled to adopt their conclusions, even those of the doctor. Liberty Mutual Ins. Co. v. Industrial Acc. Com., 33 Cal.2d 89, 199 P.2d 302; Berry v. Chaplin, 74 Cal. App.2d 652, 665, 169 P.2d 442; People v. Tucker, 88 Cal.App.2d 333, 198 P.2d 941. Appellant argues that the opinions of the defendants' witnesses were not admissible because they were not intimate friends. Code Civ.Proc., sec. 1870, subd. 10. But that, too, presented a matter for the determination of the trial court, where no abuse of discretion appears, Atkins Corporation v. Tourny, 6 Cal.2d 206, 212, 57 P.2d 480; In re Estate of Perkins, supra, 195 Cal. at page 710, 235 P. 45; Hart v. Olson, 68 Cal.App.2d 657, 663, 157 P.2d 385; and, further, the testimony of these witnesses was received without objection by appellant, so her objection may not be considered for the first time on appeal. Compare People v. One Ford V8 Coach, 21 Cal.App. 2d 445, 448, 69 P.2d 473, hearing in Supreme Court denied; Hart v. Olson, supra, 68 Cal.App.2d page 663, 157 P.2d 385; Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156; Berk v. Equitable Life Assurance Society, 7 Cal.2d 544, 546, 61 P.2d 762.

[9] Appellant next contends that the evidence does not support the finding regarding the financial condition of William H. Sampson. She does not deny that Sampson gave testimony regarding possession of sufficient moneys but asserts that such testimony is "fantastic and incredible." While it may seem so to appellant and might even seem so to us, the credibility of the witness was for the trial court who saw and heard him testify that he brought from Texas in a steel locker $6500.00 in cash which his brother-in-law had given him in repayment of a loan which had been evidenced by a note and mortgage, and also other money in an indefinite amount; and it is admitted that, in addition to the cash in the locker, he had $2817.00 in a Vallejo bank.

[10] While appellant denied that she received any money whatsoever from Sampson, his payment to her of $4000.00 on April 9, 1946, on account of the purchase of a half interest in the Tennessee Street property was evidenced by a receipt for that amount, signed by appellant; and her attorney testified that he asked her if the money had been taken care of and she replied that it had been settled; Sampson testified that her attorney asked her about the money and she told him she had it right there in the purse. Payment to her of $2780.00 in cash for her remaining one-half interest in the property was testified to by Sampson and corroborated by a Mr. Middleton who was with the two in a car on their way to attorney Cox's office, and witnessed the transaction. Sampson also testified to the payment of $800.00 to appellant for the Bertha Kenner note and chattel mortgage, out of money in his steel locker. Appellant attacks this transaction on the ground, not only that she never received "one cent" from defendant for the note and mortgage, but that $800.00, the amount Sampson claimed he paid her, was not the reasonable value thereof; that there was a balance of $2063.72 due on the note. As for the actual payment of $800.00 as testified to by Sampson, Bertha Kenner testified that she saw Sampson pay appellant that amount in $50 bills in her living room, and saw appellant give him a receipt for it. She also said that she suggested to appellant that she should not sell the note, but appellant said she was leaving town, and was selling her business. And as for the reasonable value of the

note, attorney Cox testified that Sampson and appellant consulted him regarding the deal; that the note was then in default, and that appellant stated that the furniture securing it "wasn't worth a great deal"; that he told them that the value of the note depended upon what the furniture would bring, and probably $800 would be a fair value; and that appellant said that she was agreeable. Such testimony furnishes adequate support for the court's findings regarding that transaction.

[11] Other testimony might be recited which tends to support the court's findings; and on this appeal this court is obliged to accept as true such evidence as supports the findings, and to disregard conflicting evidence. Appellant, we think, has failed to give due regard to this limitation upon appellate courts, in arguing on appeal matters only proper for consideration by the trial court.

Coming now to appellant's contention that the trial court committed reversible error by admitting "hearsay evidence" after submission of the cause for decision, this point was argued by appellant on motion for a new trial, but she charged it only as misconduct on the part of defendants' counsel in sending to the court a letter written by Sampson's brother-in-law in Texas regarding the payment to Sampson of $6500.00 in payment of the loan, and as an "irregularity" on the part of the judge in receiving and reading it. The record shows that the trial court on several occasions during the trial requested Sampson to produce the note and mortgage which he claimed he had received from his brother-in-law and returned to him; and at the conclusion of the trial, after Sampson had testified that he had sent a letter to his brother-in-law requesting such papers, the judge said: "I want to know something from Mr. Sampson about that mortgage or the documents from Texas. I would want to see them, of course, and he will deliver them to you, Mr. Kilpatrick" (attorney for defendants). He also said that he wanted to look at the Pennsylvania Street property, and added: "There will be no objection," to which counsel for both parties agreed. Thereafter Mr. Kilpatrick sent to the court a letter signed by the brother-in-law, Sumrow, as follows:

"O'Donnell Tex
3-10-47

Dear Henderson.

How are you all getting along? We are just fine. We had a snow last week just about three or four inches I guess. We sure need a rain. The note for $6000.00 that you loaned me in 1942 I can't seem to find it anywhere it must have been destroyed with some of the other old papers. I didn't think about you wanting it, or I would have kept it. After we payed it off I didn't think it was any good or I would have been more careful where I put it.

How is Dalton liking Vallejo? What is he doing now?

Lots of love from.

Lenna and Ervin Sumrow."

[12] Copy of same was sent to counsel for appellant at the same time, but no objection was voiced by him until notice of intention to move for a new trial was filed in November, some eight months later. The letter was not received as evidence, and in view of the fact that Mr. Kilpatrick in sending it to the court was acting upon a request of the judge to which counsel for appellant obviously made no objection, we cannot hold that there was any misconduct on Mr. Kilpatrick's part in complying, nor any irregularity on the part of the court in receiving it. Furthermore, since said letter did not conform to the court's request, it does not follow that the court considered it at all in arriving at his conclusions, or if he did that he drew therefrom conclusions in favor of defendants.

[13] Corroboration of Sampson's testimony regarding the repayment of the loan was furnished by Dalton Sumrow, son of Ervin Sumrow, who testified that he was present in Texas when the $6500.00 was paid to Sampson, and that he himself counted it out in $100 and $50 bills; and that his "dad" said he was paying off the note he owed Sampson for money he had borrowed in 1942. This witness also testified that he saw the note and mortgage which mortgage covered three tractors and

other farm equipment. Even if there could be said to have been error we cannot say that it was necessarily prejudicial. Compare Mullanix v. Dasich, 67 Cal.App.2d 675, at page 679, 155 P.2d 130, and Roy v. Salisbury, 21 Cal.2d 176, at page 187, 130 P.2d 706.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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91 Cal.App.2d 814

A. LEVY & J. ZENTNER CO. v. BRUGETTI ICE CO. et al.

Civ. 3760.

District Court of Appeal, Fourth District, California.

May 13, 1949.

Rehearing Denied June 10, 1949.

1. Warehousemen 🔑34(7)

In action for damages caused by negligence in the storage of frozen shrimp, findings that the shrimp were not in good or usable condition, fit for human consumption, when delivered to defendants, and that defendants were not negligent in the operation of their cold storage plant, were supported by substantial evidence.

2. Warehousemen 🔑34(5)

In action for damages caused by negligence in the storage of frozen shrimp, plaintiff had burden of proving actionable negligence.

3. Appeal and error 🔑931(1)

In action for damages caused by negligence in storage of frozen shrimp, where trial court visited cold storage plant at request of counsel for both parties and made an examination of the various storage rooms and premises prior to his decision, Court of Appeal would assume that what trial court saw supported his findings that defendants were not negligent in operation of plant.

4. Warehousemen 🔑24(1)

If operators of cold storage plant were warehousemen, their liability for spoilage was not that of insurers' and they were liable only for failure to exercise ordinary care.

5. Warehousemen 🔑34(7)

In action for damages caused by negligence in the storage of frozen shrimp, where owner failed to prove that shrimp were in good condition when delivered to cold storage plant, owner did not make out a prima facie case of negligence by proof that shrimp were unfit for human consumption when removed.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by A. Levy & J. Zentner Company against the Brugetti Ice Company and others for damages caused by negligence in the storage of frozen shrimp. Judgment for defendants and plaintiff appeals.

Affirmed.

Edward L. Kellas, Breckinridge Thomas and Lamberson & Thomas, all of Fresno, for appellant.

John D. Chinello, of Fresno, for respondents.

MUSSELL, Justice.

This is an appeal from a judgment in an action for damages for negligence in the storage of frozen shrimp.

On May 28, 1946, plaintiff delivered to defendants at their place of business in Fresno, and defendants accepted for storage, 5000 pounds of frozen shrimp in 100 cases of 50 pounds each, to be stored and kept by defendants in a frozen state and delivered to plaintiff on order. The shrimp was packed in cases of soft corrugated cardboard and each case contained 10 waxed cardbord cartons, each containing five pounds of shrimp frozen in a solid block.

Plaintiff sold 99 cases, so stored, to various customers and during a period of approximately eight weeks after May 28, 1946, about 31 cases were withdrawn from storage, delivered to purchasers and were by them found to be in good condition.

After August 1, 1946, customers complained that the shrimp delivered to them was discolored, gave off a strong offensive odor when thawed and was unfit for human consumption. It was then found that 3450 pounds, or 69 cases, were spoiled and unmarketable.

It is contended by plaintiff that the shrimp was in good condition and fit for human consumption when stored with defendants; that 3450 pounds were returned to plaintiff by defendants in a spoiled condition and that it was the duty of defendant to account for this condition in some manner consistent with the exercise of due care on their part.

Defendants operated the cold storage plant in a building approximately 60 by 75 feet, which on the inside was divided into three storage rooms, with lockers and storage space. The refrigerant was driven by means of fans through coils in each room and there was testimony by defendants that the temperature was kept below ten degrees above zero during all of the time that plaintiff's shrimp was stored in the plant.

Herman Rempel, a chemist, testified on behalf of plaintiff that bacteria are always present in shrimp; that as soon as they are frozen, bacterial action will be arrested and stopped, and they will be in the condition in which they were frozen until rethawed again; that if frozen shrimp is discolored to a brown or blackish color and gives off a strong odor when thawed, "that indicates that products of decomposition are present" and, "if the color has definitely changed, and if the bacteria content is high, it would not be fit for human consumption"; "that at 23 above, certain types of bacteria could grow and cause decomposition; but below that they would not"; that if a package of shrimp is opened and decomposition found beyond the point where they are fit for human consumption, either the shrimp were not fresh when originally frozen, or, after originally frozen, temperatures were not maintained at a point where bacterial decomposition was arrested; that simply by opening the package of shrimp and finding it unfit for human consumption, by reason of bacterial development, does not lay any foundation or basis or means for saying whether or not the shrimp was fresh when originally frozen, or whether the development occurred after freezing; that one of two things would be true; either the bacterial development had progressed to that point when originally packed, or temperatures were above 20 degrees for a long period of time.

The manager of plaintiff's Fresno office testified that the shrimp in question was ordered from Levy-Zentner, San Francisco, and was obtained from the Gulf States. There was no evidence as to when it was originally harvested, by whom, or whether "quick frozen" within 24 hours of harvesting. Likewise there was no evidence as to when it was frozen, or as to how long it had been in storage before being shipped to San Francisco. There was evidence that shrimp of other owners was stored in defendants' plant during the time in question, and under similar conditions, and was kept in good condition.

[1-3] The trial court found that the shrimp in question was not in good or usable condition, fit for human consumption, when delivered to defendants, and also found that defendants were not negligent in the operation of their plant. These findings are supported by substantial evidence and cannot be disturbed. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Swales v. Barr, 83 Cal.App.2d 291, 295, 188 P.2d 516. The complaint charged defendants with negligence and the burden was therefore upon plaintiff to prove actionable negligence on the part of defendants. Martin v. Nelson, 82 Cal.App.2d 733, 736, 187 P.2d 78. Plaintiff failed to show that the temperature maintained at defendants' plant during the time the plaintiff's shrimp was there stored was such as to cause the damage complained of, and the evidence produced by defendants was that the proper temperature was maintained at all times. The trial court visited defendants' plant at the request of counsel for both parties and made an examination of the various storage rooms and premises prior to his decision, and while such an examination may have been of no evidentiary value in determining the temperature maintained during the storage period, the court may well have considered the character of defendants' equipment to properly preserve frozen foods, and

we assume that what he saw supports his findings in this respect. In re Estate of Sullivan, 86 Cal.App.2d 890, 895, 195 P.2d 894.

[4, 5] If we assume, as is contended by plaintiff, that defendants were warehousemen, their liability is not as insurers, but they are liable only for a failure to exercise ordinary care. Scott's Valley Fruit Exchange v. Growers Refrigeration Co., 81 Cal.App.2d 437, 445, 184 P.2d 183. Plaintiff contends it was only necessary to prove that the shrimp was in good condition when stored, but was unfit for human consumption when removed, in order to make out a prima facie case of negligence. But where, as here, the plaintiff failed to prove that when delivered the shrimp was in good condition, this contention cannot be maintained.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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91 Cal.App.2d 658

CITIZENS' COMMITTEE FOR OLD AGE PENSIONS v. BOARD OF SUP'RS OF LOS ANGELES COUNTY et al.

Civ. 16827.

District Court of Appeal, Second District, Division 2, California.

May 4, 1949.

Hearing Denied June 27, 1949.

1. Counties 🔑196(3)

A cause of action for injunction restraining county board of supervisors from approving and ordering payment of appropriation to county supervisors' association was moot where prior to hearing board had made appropriation and had ordered warrant for amount thereof drawn, and county auditor had delivered warrant to association, and county treasurer was not a party to action so that injunction could not have been issued restraining him from paying amount of warrant. Gen.Laws, Act 4276.

2. Counties 🔑196(1, 4)

If an appropriation is made illegally or for an unlawful purpose by county board of supervisors, any taxpayer can maintain action for recovery into county treasury of public funds so expended, after making demand on proper public officials to commence action, unless it be made to appear that demand would be unavailing.

3. Declaratory judgment 🔑209

Taxpayer contending that defendant county board of supervisors expended money for unlawful purpose was not entitled to declaratory judgment, where every question that could have been determined by such judgment, including constitutionality of statute under which payment was made and validity of payment, could be presented to court for decision in taxpayer's suit to recover the money. Gen.Laws, Act 4276; Code Civ.Proc. § 1061.

4. Declaratory judgment 🔑7

Even if a controversy actually exists, litigants have not an absolute right to determination of such controversy by invoking declaratory relief, and court is justified in refusing declaratory judgment where declaration is not necessary or proper at the time under all the circumstances. Code Civ.Proc. § 1061.

5. Pleading 🔑238(2, 3)

An affidavit of merits and an application on notice are necessary prerequisites to a motion for leave to amend a pleading. Code Civ.Proc. § 473.

6. Pleading 🔑238(2, 3)

Where plaintiff amended complaint once of course as permitted by statute and plaintiff did not serve proposed second amended complaint on defendants and did not serve notice of motion for leave to file such amended complaint or affidavit showing any reason why filing was necessary or proper, denial of permission to file proposed amended complaint was not error. Code Civ.Proc. §§ 472, 473.

7. Appeal and error 🔑78(3)

Orders sustaining general and special demurrers to amended complaint without leave to amend, granting defendants' motion to dismiss, granting defendants' motion to strike, and denying plaintiff's motion to file second amended complaint were nonappealable.

◆

Appeal from Superior Court, Los Angeles County; Vernon W. Hunt, Judge.

Action for injunction and for other relief by the Citizens' Committee for Old Age Pensions, a California corporation, against the Board of Supervisors of Los Angeles County and the County Supervisors Association of California. From the judgment and from orders sustaining demurrers, granting motion to dismiss, granting motion to strike and denying motion to file second amended complaint, the plaintiff appeals.

Judgment affirmed and purported appeals from orders dismissed.

Edward Raiden, of Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and John B. Anson, Deputy County Counsel, both of Los Angeles, William R. MacDougall, of Sacramento, J. Frank Coakley, Dist. Atty. of Alameda County, of Oakland, Leroy McCormick, County Counsel of Tulare County, of Visalia, Charles J. McGoldrick, Dist. Atty. of Sonoma County, of Santa Rosa, Joel E. Ogle, County Counsel of Orange County, of Santa Ana, Earl Redwine, County Counsel of Riverside County, of Riverside, M. Arthur Waite, Dist. Atty. of Ventura County, of Ventura, for respondents.

WILSON, Justice.

The question to be determined upon this appeal is whether the court abused its discretion in refusing a judgment for declaratory relief.

Plaintiff, alleging itself to be a taxpayer, brought this action (1) for an injunction to restrain defendant Board of Supervisors from approving and ordering the payment of an appropriation to defendant County Supervisors Association, and (2) for a judgment declaring the appropriation made by defendant board to defendant association in the 1947–48 budget to be illegal and unauthorized. When the order to show cause why a preliminary injunction should not issue came on for hearing it appeared that defendant board had ordered a warrant to be drawn in favor of defendant association for the full amount of the appropriation, and the county auditor had delivered the warrant to defendant association, hence a preliminary injunction restraining such action was denied. Defendants' demurrers to the amended complaint were sustained without leave to amend and the court ordered the action dismissed. Plaintiff has appealed from the judgment of dismissal.

Plaintiff alleges that defendant association was incorporated to carry out the purposes of a statute authorizing legislative bodies of counties, through their representatives, to attend sessions of the Legislature of this state and of the Congress of the United States, or of any committee of either body, for the purpose of advancing or opposing legislation. Stats.1935, ch. 26, p. 92, amended by Stats.1941, ch. 30, p. 469, 2 Deering's Gen.Laws, 1944 Ed., p. 1506, Act. No. 4276.

Plaintiff contends that (1) the statute is unconstitutional, (2) defendant board was and is without power to make appropriations for the purposes purportedly authorized by the act, and (3) defendant association was not and is not authorized to accept county funds.

[1] There was no ground for an injunction since prior to the hearing defendant board had made the appropriation and ordered the warrant for the amount thereof drawn, and the county auditor had delivered the warrant to the payee. The county treasurer was not a party to the action, hence an injunction could not have been issued restraining him from paying the amount of the warrant.

[2] Since the cause of action for an injunction had become moot at the time of the hearing it is contended that only declaratory relief can give plaintiff as a taxpayer a determination of its legal rights against defendants. If the appropriation was made illegally or for an unlawful purpose any taxpayer may maintain an action for the recovery into the county treasury of the public funds so expended, Osburn v. Stone, 170 Cal. 480, 482–483, 150 P. 367; Mines v. Del Valle, 201 Cal. 273, 279–280,

257 P. 530; Miller v. McKinnon, 20 Cal.2d 83, 95, 124 P.2d 34, 140 A.L.R. 570; Hansen v. Carr, 73 Cal.App. 511, 518, 238 P. 1048; Newton v. Brodie, 107 Cal.App. 512, 517, 290 P. 1058, after making demand on the proper public officials to commence the action, unless it be made to appear that demand would be unavailing. Briare v. Matthews, 202 Cal. 1, 8, 258 P. 939; Newberry v. Evans, 97 Cal.App. 120, 125, 275 P. 465.

[3, 4] If plaintiff is correct in its contention that the money was expended for an unlawful purpose it has a cause of action at law as a taxpayer to recover it. Every question that could have been determined by a declaratory relief judgment, including the constitutionality of the statute and the validity of the payment made to defendant association, may be presented to the court for decision in a taxpayer's suit to recover the money. Even if a controversy actually exists the litigants have not an absolute right to a determination of it by invoking declaratory relief. Monahan v. Dept. of Water & Power, 48 Cal.App.2d 746, 750, 120 P.2d 730. The court is justified in refusing a judgment under the declaratory relief provisions of the code "where its declaration or determination is not necessary or proper at the time under all the circumstances." Code Civ.Proc., § 1061; City of Alturas v. Gloster, 16 Cal.2d 46, 49, 104 P.2d 810; Simpson v. Security-First Nat. Bank, 71 Cal.App.2d 154, 157, 162 P.2d 494.

At the time of the hearing of the demurrers to the amended complaint plaintiff tendered in open court and requested leave to file an unserved proposed second amended complaint, which request was denied.

[5, 6] Plaintiff had amended its pleading once of course as permitted by section 472 of the Code of Civil Procedure. Section 473 provides that the court "in its discretion, after notice to the adverse party," may allow an amendment to a pleading. Plaintiff had not served the proposed amendment on defendants, and had not served notice of motion for leave to file it nor an affidavit showing any reason why its filing was either necessary or proper. An affidavit of merits, Janson v. Bryant, 52 Cal.App. 505, 506, 199 P. 542, and an application on notice, Code of Civ.Proc., sec. 473; Buckley v. Howe, 86 Cal. 596, 605, 25 P. 132; Minor v. Carpenter, 28 Cal.App. 368, 370, 152 P. 737, are necessary prerequisites to a motion for leave to amend a pleading. The court did not err in denying permission to file the proposed second amended complaint.

Judgment affirmed.

[7] The purported appeals from the orders (1) sustaining the general and special demurrers to the amended complaint without leave to amend, (2) granting defendants' motion to dismiss, (3) granting defendants' motion to strike, (4) denying plaintiff's motion to file a second amended complaint, all nonappealable orders, are dismissed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

91 Cal.App.2d 652

YUAN v. PING et al.

Civ. 13848.

District Court of Appeal, First District,
Division 2, California.

May 4, 1949.

Hearing Denied June 27, 1949.

1. Execution 🔑73

Under statute relating to issuance of execution more than five years after entry of judgment, court is authorized to give judgment creditor an execution only if, during five years following entry of judgment, creditor exercised due diligence in locating and levying upon property owned by debtor or in following available information to a point where a reasonable person would conclude that there was no property subject to levy within that time. Code Civ.Proc. § 685.

2. Appeal and error 🔑983(3)
Execution 🔑73

Whether motion for issuance of execution failed to show that judgment creditor used due diligence for collection of judgment must be determined on facts of each case and discretion in matter is with trial court, not reviewing court. Code Civ.Proc. § 685.

3. Execution 🔑73

Judgment creditor, to be entitled to an execution more then five years after entry of judgment, is bound only to have used due or reasonable diligence, not extreme diligence, in attempting to enforce judgment during the five year period, and it is not necessary that he institute proceedings supplemental to execution for the examination of judgment debtor. Code Civ.Proc. § 685.

4. Execution 🔑73

On question of whether judgment creditor exercised due diligence to enforce judgment during the five years after its entry so as to be entitled to an execution after such five year period, a determination of whether in fact judgment debtor was possessed of leviable property during the five year period which reasonable diligence would have discovered is material. Code Civ.Proc. § 685.

5. Execution 🔑73

On judgment creditor's motion for an order for execution more than five years after entry of judgment, trial court was entitled to disbelieve judgment debtor's statement as to ownership of automobiles during the five year period in view of impeachment of other testimony in judgment debtor's affidavit by flatly contradictory assertion in affidavit of judgment creditor which, in view of order entered, reviewing court was bound to assume that trial court believed. Code Civ.Proc. § 685.

6. Execution 🔑73

Where judgment creditor was an aged Chinese with a limited knowledge of English and no knowledge of American records, judgment creditor's employment of another person to search such records for him was exercise of required diligence under statute so as to permit execution more than five years after entry of judgment, notwithstanding that his testimony as to such employment was hearsay on question of whether a search was actually made. Code Civ.Proc. § 685.

7. Execution 🔑73

On judgment creditor's motion for an execution more than five years after entry of judgment, judgment debtor's failure to assert under oath that he did own leviable property of record at time of alleged search made on behalf of judgment creditor or otherwise authorized an inference that judgment debtor in fact owned none. Code Civ.Proc. § 685.

8. Execution 🔑73

Where judgment creditor, almost immediately after recovering judgment, employed a person to search records to ascertain whether judgment debtor had any leviable property and there was no showing of existence of any leviable property to be discovered, showing that creditor afterwards continued to pursue inquiries among neighbors and friends of debtor and to search telephone books to try to locate a place of business operated by debtor which, if discovered, might have led to discovery of leviable assets, was evidence of additional diligence which would support order for issuance of execution more than five years after entry of judgment. Code Civ.Proc. § 685.

9. Execution 🔑73

The statute authorizing execution more than five years after entry of judgment will not be construed as penalizing a judgment creditor for inactivity when he in good faith explores available sources of information in attempt to enforce judgment during five year period and statute does not require creditor to continue a vigorous search for something he believes does not exist and which does not in fact exist. Code Civ.Proc. § 685.

10. Execution 🔑73

Where judgment debtor during five year period after entry of judgment did not have any leviable property until he moved from San Francisco to Oakland and evidence authorized a finding that about that time judgment debtor deliberately misled judgment creditor into belief that debtor was a resident of Honolulu, evidence authorized order for issuance of execution more than five years after entry of judgment. Code Civ.Proc. § 685.

Appeal from Superior Court, City and County of San Francisco; Thos. M. Foley, Judge.

Action by Louis Yuan against Arthur Ping and others, wherein plaintiff secured a judgment. From an order directing execution to issue against him more than five years after entry of judgment, defendant Ping appeals.

Order affirmed.

Eugene H. O'Donnell and Ralph Bancroft, both of San Francisco, for appellant.

Ben K. Lerer and F. R. Leuenberger, both of San Francisco, for respondent.

DOOLING, Justice.

Defendant Ping presents this appeal from an order directing execution to issue against him under Code of Civil Procedure section 685. The judgment was entered on May 14, 1932 and the order for execution was made on December 26, 1947.

An amended affidavit made by plaintiff and respondent in support of his motion shows the following: Immediately after rendition of judgment respondent made demand on appellant for payment and appellant stated that he was without means or assets to satisfy the judgment but promised to pay it as soon as he acquired any money. Not satisfied with appellant's statement that he was without assets respondent then employed a person to investigate the financial responsibility of appellant and to examine the records of the San Francisco tax assessor's office (that being the place in which the parties both resided and in which the judgment was secured) to determine whether respondent had any leviable assets. After several weeks this person informed respondent that no assets or property belonging to appellant had been discovered. Upon receiving this report respondent again sought out appellant, reiterated his demand for payment of the judgment and was again told that appellant was without funds or property to satisfy it. Shortly thereafter and still in 1932 appellant vacated his offices in San Francisco without leaving any forwarding address or informing respondent where he was going. Both parties are Chinese and had been residents of San Francisco's Chinatown and after appellant's disappearance respondent made frequent inquiries of residents of Chinatown and acquaintances of respondent as to appellant's whereabouts and whether he had any assets known to them and was informed by many of appellant's acquaintances and disinterested persons that appellant had left San Francisco and gone to China to remain there permanently and that they knew of no property belonging to appellant. Thereafter, and from time to time, respondent would rediscover appellant in San Francisco and renew his demands for the payment of his judgment. Respondent made it a practice to examine the telephone directory of San Francisco and appellant's name did not appear in the directory during the entire period after he vacated his place of business in 1932. Respondent is advanced in years with a limited knowledge of the English language and totally unfamiliar with the procedure of discovering assets of record. Four years before the affidavit was made respondent again met appellant and appellant told him that he had been away for many months at a time in Honolulu where he was maintaining a residence and was employed and that he was returning to Honolulu immediately. Respondent at that time endeavored to discover whether appellant had brought any property or assets to San Francisco but discovered none. Respondent did not know or discover any assets of appellant until a few months past when he was informed by a friend that appellant had a restaurant and certain other assets in Oakland.

Appellant presented an affidavit contradicting respondent's affidavit in many particulars. Appellant claimed in his affidavit to have been openly engaged in various employments in and around San Francisco from the time of entry of the judgment with his name listed in the English and Chinese telephone books for San Francisco at a residence in Chinatown until March 1, 1943 when he removed to Oakland and purchased a grocery with his wife. He admitted being out of San Francisco and in China from January 1933 to July 1934 and again from December 1939 to July 1940. He denied that respondent had ever spoken to him after the entry of the judgment or demanded its payment and that he had ever promised to pay it. He made no showing that at any time before his removal to Oakland he had any leviable property or assets except for the following: "that since 1932 your affiant has been the owner of several automobiles, all of which have been registered in his name with the Department of Motor Vehicles of the State of California."

[1] It is now settled that Code Civ.Proc. sec. 685 authorizes the court "to give a creditor an execution only if, during the five years following entry of judgment, he exercised due diligence in locating and levying upon property owned by the debtor, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time." Butcher v. Brouwer, 21 Cal.2d 354, 358, 132 P.2d 205, 207.

Addressing ourselves to the critical first five years after the entry of judgment we must assume that all conflicts in the evidence were resolved in favor of respondent. So assuming it appears that immediately after entry of judgment respondent personally demanded of appellant that he pay the judgment and on being told that appellant had no money or property with which to do so employed a person to search the records to discover whether appellant owned any leviable property. Upon being informed that no leviable property had been located respondent again personally demanded payment of the judgment by appellant and received the same reply. Shortly following the second demand appellant abandoned his place of business and departed for China where he remained for one year and a half. When appellant returned from China in July of 1934 he did not open another place of business and a search by respondent showed that his name did not appear in the San Francisco telephone books. Respondent inquired of various persons in Chinatown and was informed by them that appellant had removed from San Francisco permanently and was living in China and that they knew of no property or assets belonging to him.

[2-5] "Each case must be judged upon its own facts; the discretion in such matters is with the trial court, not the reviewing court." Helvey v. Castles, 73 Cal.App.2d 667, 674, 167 P.2d 492, 496; John P. Mills Organization v. Shawmut Corp., 29 Cal.2d 863, 865, 179 P.2d 570. The plaintiff is bound only to use due or reasonable diligence, not extreme diligence, Troendle v. Clinch, 74 Cal.App.2d 480, 484, 169 P.2d 55; Long v. Long, 76 Cal.App.2d 716, 721, 173 P.2d 840, nor is it necessary that he institute proceedings supplemental to execution for the examination of the debtor. Terrill v. Shepherd, 57 Cal.App.2d 290, 295, 134 P.2d 491. It is also material to determine whether in fact the judgment debtor was possessed of leviable property during the five year period which reasonable diligence would have discovered. Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 363, 132 P.2d 207. No such showing was made. The reference to automobiles owned by appellant would be true if he owned no automobile until after his removal from San Francisco to Oakland in 1943. The trial court was entitled to so assume in the face of the failure of appellant's affidavit to contain any specific statement of the dates at which the automobiles were owned by him. In fact the trial court might disbelieve the statement entirely in view of the impeachment of other testimony in appellant's affidavit by flatly contradictory assertions in the affidavit of respondent which we must assume that the trial court believed. Young v. Tassop, 47 Cal.App.2d 557, 561-562, 118 P.2d 371; Jaegel v. Jacques, 47 Cal.App.2d 179, 181, 117 P.2d 710; In re Estate of Friedman, 178 Cal. 27, 32, 172 P. 140; Rolland v. Porterfield, 183 Cal. 466, 470, 191 P. 913.

[6, 7] Appellant argues that the respondent's affidavit is insufficient to establish that any search of the records was actually made, being hearsay as to that fact. Southern Cal. Telephone Co. v. Damenstein, 81 Cal.App.2d 216, 221, 183 P.2d 675. This may be conceded, but respondent, an aged Chinese with a limited knowledge of English and none of American records, could hardly make the search himself. By employing another person to do so he exercised such diligence as he could in that regard and it may be inferred from appellant's failure to assert under

oath that he did own any leviable property at that time of record or otherwise that he in fact owned none.

[8] Appellant attempts to nullify the effect of respondent's inquiries from persons in Chinatown as to appellant's whereabouts and ownership of property by quoting from Hatch v. Calkins, 21 Cal.2d 364, 371, 132 P.2d 210, 214, the language indicating that a judgment creditor may not rely on "gossip in the community" or "hearsay statements of the debtor's fellow townsmen rather than make any independent search for property of the debtor." The facts of that case are not parallel. In the Hatch case no attempt to search the records was made and if one had been made leviable property of the debtor would have been discovered. In our case the respondent employed a person almost immediately to make a search and there was no showing of the existence of any leviable property to be discovered. After failing to discover leviable property by the employment of a person to search the records, it was an evidence of additional diligence that respondent afterwards continued to pursue inquiries among neighbors and friends of appellant and to search the telephone books to try to locate a place of business operated by appellant at which, if discovered, leviable assets might have been found.

[9] "The law does not require idle acts and the statute under consideration should not be given a construction which would penalize a creditor for inactivity when he in good faith explores the available sources of information. There is no rule of law which requires a creditor to continue a vigorous search for something he believes does not exist and which does not in fact exist." Helvey v. Castles, supra, 73 Cal.App.2d 667, 674, 167 P.2d 492, 496.

[10] It does not here appear that appellant had any leviable property until he moved to Oakland and the trial court was entitled to find that just about that time appellant deliberately and fraudulently misled respondent into the belief that he was a resident of Honolulu.

The two cases of Bank of America Nat. Trust & Savings Ass'n v. Williams reported respectively in 84 Cal.App.2d 562, 191 P.2d 17 and 89 Cal.App.2d 21, 200 P.2d 151, are not in point. In them the Los Angeles branch of the creditor bank made no effort whatever to locate property of the debtor in the county of his residence.

We cannot hold that the trial court abused its discretion in this case.

Order affirmed.

NOURSE, P. J. and GOODELL, J. concur.

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91 Cal.App.2d 502

HOLMAN et al. v. SANTA CRUZ COUNTY et al.

No. 13955.

District Court of Appeal, First District, Division 1, California.

April 28, 1949.

Rehearing Denied May 28, 1949.

Hearing Denied June 27, 1949.

1. Officers ⚷119

If a judgment is sought against an official in his individual capacity, he should be so designated in the complaint.

2. Judgment ⚷665

"Identity of parties" means not only that parties must be identical in person, but that capacity in which they appear must be same.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Identity of Parties".

3. Judgment ⚷670

A judgment for or against a party in one right or capacity cannot affect him when acting in another right or capacity

4. Pleading ⚷252(2)

An amended complaint supersedes an original complaint and is basis for cause of action though original or amended complaint may tend to clarify final amended complaint.

5. Officers 🔑114

Generally, a public officer is not liable to an action if he falls into error in a case where act to be done is not merely ministerial but is one requiring exercise of judgment and discretion, even though an individual may suffer by his mistake, when he acts in good faith within scope of his authority and without malice, corruption or sinister motives.

6. Municipal corporations 🔑172

Where suit was brought by taxpayers against commissioners of fire district designating them in original and amended supplemental complaints as officials to enjoin them from collecting tax on property situate within fire district and prayer requesting injunction was limited to acts which commissioners could perform in their official capacity, judgment against commissioners as individuals for funds of fire district disbursed for unlawful purposes could not be rendered.

7. Appeal and error 🔑843(3)

Question that evidence was insufficient to support certain finding would not be considered by District Court of Appeal where such point was admitted by answer.

8. Municipal corporations 🔑979

Evidence that facilities provided by dam were insufficient to provide fire protection for more than 10 per cent of area of county fire district established that construction of dam was not for a proper purpose of district, and taxpayers could enjoin fire commissioners from levying a tax on property within district to pay debt incurred in construction of dam which was not authorized by voters of district. Health and Safety Code, §§ 14074, 14077, 14078, 14150, 14154, 14155.

9. Municipal corporations 🔑864(5)

"Estimated income" of fire district was properly determined by considering amount of cash on hand, amount required to meet lawful expenditures of fire district during year, amount of taxes which could be lawfully levied for year and properly excluded figures covering prospective improvements, capital outlay, and reservoir, including interest and legal expenses, in determining whether district fire commissioners had power to authorize building of a dam. Health and Safety Code, § 14150.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Estimated Tax Income".

10. Pleading 🔑276

Filing of a supplemental complaint alleging facts material to a case occurring subsequent to time that issues have been raised by complaint and answer is in discretion of trial court.

11. Equity 🔑39(1)

Equity having once acquired jurisdiction of subject matter of an action will retain it to end that a complete adjudication of all conflicting rights may be had and a final determination of all matters in controversy may be accomplished.

12. Judgment 🔑210

Where judgment provided that trial court would retain full jurisdiction to make any and all orders and decrees from time to time as would be necessary to effectuate its decision and judgment therein, decree enjoining county fire district commissioners from collecting a certain tax on property within fire district was not prematurely rendered on ground that at time judgment was signed supplemental complaint to enjoin calling of a special election to validate acts of fire commissioners subsequent to trial was neither joined nor tried. Code Civ.Proc. § 464.

13. Municipal corporations 🔑994

Where it is proposed to hold an election for submission of a measure to popular vote and that measure will be wholly void even if adopted, courts may, at instance of resident taxpayer, enjoin holding of election on ground that it will be a useless expenditure and waste of public funds.

14. Municipal corporations 🔑994

Where plan of building dam and raising funds therefor adopted by fire district commissioners was illegal, election within district in an attempt to approve the illegal and inoperative project would be enjoined at instance of resident taxpayers.

15. Municipal corporations 🔑985

Funds originating under power to levy an annual maintenance tax for fire district could not be used to pay for dam constructed by county fire district commissioners. Health and Safety Code, §§ 14152, 14153.

16. Municipal corporations 🔑979

Evidence was insufficient to show that taxpayers who filed action to enjoin county fire district commissioners from collecting a tax levied on property within fire district knew that commissioners had erected a dam until its completion and that they should have known of illegal procedure used by fire commissioners in financing project, and taxpayers were not estopped from maintaining action to enjoin collection of taxes levied on property within fire district to pay for indebtedness incurred in construction of dam. Health and Safety Code, §§ 14150, 14152–14156.

17. Municipal corporations 🔑858, 956(1)

General powers conferred by statutes on county fire district commissioners for purposes of financing construction of a dam or acquiring new lands are subject to specific limitations of health and safety code provisions on finance and taxation. Health and Safety Code, §§ 14073, 14074, 14077–14079, 14150, 14154–14156.

18. Municipal corporations 🔑961

Term "maintenance" within statute authorizing board of supervisors of fire district to levy tax on all taxable property within fire district sufficient to defray cost of maintenance of district means repairing or keeping in good condition of articles or things that exist including salaries and costs of operation, but not creation of something new and hence tax to pay off debt incurred in constructing a dam could not be imposed. Health and Safety Code, §§ 14152, 14153.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Maintenance".

19. Municipal corporations 🔑956(4)

Where other statutes in section relating to finance and taxation of fire protection districts use word "shall," term "may" in statute relating to voting of special tax for purpose of acquiring land or erecting buildings in fire district is not permissive but mandatory so that money used for purposes other than maintenance of fire district must be obtained through means of special tax. Health and Safety Code, §§ 14154, 14155, 14156.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "May".

20. Municipal corporations 🔑864(5)

Under statute limiting a district fire board's power to borrow, to an indebtedness in anticipation of revenue for current year in which indebtedness occurred or of ensuing year thereafter, use of "or" assumes an alternative and means one of two courses must be adopted so that a loan must be obtained under provisions of the statute either in anticipation of indebtedness for current year or of ensuing year but not under both plans. Health and Safety Code, § 14150.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Or".

21. Municipal corporations 🔑863

Personal advance of money made by district fire commissioner to fire district for purpose of constructing a dam which exceeded fire district board's power to borrow in anticipation of revenue was ultra vires and could not be recovered. Health and Safety Code, § 14150.

22. Municipal corporations 🔑863

Indebtedness incurred by county fire district commissioners for lawful purpose of constructing a dam in fire district which was in excess of statutory limitation was invalid and not binding upon district. Health and Safety Code, §§ 14074, 14077, 14078, 14150, 14152–14156.

23. Parties 🔑18, 29

Requirement that indispensable parties must appear at court proceedings is mandatory.

24. Parties 🔑18, 29, 51(1)

To reach a complete determination of a case, necessary parties must be present and court may order proper parties to be brought in if expedient for a complete determination of controversy.

25. Municipal corporations ⚷979

Where issue was whether commissioners of fire district had right to construct a dam, bank which had made a loan to fire district board for construction of dam was not an "indispensable party" in action by taxpayers to enjoin commissioners from collecting taxes on property within district to pay debt incurred in construction of dam, but court could not enter a decree invalidating promissory note to bank of district commissioners in their official capacity as void without joining bank as a party defendant.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Indispensable Party".

◆

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Suit by Everett A. Holman, Rowland K. Hill, Thomas Hill and A. R. McEwan against the County of Santa Cruz, a political subdivision of the State of California, and J. E. Helms, County Treasurer of the City of Santa Cruz, Ben Lomond Fire District, a fire district of the State of California, and Earl L. Lyon, Frank R. Pimentel and F. A. Whitaker, Commissioners of Ben Lomond Fire District, to enjoin collection of a tax on property situate within defendant fire district. From an order setting aside and vacating portion of judgment, plaintiffs appeal. Defendant fire district and its commissioners appeal from a judgment and decree entered for plaintiff and from certain orders granting or denying motions and reference to certain injunctive proceedings and from order denying defendants' motion for new trial.

Modified and affirmed.

Wyckoff, Gardner, Parker & Boyle, of Watsonville, for plaintiffs-appellants-respondents.

Bohnett, Hill, Cottrell & Bohnett, of San Jose, and Jos. A. Brown and Harry Gottesfeld, both of San Francisco, for appellants-respondents.

WARD, Justice.

Defendants Ben Lomond Fire District and Earl L. Lyon, Frank R. Pimentel, and F. A. Whitaker, commissioners of Ben Lomond Fire District, filed on October 3, 1947 a notice of appeal from a judgment and decree entered on July 28, 1947 and from certain orders granting or denying motions in reference to certain injunctive proceedings and from the order denying defendants' motion for a new trial made on September 10, 1947. The latter order is not appealable and the appeal therefrom is dismissed.

On January 3, 1948 the same defendants appealed from an amended judgment and decree dated September 10, 1947 and also from an order granting a temporary injunction made on April 17, 1947. The notice dated January 3, 1948 also refers to certain orders made subsequent to the entry of the original judgment on September 10, 1947. The latter orders are similar to the second portion of the matters noted in the original appeal.

On October 8, 1947 the records show an appeal filed by plaintiffs from the "Order Setting Aside And Vacating Portion Of Judgment" dated September 10, 1947. Thereafter, on December 23, 1947, plaintiffs filed a second notice of appeal from the "Amended Judgment And Decree" dated September 10, 1947.

On November 8, 1946 plaintiffs, as citizens of a certain fire district of Santa Cruz County, filed a complaint naming as defendants the County of Santa Cruz, a political subdivision of the State of California, J. F. Helms, County Treasurer of the County of Santa Cruz, Earl L. Lyon, Frank R. Pimentel and F. A. Whitaker, Commissioners of Ben Lomond Fire District, and Ben Lomond Fire District, a fire district of the State of California. It was prayed that defendants be enjoined from collecting a tax upon property situate in Ben Lomond Fire District (hereafter called district, or fire district) on the ground that the proceeds would be used "for illegal and unauthorized purposes," and accordingly defendants were restrained from "paying out or disbursing the proceeds of the collection of said tax, or any part thereof, until the further order of this Court."

One week later plaintiffs filed an amended complaint, praying for injunctive relief.

Paragraph one of the amended complaint alleges that the defendants Lyon, Pimentel and Whitaker "at all times herein mentioned were and now are all of the duly elected, qualified and acting commissioners of defendant Ben Lomond Fire District. Defendant Ben Lomond Fire District * * * at all times herein mentioned was and now is a fire district of and organized under the laws of the State of California." The complaint alleged that, "On or about the 1st day of August, 1946, defendant Commissioners in writing reported to the Board of Supervisors of said defendant County of Santa Cruz its budget for and an estimate of the amount of the financial needs of said defendant District for the fiscal year commencing July 1, 1946 and ending June 30, 1947, in words and figures as follows: Salaries and Wages, $1600.00; Maintenance and Operation, $2800.00; and Capital Outlay, $16700.00.

"Thereafter and on or about the 30th day of August, 1946, said Board of Supervisors of said County of Santa Cruz, at the request of said Commissioners, levied * * * a tax upon all the taxable property within said District at the rate of Three Dollars and 96/100 ($3.96) per $100.00 assessed valuation thereof; * * * the action of said Commissioners in requesting the levy and assessment of said tax was unlawful, illegal and not authorized by law, by reason of the following:

"1. Said Commissioners on behalf of said District have purported to borrow, and to incur an indebtedness in the sum * * * of $39,000., within the two years last past, the amount of which indebtedness exceeded the total amount of the estimated tax income of said District for the year in which said indebtedness was purported to have been incurred and also exceeded the total amount of the estimated tax income of said District for the ensuing year; and

"2. Said Commissioners propose and intend to use and disburse the funds of said District now on hand and the proceeds of said tax, or a portion thereof, so levied and assessed as aforesaid to pay and discharge said alleged indebtedness; and

"3. Said Commissioners have acquired certain land and have constructed thereon, within two years last past, a swimming pool for recreation purposes in the Ben Lomond district of said District; and

"4. Plaintiffs are informed and believe and therefore allege that said Commissioners propose and intend to use and disburse a portion of the proceeds of said tax to pay for said land or to pay for the construction of said swimming pool; and

"5. The construction of a swimming pool by said District was and is not a proper purpose of said District; and

"6. No election by the voters of said District has been held, and neither said Commissioners nor said District have ever been authorized by any such election or otherwise; (a) to incur said indebtedness or (b) to pay said indebtedness or (c) to acquire said land or (d) to construct said swimming pool or (e) to purchase said land or any other land (f) to pay for said swimming pool; and

"7. Plaintiffs are informed and believe and therefore allege that said Commissioners propose and intend to acquire other land and to purchase fire apparatus and equipment and to pay for the same with the funds of said District, all without submitting such proposals to the voters of said District."

A general and special demurrer was interposed and overruled.

The answer sets forth, "Come Now the defendants Ben Lomond Fire District * * * and Earl L. Lyon, Frank R. Pimentel, and F. A. Whitaker (The District and said Earl L. Lyon, Frank R. Pimentel, and F. A. Whitaker being hereinafter referred to as 'the answering defendants'), and by way of answer to the Amended Complaint on file in the above-entitled proceeding, admit, deny and allege as follows:" Thereupon the defendants admit the allegations of paragraph one of the amended complaint which refers to the three commissioners in their official and not in their individual capacity. The answer alleged that the water reservoir needed improvements as expressed in a resolution passed by the commissioners. The district commissioners agreed to buy real property for $300. The answer alleged, "that on September 19, 1945 Granite Construction Company of Watsonville, California, by a written instrument offered to the District to make said improvements and repairs on a cost plus 15% basis; that on September 22, 1945 the District by a written instrument accepted said offer, promising to pay said company the cost plus 15% of said improvements and repairs; that the Board of Fire Commissioners of the District by resolutions duly adopted and entered upon its minutes, ordered said improvements and repairs to be made and resolved to purchase said real property; that said improvements and repairs were completed in June, 1946; that the entire cost thereof was $38,195.93, including the purchase price of $300 for said real property;

"(c) That at the time when the aforementioned contract with Granite Construction Company was made, the District had no indebtedness other than that created by said contract, and had funds on hand amounting to $6,349.13; that the entire cost of said improvements and repairs, including the purchase price of said real property, was paid on or prior to July 1, 1946, excepting only a balance of $2,895.93; that said balance was paid on or prior to August 30, 1946; that on July 29, 1946 defendant Commissioners on behalf of the District borrowed the amount of $20,000 and on September 2, 1946 the additional amount of $7,895.93, and no other amount or amounts of money whatsoever at the times mentioned or at any other time since July 1, 1945; that the District borrowed the aforementioned amounts by issuing therefor in each instance its promissory note promising to repay the amount borrowed on or before June 30, 1948, with interest at the rate of 4% per annum, payable quarterly; that the aggregate amount of all moneys borrowed by defendant Commissioners on behalf of the District since July 1, 1945 does not exceed $27,895.93; and that the aggregate indebtedness incurred by defendant Commissioners on behalf of the District, taking into account the funds on hand at the time when such indebtedness was incurred as aforesaid, at no time exceeded $31,846.80."

Excepting a small balance, "the entire cost of improvements and repairs, including the purchase price of the property" was paid prior to obtaining the loans in the sums of $20,000 and $7,895.93 respectively as appears from the above quoted answer.

As a separate defense the district commissioners alleged laches and estoppel.

On November 8, 1946, an order was filed directing defendants to show cause why they should not be enjoined from collecting the tax described in plaintiffs' complaint, and restraining them from "paying out or disbursing the proceeds of the collection of said tax, or any part thereof, until the further order of this Court." It was stipulated that said preliminary injunction remain in full force to November 19, 1946. On April 17, 1947, an "Order Granting Preliminary Injunction" was filed.

The issues joined by the amended complaint and the answer of "Ben Lomond Fire District and Earl L. Lyon, Frank R. Pimentel and F. A. Whitaker, Commissioners of Ben Lomond Fire District" were subsequently tried. Evidence was introduced to the effect that the commissioners had adopted a resolution "to construct a dam in the San Lorenzo River and to acquire a strip of land on the south bank of the river." There is evidence that a copy of the resolution is in the files and signed by commissioner F. A. Whitaker. On September 19, 1945 an agreement to construct the dam was executed and work was started. In December, 1945 and in March, 1946 the commissioners paid $4,000 and $6,000 respectively from the funds of the district to the Granite Company. Construction of the dam was completed in June, 1946. By that time there had been due the Granite Construction Company $27,895.93 which commissioner Lyon had personally advanced from his own funds with the exception of $2,895.93 which subsequently Mr. Lyon also paid.

Evidence of the fiscal history of the district, largely produced by defendants, was presented by plaintiffs. The purpose of such evidence was to show that the indebtedness of $27,895.93 was illegal. It was stipulated that the district's cash book showed that the balance on June 30, 1944, was $3,065.41; on June 30, 1945, was $7,797.46, and on June 30, 1946, was $3,450.75. It was stipulated that at the time of trial $22,324.52 was on hand.

Maps of the area and diagrams of the dam were introduced as exhibits. There is some evidence with respect to leveling and filling and the erection of a retaining wall indicating that the project in addition to the retention of water for fire purposes had certain recreational aspects. However, the main question is whether the district commissioners had any power to authorize the building of the dam in view of the facts and circumstances presented. Commissioner Lyon was the only witness called in defense. He testified to the method of combating fires and in particular the inadequacy of water to fight fires in certain parts of the district.

The minutes of the district commissioners of October 15, 1945 show, "Commissioners met and discussed a new dam and pump station. Fire Department and community desire for the improvement weighed and negotiations discussed for Granite Construction Company of Watsonville to start work on time and material basis for dam and wings, estimated cost $6200. Work ordered started by Commissioners. Earl Lyon, Secretary." The record shows that prior to the passage of the resolution the Granite Construction Company had entered into a contract with the district commissioners on September 3, 1945. However, the minutes were frequently prepared prior to a meeting and sometimes subsequent thereto. An inference could reasonably be drawn from the estimated figure appearing in the resolution that the work then contemplated could not be performed for the amount stated.

The commissioners of the district negotiated a loan with the Bank of America for $20,000 after they had passed a resolution to that effect. Mr. William T. Rice, vice president and manager of the Santa Cruz branch of the Bank of America, called as a witness on behalf of plaintiffs, testified relative to the details of the transaction. It appears that the commissioners purported to pledge the credit of the district and signed a separately executed document personally guaranteeing the payment of the $20,000 obtained from the bank. Pursuant to the transaction "the bank then disbursed $20,000 to Earl Lyon". Later another promissory note to Mr. Lyon's order was executed for $7,895.93 bearing the signatures of Lyon, Pimentel and Whitaker as district commissioners.

Prior to the submission of the evidence plaintiffs were given permission to file an amended complaint to conform to the proof.

The court found the material allegations in the first count of the second amended complaint to be true with certain exceptions. The court found that Lyon personally paid $27,895.93 of the district's indebtedness of $38,195.93; that Lyon, Pimentel and Whitaker, purporting to act as commissioners of the district, executed a promissory note for $20,000 to the Bank of America, so as to reimburse Lyon $20,000, and that Lyon, Pimentel and Whitaker, purporting to act as commissioners of the district, executed a promissory note to Lyon individually for $7,895.93, purporting to bear interest at the rate of 4% per annum from May 21, 1946. The court also found that "The estimated tax income of said Fire District for the fiscal year commencing July 1, 1945, and ended June 30, 1946, was nil by reason of the following: the amount reasonably required for the maintenance of said Fire District during said fiscal year was the sum of $3900.00; the amount of cash on hand in the fund of said Fire District on June 30, 1945, was the sum of $7,797.46.

"The estimated tax income of said Fire District for the fiscal year commencing July 1, 1946, and ended June 30, 1947, was nil by reason of the following: the amount reasonably required for the maintenance of said Fire District during said fiscal year was the sum of $4400.00; the amount of cash on hand in the fund of said Fire District on June 30, 1946, was the sum of $3,450.76 in the hands of the County Treasurer of said County of Santa Cruz and the sum of $10,000.00 illegally disbursed by said defendant Commissioners.

"The estimated tax income of said Fire District for the fiscal year commencing July 1, 1947, and ending June 30, 1948, is nil by reason of the following: the amount reasonably required for the maintenance of said Fire District during said fiscal year is the sum of $6090.00; the amount of cash on hand in the fund of said Fire District on June 26th, 1947, was the sum of $22,324.52."

The court concluded that plaintiffs were entitled to an injunction permanently restraining defendants and their agents and successors from "Disbursing any of the funds of said Fire District now in or to come into the County Treasury of said defendant County of Santa Cruz, for the use and account of said Fire District, except in payment of salaries or wages of employees of said Fire District or in payment of charges for maintenance or repair of the existing facilities of said Fire District." The defendants were enjoined from paying any of the money from the district to the bank in payment of the $20,000 promissory note or to defendant Lyon in payment of the $7,895.93 promissory note.

The court concluded that the levy of the tax of $3.96 per $100 assessed valuation for the year 1946–1947 for the use of the fire district was illegal and void and that the indebtedness incurred in the erection of the dam was illegal and that the district is entitled to judgment against Lyon, Pimentel and Whitaker "individually" for $10,000. The original judgment and decree is in accord with the findings and conclusions of law.

A third supplemental complaint was filed alleging that the order temporarily restraining an election to approve a special tax of $39,000 set forth in the second supplemental complaint had been dissolved and prayed that defendants be enjoined from holding such election or any election to levy any tax with which to pay the notes to the bank and to Lyon. The relief was granted.

Demurrers and motions to strike the whole or part of the various amended and supplemental complaints were filed. The demurrers were overruled and the motions denied. In some instances answers appear to have been filed subsequent to a hearing. However, the order to the effect that the district is entitled to judgment against Lyon, Pimentel and Whitaker individually for $10,000 was stricken from the judgment and decree.

Plaintiffs' appeal may be disposed of preliminarily. Plaintiffs appeal from an "Order Setting Aside and Vacating Portion of Judgment" and from an "Amended Judgment and Decree" dated September 26, 1947. Each order and judgment involves the same question, which may be stated as follows: Assuming that the transaction of payment of $10,000 from the funds of the district was expended without official authority may the commissioners be held personally liable? This item should not be confused with the money advanced by Commissioner Lyon. The amount was paid in two installments from the district "maintenance" funds.

[1–4] A taxpayer, by civil action in certain cases, may compel a public official to personally repay to the public treasury public funds expended without authority. Osburn v. Stone, 170 Cal. 480, 150 P. 367, quoted with approval in Mines v. Del Valle, 201 Cal. 273, 257 P. 530; see also Mahoney v. San Francisco, 201 Cal. 248, 257 P. 49. However, if a judgment is sought against an official in his individual capacity he should be so designated in the complaint. "Identity of parties means not only that they must be identical in person, but that the capacity in which they appear must be the same. A judgment for or against a party in one right or capacity cannot affect him when acting in another right or capacity." 15 Cal.Jur., sec. 218, p. 188. In the Osborne and other cases cited by plaintiffs this precise point was not raised. An amended complaint supersedes an original complaint and is the basis for the cause of action, Morehead v. Turner, 41 Cal.App.2d 414, 106 P.2d 969, though the original or prior amended complaint may tend to clarify the final amended complaint. In the present case, until the filing of the decision and judgment no attempt was made by plaintiffs to definitely charge the three commissioners individually. In the original decision the trial court included as a conclusion of law that the district was entitled to a judgment with interest against the commissioners individually on $4,000 from December 5, 1945, and on $6,000 from March 6, 1946. The judgment followed this conclusion of law.

The commissioners were designated in the original and amended and supplemental complaints as officials. The prayer requesting an injunction is limited to acts which the commissioners could perform as commissioners. A fair sample of a paragraph from the prayer of the amended complaint is as follows: "Adjudging that said defendant Commissioners are indebted to said defendant District in such sum as they may have disbursed the funds of said defendant District for the unlawful purposes aforesaid."

[5] In great measure plaintiffs rely uppon Mock v. City of Santa Rosa, 126 Cal. 330, 58 P. 826. A prayer attached to the complaint indicates the theory upon which the action is based, but when appropriate or general relief is requested assistance may be awarded which is consistent with the special prayer. 30 A.L.R. 1176. In the Mock case judgment was given individually though the complaint alleged the facts against most of the defendants as official acts. In great part the justification for such action was the prayer for general relief. A fair reading of the Mock case indicates fraud in the commission of ministerial official acts and hence there was justification in holding the officials personally liable. The evidence in the present case does not indicate that defendants possessed an intent to defraud the district. Their mistake appears to be that they used poor judgment. In People v. Standard Accident Ins. Co., 42 Cal.App.2d 409, at page 411, 108 P.2d 923, 925, the court said, "Generally, a public officer is not liable to an action if he falls into error, in a case where the act to be done is not merely a ministerial one but is one in relation to which it is his duty to exercise judgment and discretion, even though an individual may suffer by his mistake, when he acts in good faith, within the scope of his authority and without malice, corruption or sinister motives. When the law trusts to the sound judgment and discretion of an officer, public policy is said to demand that he be protected from the consequences of erroneous judgment. 21 Cal.Jur. 911."

[6] The trial court was justified in making its order vacating a portion of the original judgment which gave personal judgment against the defendants. Plaintiffs appeal is without merit. The action of the trial court in this respect must be affirmed.

On defendants' appeal it is contended that the evidence is insufficient to support certain findings of fact.

[7] The complaint alleged and the court so found that Commissioner Whitaker was at all times covering the periods mentioned in the complaint a "duly elected, qualified and acting commissioner" of the designated fire district. The record does not disclose that Commissioner Whitaker ever took the stand to deny such allegation though it does appear in an unsigned deposition of his that he became a commissioner in April, 1946. However, Whitaker wrote the minutes of the commissioners' meeting of September, 1945, according to Commissioner Lyon. It was on September 3, 1945, that the resolution was passed "to construct a dam in the San Lorenzo River and to acquire a strip of land on the south bank of the river". The amended complaint alleged that, "Defendants Earl L. Lyon, Frank R. Pimentel and F. A. Whitaker * * * at all times herein mentioned were and now are all of the duly elected, qualified and acting commissioners of defendant Ben Lomond Fire District." The answer admitted the allegations of the quoted paragraph. The point need not be further considered.

[8] The finding that the dam "produced a quantity of water far and greatly in excess of the proper or necessary needs of said fire district" is criticised as lacking support in the evidence, as is the finding "that said excessive construction was required only for recreational purposes, to wit: to provide a swimming pool" and the finding "that the fire protection facilities provided and afforded by said dam were not sufficient to provide fire protection for more than ten per cent (10%) of the area of said Fire District." Commissioner Lyon described the adequacy of the water supply as follows: "The northern part of the district, along highway number 9, is fairly adequate, in which they have a six inch main under heavy pressure from Boulder Creek. That stops at Marshall Creek. From there on the supply is very inadequate for fire fighting purposes; from Ben Lomond, where there is a six inch main, you cannot maintain one fire fighting stream."

Plaintiffs also rely upon Lyon's testimony to support their contention that the trial court's findings are correct, because "In the northern part of the District from Boulder Creek to Marshall Creek there is a 6-inch main under heavy pressure. There is adequate water in the San Lorenzo River available wherever there is access for portable pumps. In Ben Lomond there is a 6-inch main with hydrants producing 205 gallons per minute." As to the last mentioned fact, Lyon testified that such a stream "is not a standard stream—250 a minute." The evidence supports the finding that the fire protection facilities provided by the dam "were not sufficient to provide fire protection for more than" 10% of the area of the fire district, since the abundance of water provided by the dam was primarily available only to the area around Ben Lomond.

[9] Defendants also criticize the findings relative to the estimated income of the fire district for the fiscal years 1945–1946 and 1946–1947. It appears that the court took the figures from the respective budgets relating to maintenance, operation and repairs but omitted the figures covering prospective improvements, capital outlay and reservoir, including interests and attorney and other legal expenses. The court found that the estimated income for each period was nil. The trial court conclusion is in accord with plaintiffs' view of the estimate of tax income, the factors of which are set forth in plaintiffs' brief. This court adopts that definition as appropriate to the facts of this case and in accordance with the provisions of Health and Safety Code section 14150. The factors are enumerated as "the amount of cash on hand; the amount required to meet lawful expenditures during the year; and the amount of taxes which can be lawfully levied for that year. A debt limitation cannot be ballooned by fanciful estimates or by items for which a tax cannot be lawfully levied." That the definition is appropriate will appear from the next subject.

Defendants urge that the judgment was prematurely given in that at the time the original judgment was signed the second supplemental complaint to the second amended complaint was on file and the issues raised therein were neither joined nor tried. Defendants filed their answer to the second supplemental complaint several months after the decision on the original hearing. That decision provided, under the heading of "Addendum to Judgment and Decree": "It Is Further Ordered, Adjudged And Decreed that this Court shall retain full jurisdiction and control of this cause, to make any and all orders and decrees from time to time as shall be necessary to effectuate its decision and judgment herein and as may be necessary to administer further equity between the parties and that this judgment and decree shall be deemed interlocutory."

[10–12] The pleading referred to by defendant is a supplemental complaint in reference to the calling of a special election subsequent to the trial. The filing of a supplemental complaint alleging facts material to the case occurring subsequent to the time that issues have been raised by complaint and answer is a matter in the discretion of the court. In Union Oil Co. v. Reconstruction Co., 20 Cal.App.2d 170, at page 183, 66 P.2d 1215, 1221, the court stated, "However, it is a familiar principle of equitable procedure that equity having once acquired jurisdiction of the subject matter of an action will retain it to the end that a complete adjudication of all conflicting rights may be had and a final determination of all matters in controversy may be accomplished. The damage suffered by respondent occurred after the suit for injunctive relief had been filed and was a matter which grew out of the situation portrayed by the allegations of respondent's complaint. It was therefore purely incidental to the relief which respondent originally sought by its equitable action and a court of equity having properly acquired jurisdiction was justified in retaining it until all issues in the action should be determined." Code of Civ.Proc. sec. 464; Supreme Grand Lodge, Etc. v. Smith, 7 Cal.2d 510, 61 P.2d 449. The record does not indicate that defendants were prejudiced on issues raised in the supplemental complaints and the answers thereto by the entry of the original decision prior to filing answers to the supplemental complaint.

A supplementary writ of injunction was signed and served on the district commissioners. It enjoined the several defendants as commissioners from disbursing any funds for the calling of an election for the purpose of authorizing a special tax to collect $39,000 for the purpose of paying for the dam. The writ was specifically directed to "County of Santa Cruz" and "Sidney Carter, County Treasurer of said county". The election was called by the commissioners, but the cost of the election, if held, would be disbursed by the county treasurer.

[13, 14] The purpose of the election was to validate the illegal acts of the commissioners. Political rights would not be curtailed and injunction was the only adequate remedy to protect plaintiffs. Johnston v. Board of Supervisors, 31 Cal.2d 66, 187 P.2d 686. The plan of building the dam and raising funds therefor adopted by the commissioners was illegal. An election would simply approve an illegal and inoperative project. "Where it is proposed to hold an election for the submission of a measure to the popular vote, and that measure will be wholly void and inoperative even if adopted by the people, the courts may, at the instance of a resident taxpayer, enjoin the holding of the election upon the ground that it will be a useless expenditure and waste of public funds (Code Civ.Proc. sec. 526a)." Harnett v. County of Sacramento, 195 Cal. 676, 683, 235 P. 445.

[15] It is contended that the judgment and decree is in excess of the trial court's jurisdiction. The vital question in this case was what funds, if any, might be used in the construction of the dam. Funds originating under the power to levy an annual maintenance tax may be used for such specific purpose and none other. The attempt to use such funds to pay for the dam or to buy lands was illegal.

[16] Defendants emphasize that the fire district has received the benefit of the erection of the dam; that the construction "work was done openly and that every tax payer in the district could, and undoubtedly did, see the work in progress"; that no protest was registered, and that plaintiffs are estopped from maintaining this action. There is no proof that the individual citizens who filed this action knew of the erection of the dam until its completion and no proof that the citizens whom they represent should have known of the illegal procedure adopted. There is no proof and hence no merit in the allegations of the answer that plaintiffs are estopped from proceeding in this action.

Defendants claim that the trial court misinterpreted certain statutes in rendering its judgment. Defendants claim that they are entirely governed and controlled by sections of the Health and Safety Code, based on Statutes, 1881, Ch. 36, sec. 3, which provide for the general powers and duties of district boards. The sections are found in Div. 12, Pt. 3, art. 4 of the Health and Safety Code and read as follows:

Sec. 14073, "The district board shall have perpetual succession." Sec. 14074, "It may make all necessary or convenient contracts with persons engaged in the supply and distribution of water, for a supply of water, and for attaching hydrants or fire plugs to their pipes, conduits, or cisterns." Sec. 14077, "It may take by grant, purchase, gift, devise, or lease, and hold, use, enjoy, and lease, or dispose of real and personal property of every kind, necessary for the exercise of the powers of the district." Sec. 14078, "It may construct or otherwise acquire suitable firehouses and other buildings or structures suitable for housing the equipment, apparatus and supplies of the district, or for carrying on its business and affairs. All property shall be taken and held in the name of the district." Sec. 14079, "The district board may sell, or otherwise dispose of real and personal property acquired by the district where it has ceased to be suitable for the uses of the district."

[17] The real question in this respect deals with the nature of the "power" to construct the dam. The general powers conferred by the sections relied upon by

defendants are subject to the specific limitations of the Health and Safety Code provisions on finance and taxation found in the same division of the same code and designated as article 6. The appropriate sections provide: Sec. 14150, "The district board may borrow money and incur indebtedness in anticipation of the revenue for the current year in which the indebtedness is incurred or of the ensuing year thereafter. Such indebtedness shall not exceed the total amount of the estimated tax income for either the current year or the ensuing year." Sec. 14154, "A special tax may be levied upon the property within the district if authorized by a majority vote of the voters voting on the proposition for a special tax at the annual election or at a special election called by the district board for the purpose." Sec. 14155, "Special taxes are in addition to the annual maintenance tax." Sec. 14156, "A special tax may be voted for the purpose of acquiring land or erecting buildings or purchasing apparatus and equipment or buildings or for paying indebtedness of the district previously incurred."

As originally enacted the board of fire commissioners had to submit to the electors residing within the fire limits "the question whether a tax shall be levied and raised for the purpose of establishing and maintaining a fire department" and "the propriety of levying and raising an additional tax for the keeping in repair the apparatus of said fire department, and maintaining the same in good order and condition." Stats.1881, Ch. 36, secs. 3(3) and 18. In 1919 the following was added: "Sec. 3½. The board of fire commissioners * * * are further authorized and empowered, in their discretion, to purchase or otherwise acquire land and to erect thereon a firehouse for purposes of housing the fire equipment and fire apparatus, or to purchase or otherwise acquire land already (thus) improved * * * and to pay for said land, improved or unimproved, as the case may be out of the annual tax provided for under section nine of this act, or by special tax to be voted by the voters within the fire limits". Stats.1919, Ch. 9, p. 8. As to the sale of land, it was provided "that if the same shall have been originally acquired pursuant to the vote of the electors within the fire limits * * * then the same shall not be sold excepting by like vote", otherwise the board had power to sell. Stats.1919, Ch. 9, p. 9.

[18] Defendants disagree with the trial court's interpretation of the word "maintenance". It is contended that the term as used by the court is limited to the repair or upkeep of existing facilities, but that it actually is broad enough to include the establishment and equipping of the new dam. The word as used in sections 14152 and 14153 means the repairing or keeping in good condition the articles or things that exist, including salaries and costs of operation and not the creation of something new. In Whitmore v. Brown, 207 Cal. 473, at page 483–484, 279 P. 447 at pages 451 the court stated, "The charter allows the levy of the tax for the 'support' of public schools 'for the ensuing year.' The words 'support' and 'maintenance' are convertible terms in the scheme of the Political Code respecting public schools. For example, referring to high schools 'maintaining the high school' is provided for in section 1756, and in sections 1760 and 1761 the word 'support' is found used to convey the same meaning. Again, in section 1840 we have the word 'maintenance' used in the same connection. We also find the significant fact that purchasing lots, building buildings, making permanent improvements and such like outlay is not included under the head of 'maintenance' or 'support'. See Pol.Code, §§ 1755, 1830, 1838 and 1840.

"It is also to be noted that taxation for building purposes comes under a different limit from taxation for support or maintenance. See Pol.Code, §§ 1755, 1838, 1839."

[19] Defendants urge that Health and Safety Code section 14156 is permissive, since the word "may" is used. All of the sections must be read to eliminate confusion and create harmony in interpretation. In sections 14152 and 14153 the word "shall" is used. Those sections, when read with others, indicate that money for pur-

poses other than maintenance must be obtained through the means of a special tax. See secs. 14154, 14155 and 14156.

The subject of "borrowing" money is touched upon at this point only in relation to the "advances" made by Commissioner Lyon, which may be considered a loan, and that he was acting in his individual capacity as to such "advances" of over $27,000 to the Granite Construction Company. The evidence shows that it was his personal money and that the personal advance by Lyon was a separate transaction from the official payment of the district's funds of $10,000 to the Granite Company and distinct from the transaction, if any, with the Bank of America. Upon the evidence presented, finding II, that Lyon used his personal funds to pay Granite, must be upheld.

[20, 21] The district board's power to borrow is limited to an indebtedness "in anticipation of the revenue for the current year in which the indebtedness is incurred or of the ensuing year thereafter." Sec. 14150. The use of the conjunction "or" assumes an alternative. It is often used "either, or" and means that one of two courses must be adopted. Accordingly, a loan must be made under the provisions of section 14150 either in anticipation of an indebtedness for the current year or of the ensuing year, but not under both plans. The loan, if there was a loan, from Lyon to the district is ultra vires. The "advance" was not made in anticipation of revenue for the current year or of the ensuing year. Bottoms v. Madera Irr. Dist., 74 Cal.App. 681, 242 P. 100; Selby v. Oakdale Irr. Dist., 140 Cal. App. 171, 35 P.2d 125.

[22] What has been said on the last two points, "maintenance" and "borrowing", is applicable in answer to defendants' statement that, "An indebtedness incurred by the Commissioners for lawful purposes even though in excess of the statutory limitation is valid and binding upon the district to the full amount permitted by the statute and the trial Court erred in holding that such an indebtedness is invalid in its entirety." The position of defendants on this point ignores the fact that the estimated tax income for each year was nil. In brief, the argument is without merit as applied to the facts of this case in view of the finding by the trial court based upon substantial evidence and proper statutory construction that the district commissioners acted without authority in building the dam.

Defendants' first and last contention is that the court's decree that the execution of a promissory note for the principal sum of $20,000 to the Bank of America is void on the ground that the Bank of America was not a party to this action.

The court found that, "On September 3, 1946, said defendants Lyon, Pimentel and Whitaker, purporting to act as Commissioners of, and on behalf of, said Fire District, executed a promissory note, dated September 3, 1946, to said defendant Lyon individually for the principal sum of $7,895.93 for the purpose of reimbursing said Lyon for the balance, to wit: the sum of $7,895.93 of said sum of $27,895.93 so paid by him on account of said indebtedness of $38,195.93 herein referred to; said promissory note purported to bear interest at the rate of 4% per annum from May 21st, 1946." The court decreed that such "Promissory note, dated Sept. 3, 1946, to Earl L. Lyon, for the principal sum of $7,895.93, purportedly by and on behalf of defendant Ben Lomond Fire District, was illegal and is void and is hereby invalidated." In view of all that has been said before, this court is unable to interfere with that part of the judgment. If there is an obligation between Lyon and his fellow commissioners individually, such question is not before this court, and anything said herein should not be construed as an expression of opinion on that particular subject. This question should not be confused with the question on plaintiffs' appeal. There it was held that the commissioners were not sued individually and not liable individually. In the present question, the acts of the commissioners, insofar as they acted officially, were illegal.

[23] The claim is made that the Bank of America was an indispensable party to this action. The history of this subject is interesting. The complaint or the amendment thereto does not refer by name to the Bank of America. The first pleading to

mention the bank is the answer to the amended complaint. All of the evidence was introduced by plaintiffs except some defense testimony by Commissioner Lyon. Plaintiffs presented the evidence of the Bank of America loan, but it is plain that such evidence was introduced to give a complete picture of all of the acts of the district commissioners. Having made an issue in the pleadings of the bank loan transaction it would appear that defendants should have insured the appearance of the bank as a party to this action. Plaintiffs having introduced the evidence might well have protected their rights by bringing in the bank as a party. In Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163, approved in Shubert v. Bates, 30 Cal.2d 785, 185 P.2d 793, it was held that the requirement that indispensable parties appear in the court proceedings is mandatory.

[24] The rule is stated in Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 284 P. 445, that to reach a complete determination the necessary parties must be present. In Miller v. McKinnon, 20 Cal.2d 83, at page 99, 124 P.2d 34, 43, 140 A.L.R. 570, the court stated, "The court may, of course, order proper parties to be brought in if expedient for a complete determination of the controversy. Code Civ.Proc., sec. 389."

[25] To the question whether the commissioners have a right under the law and the facts of this case to construct the dam and whether it is necessary to make the bank a party to the action to determine that question, the answer must be in the negative, but when plaintiff sought and the court acquiesced in a decree invalidating the promissory note to the bank of the district commissioners in their official capacity the court voided a promissory note without extending to the payee of the note the right and benefit to defend factually and legally.

While the bank was not an indispensable party to a determination of the real issue in this case, it was an absolutely necessary party to the proceedings before a judicial decree could be effective concerning the bank's legal rights relative to the loan transaction.

However, it was not necessary to mention the Bank of America in the judgment and decree in view of the prohibition against the expenditure of the questioned district funds for any purpose except maintenance. The decree is interlocutory and the error may be corrected. In the "Addendum to Decision" the court decreed, "That the Court shall retain full jurisdiction and control of this cause to make any and all orders and decrees from time to time as shall be necessary to effectuate its decision and judgment herein and as may be necessary to administer further equity between the parties and that the judgment and decree made pursuant to this decision shall be deemed interlocutory."

The trial court is directed to modify the judgment and decree by deleting from the findings, conclusions of law and the judgment all reference to the invalidity of the $20,000 note to the Bank of America signed by the defendants as district commissioners. This order of modification is not to be construed as any interference with the bank's right to file any action within the statutory period of limitation.

The orders appealed from by plaintiffs are affirmed. The original judgment as amended will stand affirmed when modified as directed herein. All other orders appealed from are affirmed.

Costs to be recovered on each appeal by respective respondents.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

MARKS v. WALTER G. McCARTY CORPORATION.

L. A. 20770.

Supreme Court of California, in Bank.
May 10, 1949.

Rehearing Denied June 9, 1949.

1. Brokers ⚿8(3), 86(4)

In action to recover broker's commission on sale of hotel, evidence warranted findings that plaintiff was employed as a broker to sell the property on commission and that he was procuring cause of sale ultimately consummated substantially on terms agreed upon at meeting arranged by him.

2. Brokers ⚿43(2)

Contract authorizing broker to sell realty on commission must meet requirements of statute of frauds that such agreement or some memorandum thereof must be in writing subscribed by party to be charged or his agent. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

3. Frauds, statute of ⚿115(2, 5)

The statute of frauds does not require that signature of party to be charged be placed at end of writing relied upon, if a proper signature is found elsewhere in instrument, and signature need not be manually affixed, but may in some cases be printed, stamped or typewritten, but name relied upon as a signature must be placed on document or adopted by party to be charged with intention of authenticating the writing and appropriating the name as a signature. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

4. Brokers ⚿43(3)

Evidence failed to show any intention to adopt as a signature letterhead of vendor corporation on carbon copy of typewritten listing agreement given broker so as to meet requirements of statute of frauds that contract authorizing broker to sell realty on commission or some memorandum thereof must be in writing subscribed by party to be charged or his agent. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

5. Brokers ⚿43(3)

Broker could not recover commission on sale of realty on basis of unsigned documents stating terms upon which realty would be sold and providing amount of commission to be received by broker, since such documents in absence of signature did not meet requirements of statute of frauds. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

6. Brokers ⚿43(2)

A broker employed to sell real and personal property, though precluded by statute of frauds from recovering commission on sale of realty, may recover commission on sale of personalty if sale price of personalty can reasonably be ascertained, even though vendor would not have sold the personal property apart from the realty. Civ. Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

7. Brokers ⚿86(1, 8)

Where absence of written memorandum of listing agreement signed by vendor corporation or its agent precluded broker under statute of frauds from recovering commission on sale of realty involved in sale of hotel and furnishings, statement in final escrow instructions signed by president of vendor corporation that sale price of personal property was $600,000, though separation was made for tax purposes only was sufficient to support a finding that sale price of personalty was severable from sale price of realty and that fair value of broker's services in bringing about sale of personalty was $30,150. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

CARTER, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Geo. A. Dockweiler, Judge.

Action by Walter N. Marks against Walter G. McCarty Corporation to recover a broker's commission on sale of real and personal property. Judgment for plaintiff, and defendant appeals.

Judgment modified and, as modified, affirmed.

Prior opinion, 194 P.2d 816.

Macfarlane, Schaefer & Haun, Henry Schaefer Jr. and William Gamble, all o' Los Angeles, for appellant.

Adams, Duque & Hazeltine, A. Andrew Hauk, John W. Preston and Henry Duque, all of Los Angeles, for respondent.

SHENK, Justice.

The plaintiff sued to recover broker's commissions for procuring the sale of the Beverly-Wilshire Hotel, its furniture and equipment. Judgment for the plaintiff was entered in the sum of $57,500 as commissions on the sale of both the real and personal property. The defendant appealed.

The defendant corporation was the owner of the hotel property until it was sold in 1944. The corporate stock was owned by Walter G. McCarty and his wife. McCarty, the president, had authority to negotiate the sale of the property. In October, 1943, a meeting was arranged by O'Neill, the manager of the Beverly-Wilshire, between the plaintiff, a licensed real estate broker, and McCarty. At that meeting McCarty said that the hotel and furnishings were for sale at a price of $2,000,000, and that a commission of 5% would be paid. The plaintiff said he was very much interested in the deal and had in mind a prospective purchaser or syndicate of purchasers. McCarty gave the plaintiff an unsigned typewritten document headed: "Re Beverly Wilshire Hotel—October 14, 1943," which set forth a description of the property and the sale price and terms. McCarty had listed the property in this manner with at least twenty brokers, but had not given an exclusive agency to any of them. McCarty also instructed O'Neill to show the plaintiff the hotel and to furnish him with financial statements of its operations.

The plaintiff began to work on the deal immediately by contacting a number of prospects. Through his attorneys the plaintiff contacted Arnold Kirkeby, a Chicago hotel operator, in the month of October, shortly after his first meeting with McCarty, Kirkeby, the ultimate purchaser, manifested interest in participating in the purchase and operation of the hotel. Numerous telephone calls and correspondence between the plaintiff or his agents and Kirkeby ensued. It was proposed by the plaintiff that Kirkeby participate with a syndicate in the purchase, and there was discussion as to the percentage of interest he would take. During these negotiations the plaintiff met with McCarty two or three times a week. The plaintiff testified that in November, 1943, he told McCarty that Kirkeby was to be a member of the purchasing syndicate.

In February of 1944 McCarty informed the plaintiff that the sale price was being raised from $2,000,000 to $2,250,000. At that time McCarty gave the plaintiff a carbon copy of a typewritten document on letterhead stationery with a picture of the hotel at the top underneath which was printed: "The Beverly-Wilshire Hotel, Walter G. McCarty Corporation." This document contained the price of the hotel ($2,250,000), the terms of sale, and a provision for a broker's commission fixed at $57,500 (5% on the first $50,000 and 2½% on $2,200,000). In reading the agreement the plaintiff noted that the broker's commission had been reduced from the sum previously indicated. According to his testimony, the plaintiff protested that it seemed unfair for McCarty to raise the price of the hotel and thus make the deal harder to consummate and at the same time reduce the commission. When McCarty told him other brokers were willing to receive a commission of $57,500, the plaintiff agreed to work for that figure.

Thereafter the plaintiff renewed his efforts to form a syndicate, which was to include Kirkeby, for the purpose of buying the hotel. The plaintiff testified that on April 17, 1944, he told McCarty that he had hopes that the deal could be closed but that he wanted something in writing so that the terms would be confirmed. McCarty wrote the terms in long-hand on a sheet of yellow paper which he handed to the plaintiff. The sheet was dated April 17, 1944, and headed: "Kirkeby deal—Walter Marks, Broker." The heading was followed by the sale terms and at the bottom was written: "Commission to Broker $57,500 payable at close of escrow." A few corrections were made by the plaintiff which McCarty approved.

From April through July the plaintiff and Kirkeby frequently discussed the possible purchase but no definite agreement was reached, principally because of Kirkeby's dissatisfaction with the mortgage payments required by McCarty's proposal. The plaintiff sought to bring others into the deal to assist in the financing. One arrangement seemed promising to Kirkeby, and at the plaintiff's urging, he came to Los Angeles about August 1, 1944. The plaintiff had told McCarty in the latter part of July that he was bringing Kirkeby to Los Angeles.

The plaintiff met Kirkeby when he arrived and arranged a meeting between Kirkeby and a prospective member of the purchasing syndicate. At this stage discussions centered around a syndicate in which Kirkeby would acquire a half-interest. However these negotiations collapsed and in a private conversation the plaintiff suggested that Kirkeby purchase the property alone. Kirkeby said that perhaps he would. He stated he wanted to see McCarty alone. The plaintiff made an appointment with McCarty for Kirkeby and loaned the latter his car to drive to McCarty's ranch. Afterward Kirkeby told the plaintiff that he was pleased with the meeting and he thought that he and McCarty had reached an agreement as to price and terms. About that time, however, Kirkeby received word that a New York hotel in which he was interested had been offered to him at a favorable price and he decided to leave Los Angeles without proceeding further on the Beverly-Wilshire deal. The plaintiff said he "would continue to watch the deal" for Kirkeby and the latter stated "he would continue to keep his interest in the Beverly-Wilshire Hotel, and any information I [the plaintiff] could give him he would be glad to get." In November, 1944, Kirkeby, dealing directly with McCarty, purchased the hotel and furnishings on price and terms substantially the same as those agreed upon in August.

[1] From these facts it may readily be seen that there was evidence to support the finding of the trial court that the plaintiff was employed as a broker on commission in the sale of the real and personal property known as the Beverly-Wilshire Hotel. There was also evidence from which the court could properly find that the plaintiff was the procuring cause of the sale. The defendant challenges this finding by reference to evidence that negotiations between Kirkeby and McCarty took place before the plaintiff became involved in the transaction. It appears that McCarty had intermittently spoken to and corresponded with Kirkeby between 1939 and 1942 about a possible sale of the hotel. But these negotiations were terminated on November 13, 1942, a year before the plaintiff began to work on the deal, when Kirkeby wrote McCarty: "Our views are so far apart both as to price and terms, I do not believe it would be worth while for us to continue the negotiation." Although the plaintiff did not introduce Kirkeby and McCarty and was not the first to call Kirkeby's attention to the fact that the hotel was for sale, the finding that the plaintiff was the efficient cause of the sale can be supported by the evidence which shows that only through his efforts over a period of many months were the parties brought together in August, 1944, when terms and price were settled. Webster v. Parra, 72 Cal.App. 639, 648, 237 P. 804; 12 C.J.S., Brokers, § 91, page 210. It has been shown that negotiations did not come to an end in August, for Kirkeby, although then short of capital, stated he would continue his interest in the hotel. Less than three months later the sale was closed at the August price. It was therefore reasonable to conclude that the plaintiff brought about the sale, and the fact that he was not present when the sale was consummated is immaterial. Williams v. Kinsey, 74 Cal.App.2d 583, 169 P.2d 487; Pryor v. McGuire, 59 Cal.App. 234, 210 P. 532; see Fitzpatrick v. Underwood, 17 Cal.2d 722, 733, 112 P.2d 3.

[2] To recover a commission on a contract authorizing a broker to sell real estate, the broker must prove not only the existence of an agreement and procurement of a willing purchaser but must meet the requirements of the statute of frauds which declares that such an agreement "is invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged, or by his agent." Civ.Code, sec. 1624(5); Code Civ.Proc. sec. 1973(5). It is the defendant's principal contention that the

plaintiff cannot recover a commission for the sale of the real property because there was no written contract or memorandum subscribed by the party to be charged. A scrutiny of the documents relied upon by the plaintiff as together constituting a sufficient memorandum immediately discloses that they are lacking in one statutory essential, namely, the signature of the party to be charged.

[3] However, the plaintiff contends that the letterhead "The Beverly-Wilshire Hotel, Walter G. McCarty Corporation" printed on the typewritten document given the plaintiff in February of 1944 by McCarty is a sufficient signature. The statute of frauds does not demand that the signature of the party to be charged be placed at the end of the writing relied upon if a proper signature be found elsewhere on the instrument. California Canneries Co. v. Scatena, 117 Cal. 447, 49 P. 462; 49 Am.Jur. sec. 380, p. 683; Commercial Credit Corp. v. Marden, 155 Or. 29, 62 P.2d 573, 112 A.L.R. 931, 937. Furthermore the signature need not be manually affixed, but may in some cases be printed, stamped or typewritten. Irving v. Goodimate Co., 320 Mass. 454, 70 N.E.2d 414, 171 A.L.R. 326, 334; 49 Am.Jur. sec. 377, p. 680; Rest., Contracts, sec. 210. But it is a universal requirement that the statute of frauds is not satisfied unless it is proved that the name relied upon as a signature was placed on the document or adopted by the party to be charged with the intention of authenticating the writing. In other words the defendant must intend to appropriate the name as a signature. McNear v. Petroleum Export Corporation, 208 Cal. 162, 280 P. 684; Little v. Union Oil Co., 73 Cal.App. 612, 238 P. 1066; Sherwood v. Lowell, 34 Cal.App. 365, 167 P. 554; 49 Am.Jur. sec. 381, p. 683; Rest., Contracts, sec. 210.

This requirement has been well stated by the New York Court of Appeals, Cardozo, Ch. J., in an opinion holding that the printed name of the defendant on its order form was not a signature which would satisfy the statute of frauds: "We may, indeed, infer from the delivery of the writing that the defendant intended to assume the obligation of a contract, whether the document was signed or unsigned. It might have intended as much if there had been no writing whatever. It may even have supposed that a writing was unnecessary. Something more must be found before the statutory requirements can be held to be obeyed. The defendant must have intended, not merely to contract, but to sign. We see no mark of such purpose." Mesibov, Glinert & Levy v. Cohen Bros. Mfg. Co., 1927, 245 N.Y. 305, 311, 157 N.E. 148, 150. See also Lee v. Vaughan Seed Store, 101 Ark. 68, 141 S.W. 496, 37 L.R.A., N.S., 352; Dorian Holding & Trading Corp. v. Brunswick Terminal & Ry. Securities Co., 230 App.Div. 514, 245 N.Y.S. 410. There is nothing on the face of the proferred documents which would indicate that McCarty intended to adopt the letterhead as a signature of the corporation. The letterhead is found on a carbon copy of a typewritten sheet which sets forth terms for the sale of the hotel but which bears no signature. This was the form used by McCarty in listing the property with numerous brokers. The other documents, one typewritten, the other written in McCarty's hand, have neither signature nor letterhead. In McNear v. Petroleum Export Corp., supra, 208 Cal. 162, 280 P. 684, 686, this court held that where it is claimed that a name appearing on a document was intended as a signature satisfying the statute of frauds, the intention must appear on the face of the document itself and "proof of such intention may not rest in parol." The rule stated in that case would seem to dispose of the plaintiff's claim without need of further discussion because of his failure to produce a memorandum with some mark of authenticating intention on its face. The plaintiff insists, however, that parol evidence was admissible on the issue of whether McCarty intended to adopt the letterhead as a signature.

Even if it be assumed that parol evidence is admissible no evidence appears in the record which would support the findings and judgment granting commissions on the sale of the real property.

Cited by the plaintiff as significant are the facts that the writing was a carbon copy, yet on letterhead stationery, that it was delivered to the plaintiff as a broker, and that it was the defendant's custom to list the property with brokers in this manner which contemplated the payment of a commission. At most this evidence discloses an intention on the part of McCarty to contract; it does not reveal an intention to appropriate the letterhead as the defendant's signature.

Testimony of McCarty on cross-examination is relied upon by the plaintiff as evidence of his intention to adopt the letterhead as the corporation signature. That testimony is obviously insufficient.

"Q. Well, what was your intention when you gave out letters on the stationery of the Beverly-Wilshire Hotel, which were obviously carbons of an original letter? A. I again state I could not answer that. It is very possible in giving this to the various brokers, having a picture of the hotel on it, it was something from which they could see what the hotel was and so forth. That is the only explanation I could add.

* * *

"Q. Well, as a matter of fact, Mr. McCarty, wasn't the purpose of having this letter or this memorandum typed on Beverly-Wilshire stationery and the copies given to brokers, wasn't the purpose of that to authenticate this memorandum and show that it was from the Beverly-Wilshire Hotel and not from anyone else? A. I don't know—I don't believe I understand your question.

"Q. Well, I will reframe it then. A. All right.

"Mr. Duque: Would you read it? (Question read.) A. Well, as to the Beverly-Wilshire Hotel, I would have to answer no. It was from my office.

"Q. Well, was it the purpose of having it on the Walter G. McCarty Corporation stationery for the purpose of authenticating it and showing that it came from your corporation; wasn't that the object of having it on that stationery? A. Well, I wouldn't say that it was. If you write a letter, any letter, you wouldn't use somebody else's stationery. I write it on my own letterheads.

"Q. Well, do you customarily use your own letterheads for carbon copies of letters? A. Not for general letters that I write out. I might have in a case where I am trying to sell a piece of property. This shows a picture of the hotel on there, and I put it on all of my carbon copies.

"Q. That is just my point, and that is just why I am asking you, isn't it a fact that contrary to your usual custom of using yellow paper for carbon copies, in this instance you were selling a hotel and you wanted to authenticate the memorandum which you were giving out to the brokers, so you had the memorandum typed and all the copies of the memorandum typed on your own corporate stationery; wasn't that the reason? A. Well, that is probably the reason.

"Q. And isn't that the fact, isn't that what you did? A. Well, I don't know. I might have had some not on my letterhead, or might have sent out some of those memorandums not on my letterhead. I don't think I did. I have no recollection of that."

This testimony was elicited on cross-examination by counsel to establish his theory of authentication. Rather than tending to prove adoption of the letterhead as a signature, it shows that if McCarty had any purpose in mind in using the letterhead it was to identify the contractual terms on the stationery as relating to the proposed sale of the Beverly-Wilshire Hotel, since copies were to be distributed to a number of brokers.

[4, 5] The wisdom of adhering to the statute of frauds by declaring the memorandum in this case inadequate is apparent. Here the defendant's letterhead was printed on its stationery at some earlier time for a purpose unconnected with the transaction in suit. The four corners of the document give no indication of an intent to adopt the letterhead as a signature. Sympathetic consideration for the plaintiff because of the absence of a writing "subscribed" as required by the statute is not enough. A decision in his favor would in effect repeal the statute of frauds and open the way for the assertion of false claims resting entirely in parol. The protection intended to be afforded by the statute would be lost.

The plaintiff was experienced in real estate deals, having handled more than 100 such transfers as a licensed real property broker over a period of 17 years. He testified that he knew the law required a broker to have an agreement in writing signed by the seller before he could enforce his claim to a commission. When asked by counsel why he didn't request a signed memorandum of McCarty the plaintiff answered: "I didn't think it was necessary at that time. I thought his word was sufficient. I had not, as a rule, taken and asked for a written commission agreement; I don't remember of ever actually doing it in my entire experience in the real estate business." Thus the plaintiff failed to procure a signature of the defendant's agent McCarty, although it seems clear that the latter, a real estate broker himself, did not sign because he did not intend to sign. The plaintiff, a man of experience in this line of business, knew how to protect himself in the transaction but failed to do so.

[6, 7] Although the plaintiff is prevented by the statute of frauds from recovering a commission on the sale of the real estate there is no such barrier in this case to his recovery of a commission on the sale of the personal property as to which no written memorandum is required. It is contended by the defendant that McCarty would not have sold the furnishings apart from the hotel and that the commission agreement is therefore entire and void in toto. It may be conceded that as between the parties to the purchase the contract was indivisible. As between broker and selling party, however, the broker's right to a commission depends, not on whether the real and personal property would have been separately sold, but on whether the sale price of the personal property actually sold can reasonably be ascertained. Dabney v. Edwards, 5 Cal.2d 1, 17, 53 P.2d 962, 103 A.L.R. 822; Ryan v. Walker, 35 Cal. App. 116, 119, 169 P. 417; Porter v. Fisher, 4 Cal.Unrep. 324, 34 P. 700. Here the sale price of the personal property was stated to be $600,000 in the final escrow instructions which were signed by McCarty. While the defendant asserts that the separation was made for tax purposes only, the fact remains that a definite portion of the purchase price was apportioned to the personal property. Thus there was adequate evidence to support the trial court's finding that the sale price of the personal property transferred is severable from the sale price of the real estate, and that the fair value of the services performed by the plaintiff in bringing about the sale of the personal property is $30,150.

The judgment for the plaintiff is modified by striking therefrom the words and figures "Fifty-seven thousand, five hundred dollars ($57,500)", and inserting in lieu thereof the words and figures "Thirty thousand one hundred fifty dollars ($30,150)", and as so modified the judgment is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion not only sanctions a palpable fraud, but reaches an absurd result which is the product of fallacious reasoning. After declaring that there is ample "evidence to support the finding of the trial court that the plaintiff was employed as a broker on commission in the sale of the real and personal property known as the Beverly-Wilshire Hotel", and that "there was also evidence from which the court could properly find that the plaintiff was the procuring cause of the sale", it further declares that while the contract between the owner and purchaser for the sale of both the real and personal property is indivisible, the contract for the payment of a commission on such sale is divisible, and that plaintiff may, therefore, recover a commission on the sale of the personal property but not on the sale of the real property. In my opinion, there is no basis in reason, common sense, or sound legal philosophy for such holding. It cannot be denied that the same proof which established plaintiff's right to a commission on the sale of the personal property is applicable to the sale of the real property. In fact, the sale of both the real and personal property was but a single transaction. There is nothing in the record to indicate that either would have been sold separately. Of course, the amount of the purchase price of each would have to be specified in the contract of sale or escrow instructions in order to determine the amount of the revenue stamps to be placed on the deed and the amount of profit or loss for income tax purposes. In view of the fact that the Beverly-Wilshire Hotel was a going concern at the time of the sale, it must be assumed that the personal property would not have been sold separately from the real property. Furthermore, plaintiff's "exhibit #4" shows that the major portion of the purchase price of the property listed (almost four-fifths) was for the real property and that the sale of the personal property was merely incidental to the sale of the real property. In view of this situation, the majority opinion postulates a legalistic paradox by holding that under the documentary evidence presented in this case plaintiff may recover a commission on the sale of the personal property, and in the same action be denied recovery of a commission on the sale of the real property, notwithstanding the fact that the documentary evidence applies with equal probative force to both the real and personal property.

The result reached by the majority in this case permits what has always been condemned, namely, the use of the statute of frauds as an instrument for the perpetration of a fraud rather than as a shield against fraud. It is conceded, and there is no room for dispute on the subject, that defendant agreed to and did employ plaintiff to procure a purchaser for both the real and personal property, consisting of the Beverly-Wilshire Hotel, its furniture and equipment, and agreed to pay a commission on the sale of both, yet defendant is permitted to hide behind the statute of frauds, insofar as the real property is concerned, and escape its just obligation.

As I see the situation, it is as follows: The evidence shows and the court found, that prior to April 17, 1944, defendant was the owner of real property known as the Beverly-Wilshire Hotel, and personal property consisting of the furniture and equipment therein; that on October 13, 1943, and thereafter until November, 1944, plaintiff was employed, by agreement with defendant, as a broker to sell the real property for $1,750,000 and the personal property for $500,000 for which he was to receive a commission of $57,500; that the agreement was evidenced and supported by written notes and memoranda authenticated and subscribed by defendant, thus denying defendant's defense of the statute of frauds; that pursuant to that agreement, plaintff procured a purchaser (Kirkeby Hotels, Inc.) for the property who bought the property at the prices above mentioned.

The chief issue is whether recovery should be denied by reason of the statutes which provide that: "An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is invalid unless it or some note or memorandum thereof is in writing. Civ.Code, sec. 1624(5), Code of Civ.Proc. sec. 1973(5). Defendant's real contention is that the evidence is not sufficient to support the finding of an agreement because there was no note or memorandum sufficient to satisfy the statute of frauds.

Turning to that contention, the following appears: In October 1943, defendant was the owner of the real and personal property here involved. Plaintiff was a licensed real estate broker. He was introduced to McCarty at that time by O'Neill, the manager of the Beverly-Wilshire Hotel. McCarty told him the hotel was for sale for $2,000,000, and the commission would be 5%. Plaintiff said he wished to work on the deal and had O'Neill show him the hotel and furnish financial statements of the business. Either at that meeting or one shortly thereafter McCarty gave plaintiff two typewritten sheets (plaintiff's exhibit #3) headed: "Re Beverly-Wilshire Hotel—October 14, 1943", followed by a description of the property, the sale price and terms, and provisions for an escrow. McCarty in his testimony described those papers as a "listing" of the property like he had given to many brokers, and stated that he listed the property with plaintiff and would pay him a commission of 5% on the first $50,000 and 2½% on the balance. Plaintiff contacted various persons to form a syndicate to buy the hotel including Mr. Kirkeby (to whom the property was ultimately sold). He had at least weekly conferences with McCarty in regard to the matter. In February, 1944, McCarty told plaintiff the price was raised to $2,250,000 and that he could work on it at that price. At that time McCarty gave plaintiff a carbon copy of a typewritten writing (plaintiff's exhibit #4) headed with a picture of the hotel followed by printing, reading: "The Beverly-Wilshire Hotel, Walter G. McCarty Corporation, Wilshire Blvd. between El Camino and Rodeo Drives, Beverly Hills, California." Thereafter followed in typing the date (Feb. 15, 1944), the price of the hotel fixed at $2,250,000, and the terms of sale thereof, with other items such as stock inventories to be paid for in cash and an offer of an option on other mentioned property, and finally: "Commission on hotel property $57,500.00. (5% on first $50,000 2½% on $2,200,000.00) Will pay commission on optioned property if exercised." As related by plaintiff the conversation between McCarty and him at that time was: "* * * I said to Mr. McCarty, 'I am surprised that you are raising the price of the hotel when we are having so much difficulty in making the sale at two million dollars.' He said that was the price, and that they would have to take it or leave it. I said, 'All right. I believe I will still work on the thing and that I can still make the sale, and I think I have the one buyer in the United States who will buy the hotel.' I looked down further in the document [plaintiff's exhibit #4] and I found he had changed the commission to $57,500.00, and I said, 'Mr. McCarty, we have had an agreement all the time that I was to receive five per cent commission on the sale of this hotel.' He said, 'Well, other brokers are willing to work on it for $57,500.00. Maybe if you worked on it, you might get a little more, but that is the price, $57,500.00.' * * * I said to him, 'Well, it seems a little hard on me to raise the price of the hotel and make the deal harder for me to make, at the same time cutting my commission from the hundred thousand dollars which I had hoped to make to fifty-seven thousand five hundred dollars,' but I was not one who could hold back working on a deal because the commission was a question, so long as it was agreed upon that the amount of $57,500.00 net to me. That is all I cared. * * * Mr. McCarty said to me that other brokers were willing to work on this deal on the basis of a business property commission, Los Angeles Realty Board rate." McCarty testified that he "no doubt gave" that memorandum to plaintiff and intended to pay a commission to any broker who consummated a deal. Thereafter plaintiff continued to work on a sale to Kirkeby, according to his testimony, until April when he told McCarty he believed a deal could be closed with Kirkeby but he wanted a written memorandum so there would be no question of the terms. McCarty wrote a memorandum in longhand on a piece of yellow paper (plaintiff's exhibit #10) which he handed to plaintiff. It was headed: "Kirkeby deal, Walter Marks, Broker." Then followed details as to price and terms, and near the end "* * * commission to Broker $57,500 payable at close of escrow." Some alterations were made in the paper by plaintiff with McCarty's consent.

It seems to be the position of the majority that the contract on its face did not show that the defendant's name printed on the heading of plaintiff's "exhibit #4" indicated an intent that such heading be an authentication, and that even if it was, the evidence was not sufficient to prove an intent to authenticate. From all of the circumstances, it is obvious that McCarty intended the document (exhibit #4) to be a contract—his memorandum of employment. They show more than merely an intent to contract. They establish that such memorandum was his way of giving a written listing of the property which was his document and authorized by him. Looking only at those circumstances, we find that: (1) The memorandum was a carbon copy and it was not McCarty's practice to use a letterhead for carbon copies, thus indicating that it was used in this case for some special purpose; we may infer the purpose was to adopt the letterhead as his signature—his authentication of the memorandum. At least we cannot say as a matter of law that such an inference is so unreasonable that it could not be drawn by the trial court from the evidence before it. (2) The use of such memorandums by McCarty was, according to his own testimony, for listing the property with brokers, that is, his method of employing brokers, and that he intended to pay a commission, thus justifying the inference that this memorandum was his contract and the letterhead his authentication. (3) The defendant-owner-employer is a corporation and customarily its signature would be made by printing or typewriting. To conclude that such evidence is insufficient is to usurp the function of the trial court. It means that in no case can there be a signature or authentication of a memorandum unless it appears at the bottom or end of the document. No purpose has been suggested, and none can be within the realm of reason, for the delivery of "exhibit #4" with the letterhead thereon other than that it was intended as the authenticated memorandum of defendant. It is counterfeit logic to argue that defendant intended to contract when he prepared the document (exhibit #4), but did not intend to do that which was necessary to complete the contract, namely, sign such document and thus make it a binding contract. It is wholly reasonable to infer that if McCarty intended to contract, he intended to make a legally binding contract, that is, that he intended the letterhead as a signature. In fact, he testified that he intended to pay a commission, thus clearly evincing an intent to make a legally binding instrument. If it is not true that he so intended, then the only other inference is that he intended to contract with his "tongue in his cheek"—with the thought that he would not abide by the contract—that he would defraud the plaintiff. We should assume that he did not intend to defraud plaintiff, but rather, that he intended to make a legally binding contract and thus intended the letterhead as the signature. Indeed, as before stated, he testified that he intended to pay a commission to brokers with whom he listed the property. In fact, there is a presumption that compels the foregoing determination of intent. It is presumed that "a person is innocent of crime or wrong", Code of Civ.Proc. sec. 1963(1), and that "private transactions have been fair and regular", Code of Civ.Proc. sec. 1963(19). Therefore, it must be presumed that McCarty did not intend to defraud plaintiff by leading him to believe he had a binding contract of employment. Rather it must be inferred that he intended the letterhead to be the signature. At least it can be said that such is not an unreasonable view of the case, and we are bound by the finding of the trial court. Moreover, in connection with the sufficiency of the exhibit, it must be remembered that insofar as a writing is required by the statute of frauds, there are two ways of satisfying the statute, namely, by a formal written contract or by a written memorandum which is not the contract but is merely an informal written sketch of the essential terms of the oral agreement between the parties. Civ. Code, sec. 1624; Code Civ.Proc. sec. 1973; King v. Stanley, 32 Cal.2d 584, 197 P.2d 321; Lindley v. Fay, 119 Cal. 239, 51 P. 333; Elbert v. Los Angeles Gas Co., 97 Cal. 244, 32 P. 9; Breckinridge v. Crocker, 78 Cal. 529, 21 P. 179; Joseph v. Holt, 37 Cal. 250; Gibson v. De La Salle Institute, 66 Cal.App.2d 609, 152 P.2d 774; Derrick v. C.W.R. Ford Co., 27 Cal.App. 456, 150 P. 396; Rest. Contracts, secs. 207, 208, 209, 214.

But we have more in the instant case. We have the positive testimony of McCarty himself. That cannot properly be ignored as does the majority, except by usurping the function of the trial court. McCarty testified: "Q. That is just my point, and that is just why I am asking you, isn't it a fact that contrary to your usual custom of using yellow paper for carbon copies, in this instance you were selling a hotel and you wanted to authenticate the memorandum [plaintiff's exhibit #4] which you were giving out to the brokers, so you had the memorandum typed and all the copies of the memorandum typed on your own corporate stationery; wasn't that the reason? A. Well, that is probably the reason."

As I see this case, it involves some important questions of law with reference to the statute of frauds which should be clarified. In connection with the sufficiency of a memorandum to satisfy the statute of frauds, it should be noted that we are speaking of the second method of complying with the statute—a note or memorandum of the contract, rather than a formal written contract (see, authorities cited supra). There are two objections to the memorandums relied upon (plaintiff's exhibits above discussed): (1) that they fail to show the employment of plaintiff as a broker, and (2) that they are not signed by defendant, the party to be charged. Generally in this connection it should be observed that the memorandum required by the statute need not consist of one instrument but may be made up of several properly connected papers. King v. Stanley, supra; 12 Cal. Jur. 904.

With reference to the first point, it has been held that a writing given by an owner to a broker which merely states that the former will sell certain property for a certain price, is insufficient because it shows no employment of the broker, Herzog v. Blatt, 80 Cal.App.2d 340, 180 P.2d 30; Sweeley v. Gordon, 47 Cal.App.2d 381, 118 P.2d 14; Egan v. Pacific Southwest Trust & Savings Bank, 92 Cal.App. 1, 267 P. 719; Patterson v. Torrey, 18 Cal.App. 346, 123 P. 224; Kleinsorge & Heilbron v. Liness, 17 Cal.App. 534, 120 P. 444; but see, Needham v. Abbot Kinney Co., 217 Cal. 72, 17 P.2d 109. There need not be a statement that a commission will be paid. Toomy v. Dunphy, 86 Cal. 639, 25 P. 130; Caminetti v. National Guaranty Life Co., 56 Cal.App.2d 92, 132 P.2d 318; Muncy v. Thompson, 26 Cal.App. 634, 147 P. 1178; Kennedy v. Merickel, 8 Cal.App. 378, 97 P. 81. It is also held, however, that where there is an oral agreement employing the broker and the owner gives him a memorandum describing the property and its sale price and providing for the payment of a commission, the memorandum is sufficient. It may be inferred or implied from the provision for a commission in the memorandum, that the broker is employed and authorized to act. Moore v. Borgfeldt, 96 Cal.App. 306, 273 P. 1114; see, Needham v. Abbot Kinney Co., supra; Coulter v. Howard, 203 Cal. 17, 262 P. 751; Corvin v. Smead Investment Co., 115 Cal.App. 175, 1 P.2d 507; Fritz v. Frost, 114 Cal.App. 602, 300 P. 454; Avis v. Rebhan, 92 Cal.App. 178, 267 P. 898; Johnson v. Krier, 59 Cal.App. 330, 210 P. 966; Carrington v. Smithers, 26 Cal.App. 460, 147 P. 225; In re Balfour & Garrette, 14 Cal.App. 261, 111 P. 615; Sanchez v. Yorba, 8 Cal.App. 490, 97 P. 205. Certainly the implication is irresistible from the provision that a commission is to be paid, that the broker is thereby employed, as commissions are not paid to some one not employed. Insofar as Egan v. Pacific Southwest Trust & Savings Bank, supra, and Morrill v. Barneson, 30 Cal.App.2d 598, 86 P.2d 924, are contrary to this view, they should be disapproved. Herzog v. Blatt, supra, is distinguishable as there was no provision for a commission in that case.

In the instant case the memorandums refer to plaintiff as a broker and make provision for a commission. Taken together these provisions are sufficient to satisfy the statute.

Turning to the statutory requirement that the note or memorandum be subscribed by the person to be charged, it appears (referring to plaintiff's exhibit #4) that it was McCarty's practice to make a memorandum under the letterhead of defendant corporation in listing the property with brokers; that he had so listed it with many brokers; that he did not intend to evade payment of a commission; that he expected to pay one; that the memorandum (plaintiff's exhibit #4) was a carbon copy on the letterhead of the corporation; and that it was not customary to use sheets with the printed heading thereon for carbon copies of general correspondence.

The law on the subject is well settled. The signature may be typewritten or printed. Little v. Union Oil Co., 73 Cal.App. 612, 238 P. 1066; Rest. Contracts, secs. 207, 210; Williston on Contracts, Rev.Ed., sec. 585. The term "subscribed" in the statute of frauds means "signed" and therefore the signature need not be at the end of the document; it may be at any place therein. California Canneries Co. v. Scatena, 117 Cal. 447, 49 P. 462; 12 Cal. Jur. 915–916; Commercial Credit Corp. v. Marden, 155 Or. 29, 62 P.2d 573, 112 A.L.R. 931, 937; Williston on Contracts, Rev.Ed., sec. 585. It is of course necessary that there be proof that the "signature" was intended as such—as an authentication of the document. McNear v. Petroleum Export Corp., 208 Cal. 162, 280 P. 684; Little v. Union Oil Co., supra. As we have seen, there is evidence in the instant case of such intent.

It is urged, however, that such parol evidence was not competent as it must appear on the face of the instrument itself that the name of the defendant was placed thereon or adopted as his signature or authentication of the document, citing McNear v. Petroleum Export Co., supra, and Little v. Union Oil Co., supra. In the McNear case the document showed on its face that the name of the defendant thereon did not purport to be an authentication. In the Little case the court had before it an appeal from a judgment of dismissal and the court pointed out that from the allegations of the complaint it was clear that the typewritten name was not intended as a signature. In the instant case we have the significant factors that the writing was a carbon copy, yet was on the letterhead of defendant. It was delivered to plaintiff as a broker, and it was customary for defendant to list the property for sale with brokers in that manner and in so doing it intended to pay a commission. In the light of these circumstances it cannot be said that it affirmatively appears that the heading was not intended to be adopted as a signature. On the contrary, it is reasonable to infer there was such an intent and McCarty's testimony verified it. Evidence of surrounding circumstances is admissible to explain a memorandum of a contract within the statute of frauds. Brewer v. Horst & Lachmund Co., 127 Cal. 643, 60 P. 418, 50 L.R.A. 240; Towle v. Carmelo Land & Coal Co., 99 Cal. 397, 33 P. 1126; Preble v. Abrahams, 88 Cal. 245, 26 P. 99, 22 Am.St.Rep. 301; Mann v. Higgins, 83 Cal. 66, 23 P. 206; Gibson v. De La Salle Institute, supra; see, King v. Stanley, supra.

The majority advance the argument that plaintiff was at fault in not procuring a signed agreement for the payment of a commission—that he should have known better—a sort of in pari delicto or contributory negligence theory of defense. That argument is indeed unique. What bearing it has upon the sufficiency of the writing (Exhibit #4) to meet the requirements of the statute of frauds does not appear. Certainly such writing would be just as invalid, according to the test laid down by the majority, if plaintiff had been illiterate and inexperienced in such transactions. The only possible purpose in injecting such argument into the case is that the majority feel that it tends to ameliorate the harshness of the injustice which this court is inflicting upon plaintiff by means of a strained and tortured application of a salutary principle of law (statute of frauds), which was never intended to be so applied as to produce such a result. It seems to me that it would be much more logical for the majority to argue that plaintiff was fully justified in relying upon the written memorandum on the letterhead of defendant prepared by its president, which covered every detail of the transaction, and that plaintiff had the right to assume that the defendant intended to act in accord with the statements contained in such memorandum—that such memorandum was not delivered to him as a mere idle act or for the purpose of inducing him to render services and incur expenses for which defendant did not intend to reimburse him if he procured a purchaser for the property described therein. In other words, that plaintiff had the right to assume that McCarty's intentions were honorable and not fraudulent. Although the majority concede that plaintiff so believed and acted, they permit defendant to escape liability by the mere assertion that the record does not show that McCarty intended to authenticate the memorandum and thus make it binding on defendant. This assertion is not justified, and, as I have heretofore pointed out, the record amply supports the finding of the trial court that McCarty intended the name on the letterhead on which the memorandum was prepared to constitute an anthentication of the document.

Finally, it is stated in the majority opinion that to hold contrary to the view there expressed would "repeal" the statute of frauds. Plainly, there was no fraud or opportunity for fraud on the part of plaintiff, as there is clearly no doubt as to the nature of the contract between the parties here.

The conclusion reached by the majority is based upon a strained legalistic approach to the problem with no regard for considerations of justice or fair dealing. The decision in this case makes a statute, which was designed to prevent fraud, an instrument which may be used to aid unscrupulous persons in the perpetration of fraud, and it is obviously being so used in this case.

For the foregoing reasons, I would affirm the judgment as rendered.

Rehearing denied; CARTER, J., dissenting.

33 Cal.2d 858

MELLIN et al. v. TROUSDELL et al.

S. F. 17961.

Supreme Court of California.
May 17, 1949.

1. Appeal and error 🔑345(1)

Under statutes and Rules on Appeal, if notice of intention to move for a new trial is served and filed within 60 days after entry of judgment, a motion for new trial extends the time within which notice of appeal from the judgment may be filed, a maximum of 90 days from service of notice of entry of judgment. Rules on Appeal, rules 2(a), 3(a); Code Civ.Proc. §§ 659, 660.

2. Appeal and error 🔑348(1)

Under statutes and Rules on Appeal, when there has been no service of notice of entry of judgment, the maximum extension of time to file notice of appeal is 60 days from entry of judgment, plus 60 days for trial court to rule on motion for new trial, plus 30 days to file notice of appeal, or a total of 150 days from date of entry of judgment. Rules of Appeal, rules 2(a), 3(a); Code Civ. Proc. §§ 659, 660.

3. Appeal and error 🔑348(1)

Where appellant filed notice of intention to move for new trial on December 3, 1948, after service of notice of entry of judgment on November 23, trial court had 60 days from service of notice of entry of judgment within which to decide the motion, and motion was denied by operation of law on January 22, 1949, so that order of denial of February 2, was without effect, and notice of appeal filed on March 2 was 9 days too late. Rules on Appeal, rules 2(a), 3(a); Code Civ.Proc. §§ 659, 660.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by Oscar A. Mellin and another against Lloyd C. Trousdell and others. From the judgment, plaintiffs appeals. On motion to dismiss appeal.

Appeal dismissed.

Jack E. Hursh, San Francisco, for appellants.

R. V. Bressani, San Jose, for respondents.

TRAYNOR, Justice.

Appellants have been ordered to show cause why their appeal should not be dismissed because notice of appeal was not filed within time. The order to show cause concerns the effect of sections 659 and 660 of the Code of Civil Procedure and Rule 3(a) of the Rules on Appeal upon the time within which notice of appeal from a judgment must be filed after denial of a motion for a new trial. The operation of these provisions may be briefly described.

Under Rule 2(a) of the Rules on Appeal, notice of appeal must be filed within 60 days from date of entry of judgment, "unless the time is extended as provided in Rule 3," which relates to extensions when there has been a motion for new trial or a motion to vacate the judgment.

[1] If notice of entry of judgment has been served upon the losing party, notice of intention to move for a new trial must be filed within 10 days from the receipt of written notice of entry of judgment. Code Civ.Proc. § 659. If the motion for new trial is not determined by the trial court within 60 days from service of notice of entry, it is deemed denied. Code Civ.Proc. § 660. Upon denial of the motion, whether by order of court or by operation of law under section 660, Rule 3(a) extends the time to file notice of appeal from the

judgment 30 days from the date of such denial. Thus, if notice of intention to move for new trial is served and filed within 60 days after entry of judgment, Rule 3(a), a motion for new trial extends the time within which notice of appeal from the judgment may be filed a maximum of 90 days from service of notice of entry of judgment.

[2] If there has been no service of notice of entry of judgment, there is no statutory time limit within which notice of intention to move for a new trial must be filed, and such a motion may therefore be made at any time. If the trial court does not act thereon within 60 days from the filing of notice of intention, the motion is denied. Code Civ.Proc. § 660. Rule 3(a) grants an additional 30 days from the date of such denial within which notice of appeal from the judgment may be filed, if the notice of intention is served and filed within 60 days from the date of entry of judgment. Thus, when there has been no service of notice of entry of judgment, the maximum extension of time to file notice of appeal is 60 days from the entry of judgment, plus 60 days for the trial court to rule on the motion for new trial, plus 30 days to file notice of appeal, or a total of 150 days from the date of entry of judgment.

[3] In the present case, judgment was entered for respondents on November 18, 1948. Appellants' counsel was served with notice of entry of judgment on November 23, 1948. He filed a notice of intention to move for a new trial on December 3, 1948, or 10 days after receipt of notice of entry. On February 2, 1949, the trial court denied the motion, and a notice of appeal was filed on March 2, 1949. The notice of appeal was filed 28 days after formal order of denial of the motion and would have been within time had the effective date of denial been the date of that order. The motion, however, had already been denied by operation of law before the formal order of denial. Under section 660, the trial court had 60 days from the service of notice of entry of the judgment on November 23rd within which to decide the motion. The 60th day was January 22, 1949, and the motion must be deemed denied on that date. The order of denial of February 2nd therefore had no effect. Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486. Rule 3(a) extended the time within which to file notice of appeal from the judgment 30 days from this denial by operation of law, or a total of 90 days from service of notice of entry of judgment. That extension expired on February 21, 1949. The notice of appeal filed on March 2nd was 9 days late. The appeal is therefore dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

33 Cal.2d 834

GEORGE et al. v. BEKINS VAN & STORAGE CO. et al.

L. A. 20801.

Supreme Court of California, in Bank.
May 13, 1949.

As Modified on Denial of Rehearing
June 9, 1949.

1. Bailment 🔑16
Trover and conversion 🔑4

The tort of "conversion" exists if there is exertion of wrongful dominion over personalty of another in denial of or inconsistent with his rights therein, and is committed when a bailee, having the power to do so, refuses to deliver goods to which bailor is entitled, but there is no conversion if redelivery is impossible because goods have been lost or destroyed, either without fault of bailee or merely because of his negligence.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Conversion".

2. Bailment 🔑31(3)

Proof of bailment and subsequent refusal of bailee to make delivery of the bailed property on demand makes out a prima facie case of conversion.

3. Bailment 🔑16

Negligence in caring for bailments is not an act of dominion over them such as is necessary to make bailee liable as a converter.

4. Warehousemen 🔑25(7)

A storage company was not chargeable with "conversion" of bailments where the property was destroyed by fire caused by negligence of storage company.

5. Warehousemen 🔑34(5)

Under Warehouse Receipts Act, duty of warehouseman to establish a lawful excuse for failure to deliver goods to bailor is not discharged by a showing that goods were destroyed by fire, and warehouseman has burden of proving that fire was not caused by negligence of warehouseman, regardless of whether plaintiff frames his complaint on a negligence or on a breach of contract theory. Gen.Laws, Act 9059, §§ 8, 21.

6. Warehousemen 🔑34(7)

In action against storage company to recover value of stored household furnishings which were destroyed by fire, evidence sustained finding that storage company breached its contract to store and redeliver the furnishings and that fire was result of negligence of storage company. Gen.Laws, Act 9059, §§ 8, 21.

7. Bailment 🔑11

A bailee is liable for the negligent use of fire by his employees while on the premises where the bailed goods are stored, regardless of whether the particular act is strictly directed toward advancement of bailee's interests.

8. Bailment 🔑11
Master and servant 🔑304

Any conduct of bailee's employees, while on the job, that creates an unreasonable risk of damage to bailments, renders them negligent as custodians, and employee's negligence in smoking may be imputed to bailee so as to make bailee liable for damage to bailments resulting from fire caused by smoking, even though bailee did not permit smoking in places where smoking would create a hazard to the bailments.

9. Evidence 🔑527

The possible causes of warehouse fires are sufficiently beyond the common experience of the ordinary judge or juror to justify the admission in evidence of expert testimony on that issue in actions against warehouseman for damage to bailments caused by fire in warehouse. Code Civ.Proc. § 1870, subd. 9.

10. Evidence 🔑524, 544

The admissibility of expert testimony as to cause of a fire does not depend on whether the expert has made a personal examination, but on whether the fire is of a type the cause of which the court or jury could not readily infer unaided by expert testimony. Code Civ.Proc. § 1870, subd. 9.

11. Evidence 🔑555

Ordinarily an expert witness must base his opinion either on facts personally observed or on hypotheses that find support in the evidence.

12. Appeal and error 🔑1048(3)

Where it was improbable that opinion of plaintiffs' expert witnesses that fire was caused by careless smoking would have been different had expert testimony been limited to opinions based on facts personally observed, or been adduced by use of hypothetical questions derived from facts supported by evidence, fact that opinions were based partially on statements of defendant's employees was not prejudicial.

13. Appeal and error 🔑1048(2)

Denial to defendant of opportunity to examine plaintiffs' expert witnesses on voir dire would not be held to be prejudicial to defendant where nothing indicated that defendant was prejudiced and defendant fully cross-examined the expert witnesses and no question was raised as to their qualifications.

14. Warehousemen 🔑24(7)

Provision of Uniform Warehouse Receipts Act permitting warehouseman to insert terms in warehouse receipt which do not impair his obligation to exercise care of entrusted goods which a reasonable careful man would exercise in regard to similar goods of his own, does not prohibit insertion of clause in receipt limiting liability of warehouseman for damages to declared value of the goods. Gen.Laws, Act 9059, § 3.

15. Warehousemen 🔑24(7)

Validity of clause inserted in warehouse receipt limiting liability of warehouseman for damages to stored goods to the declared value of stored goods, does not depend on relationship between the actual value and the stipulated value, or on whether warehouseman knows that actual value is greater than the stipulated value. Gen.Laws, Act 9059, § 3.

16. Warehousemen 🔑10, 13

When goods are delivered to a warehouseman for storage and no warehouse receipt is issued at time of delivery, an implied contract of storage arises containing the terms required by law, and if implied contract is to be superseded by contract contained in subsequently issued warehouse receipt, bailor must assent to written contract as proposed by warehouseman, which assent may ordinarily be found in the acceptance and retention of warehouse receipt by bailor. Gen.Laws, Act 9059, § 3.

17. Warehousemen 🔑13, 24(7)

Bailors, by retaining warehouse receipt mailed to them by storage company, and by forwarding to storage company an identification card mailed to bailors with receipt, which was not designed to conceal fact that card was to be used as form for acceptance of storage contract, agreed to declared value of their stored household furnishings contained in warehouse receipt, and clause of receipt limiting liability of storage company for destruction of goods to declared value, superseded the previously existing implied contract of storage, regardless of whether bailors read the contract they accepted. Gen.Laws, Act 9059, § 3.

18. Warehousemen 🔑24(7)

Storage company by issuing warehouse receipt after goods were stored by plaintiffs proposed the terms to plaintiffs on which company would continue to store the goods, and continued performance of contract by company as bailee after plaintiffs accepted offer, was adequate consideration to support clause of receipt limiting liability of company for damage to declared valuation of goods.

19. Warehousmen 🔑24(7)

Where storage company accepted goods shipped by plaintiffs for storage before a warehouse receipt was issued, and plaintiffs subsequently accepted mailed warehouse receipt basing monthly rates and responsibilities on a declared value proposed by company therein, which rates would have been higher had plaintiffs stipulated a higher value for goods than value stated on receipt, reduced rate was adequate consideration to support the limitation clause as to time goods were stored after receipt was issued and accepted, regardless of fact that storage charged for first month, which was not controlled by receipt, was identical with proposed and accepted rate.

20. Warehousemen 🔑24(7)

Where storage company accepted shipped goods for storage before warehouse receipt limiting liability of company for damage to declared value of goods was issued and accepted by plaintiffs, company would have been liable for an amount not in excess of what plaintiffs told company the goods were worth, or an amount company had reason to suppose goods were worth, if stored goods had been destroyed by fire before warehouse receipt was issued. Civ.Code, § 1840.

21. Appeal and error 🔑833(5)

Where order of District Court of Appeal denying motion to dismiss appeal made on ground that appeal was not taken from a final judgment, became final before decision on merits by District Court of Appeal, and hearing was denied in Supreme Court, ruling denying hearing would be deemed to be final by Supreme Court, and granting of a hearing by Supreme Court on merits did not reopen earlier decision

CARTER, SHENK and SCHAUER, JJ., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Raymond George and Martha George against Bekins Van & Storage Co., a corporation and others, to recover value of household furnishings and effects of plaintiffs which were destroyed by fire while in possession of defendant storage company. From an adverse judgment, defendant storage company appeals and plaintiffs move to strike the appeal.

Motion denied and judgment affirmed as modified.

Prior opinion, 196 P.2d 637.

Chase, Rotchford, Downen & Chase, Robert E. Moore, Jr. and Richard T. Drukker, all of Los Angeles, for appellant.

Musick, Burrell & Ingebretsen and Clayton Straub, all of Los Angeles, as amicus curiae on behalf of appellant.

C. Paul DuBois and Henry F. Walker, both of Los Angeles, for respondents.

TRAYNOR, Justice.

Plaintiffs' household furnishings and effects were destroyed by fire while in the possession of defendant at its Grand Avenue warehouse in Los Angeles. They brought this action to recover the value of the goods destroyed, alleging six separate causes of action. The trial court made findings of fact and conclusions of law in support of three of these causes that alleged, respectively, that defendant converted plaintiffs' goods, that defendant breached its contract to store and redeliver the goods, and that the goods were destroyed by fire as a result of defendant's negligence. Defendant appeals from the judgment entered thereon. It contends at the outset that the evidence does not support the findings.

[1-4] The tort of conversion exists if there is an exertion of wrongful dominion over the personal property of another in denial of or inconsistent with his rights therein. Zaslow v. Kroenert, 29 Cal.2d 541, 549, 176 P.2d 1; Gruber v. Pacific States Sav. & Loan Co., 13 Cal.2d 144, 148, 88 P.2d 137; see, Prosser on Torts, p. 95. The tort is committed when a bailee having the power to do so refuses to redeliver goods to which the bailor is entitled. Edwards v. Jenkins, 214 Cal. 713, 720, 7 P.2d 702; see, Rest., Torts, § 223; Prosser on Torts, p. 105. It is thus generally held that a prima facie case is made out by proof of the bailment and subsequent refusal of the bailee to make delivery on demand. Doot v. Skirving Warehouse Co., 202 Cal. 75, 78, 259 P. 81; Chatterton v. Boone, 81 Cal.App.2d 943, 945, 185 P.2d 610; Vagim v. Haslett Warehouse Co., 131 Cal.App. 197, 201, 20 P.2d 992; Wolfe v. Willard H. George, Inc., 110 Cal.App. 532, 535, 294 P. 436; Atwood v. Southern California Ice Co., 63 Cal.App. 343, 346, 218 P. 283; U Drive, etc., v. System Auto Parks, 28 Cal.App.2d Supp. 782, 784, 71 P.2d 354. If redelivery is impossible, however, because the goods have been lost or destroyed, either without fault on the part of the bailee or merely because of his negligence, there is no conversion. Negligence in caring for the goods is not an act of dominion over them such as is necessary to make the bailee liable as a converter. Rogers v. Huie, 2 Cal. 571, 572, 56 Am.Dec. 363; Emmert v. United Bank etc. Co., 14 Cal.App.2d 1, 4, 57 P.2d 963; Cass v. Ocean Park Bath Co., 45 Cal.App. 656, 658, 188 P. 616; see, Zaslow v. Kroenert, 29 Cal.2d 541, 550, 176 P.2d 1; Rest., Torts, § 224; Prosser on Torts, p. 106. In the cases relied on by plaintiffs for the proposition that negligence in caring for the goods lost or destroyed constitutes conversion, either more than negligence was shown, Wolfe v. Willard H. George, Inc., 110 Cal.App. 532, 294 P. 436; First Nat. Bank v. Crown Transfer & Storage Co., 89 Cal.App. 243, 264 P. 534; Atwood v. Southern California Ice Co., 63 Cal.App. 343, 218 P. 283, or the evidence would have supported the judgment on either a breach of contract or negligence theory, and no point was raised as to the sufficiency of the pleadings to support the judgment. Wilson v. Crown Transfer etc. Co., 201 Cal. 701, 258 P. 596; Dieterle v. Bekin, 143 Cal. 683, 77 P. 664; see also, Scott's Valley Fruit Exch. v. Growers Refrigeration Co., 81 Cal.App.2d 437, 440, 184 P.2d 183. Since the trial court found that plaintiffs' goods were destroyed by fire as a result of defendant's negligence, the finding that defendant converted plaintiffs' goods cannot be sustained.

The evidence shows that the fire started in the bailments on a well-lighted aisle near the toilet on the second floor of the warehouse and destroyed or seriously damaged all the goods on that floor including plaintiffs'. Although the fire was discovered within half an hour after it started, there were no witnesses who were in the building at the time who could explain its cause. Since the construction of the building and the speed with which the fire spread made it unlikely that it was caused by defective wiring, heating equipment, or spontaneous combustion; it seems probable that the fire was started by some person on the second floor, either deliberately or as a result of negligence. Defendant had a rigid rule, enforced by discharging violators, against smoking in the warehouse except in one designated area of the first floor. No unauthorized persons were allowed above the first floor of the warehouse. After the fire some cigarette butts were found in the toilet on the second floor, but firemen had been smoking on that floor during the fire.

Defendant contends that this evidence does not support a finding that the fire was caused by negligence on the part of defendant or its employees. If, as plaintiffs contend, however, the burden of proof is upon defendant to establish that the fire was not caused by its negligence, it is not necessary to decide whether the evidence would support a judgment for plaintiffs if they had the burden of proof. Defendant cannot explain the fire, and the fact that it enforced rigid rules to prevent fire does not preclude as a matter of law a finding that it was at least as probable that the fire was caused by negligence on the part of defendant or its employees as by a cause for which defendant would not be legally responsible.

Section 21 of the uniform Warehouse Receipts Act provides: "A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care." 3 Deering's Gen.Laws, Act 9059, § 21. Section 8 of the same act provides in part: "In case the warehouseman refuses or fails to deliver the goods in compliance with a [proper] demand * * *, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal." 3 Deering's Gen.Laws, Act 9059, § 8. Defendant contends that its duty to establish a lawful excuse is discharged by a showing that the goods were destroyed by fire, and that plaintiffs then have the burden of proving that the loss was caused by defendant's failure to exercise the care required by section 21. There is a conflict among the jurisdictions that have adopted the uniform act whether section 8 places the burden of proving due care on defendant when the goods have been lost or destroyed. See, 3 Uniform Laws Annotated, pp. 37–43; Cumulative Annual Pocket Part 1948, pp. 45–49. In California, both before and after the adoption of the uniform act, the decisions considering the question of burden of proof have been conflicting and confusing. Burden of proof on plaintiff Runkle v. Southern Pacific Milling Co., 184 Cal. 714, 721, 195 P. 398, 16 A.L.R. 275; Taussig v. Bode & Haslett, 134 Cal. 260, 263, 66 P. 259, 54 L.R.A. 774, 86 Am.St.Rep. 250; Wilson v. Southern Pacific R. Co., 62 Cal. 164, 172; Jackson v. Sacramento Valley Railroad Co., 23 Cal. 268, 273; England v. Lyon Fireproof Storage Co., 94 Cal.App. 562, 567, 271 P. 532; Webber v. Bank of Tracy, 66 Cal.App. 29, 34, 225 P. 41; Atwood v. Southern California Ice Co., 63 Cal.App. 343, 346, 218 P. 283. Burden of proof on defendant: Wilson v. Crown Transfer etc. Co., 201 Cal. 701, 706, 258 P. 596; Dieterle v. Bekin, 143 Cal. 683, 688, 77 P. 664; Wilson v. California Cent. R. Co., 94 Cal. 166, 172, 29 P. 861, 17 L.R.A. 685; Dodwell & Co. v. Los Angeles Warehouse Co., 119 Cal.App. 457, 460, 6 P.2d 990; Ferguson v. Green, 99 Cal.App. 641, 643, 278 P. 1058; Garrette v. Grangers' Business Ass'n, 58 Cal.App. 396, 398, 208 P. 1010. In Wilson v. Crown Transfer etc. Co., 201 Cal. 701, 258 P. 596, however, the court expressly considered the effect of section 8 and held that this section places the burden of proving due care on the defendant when goods are lost by fire. The court pointed out that Wilson v. Southern Pacific R. Co., 62 Cal. 164, had been distinguished in Wilson v. California Cent. R. Co., 94 Cal. 166, 29 P. 861, 17 L.R.A. 685, and Dieterle v. Bekin, 143 Cal. 683, 77 P. 664, on the ground that in the earlier case plaintiff had assumed the burden of proving negligence by pleading it in his complaint, whereas in the later cases plaintiff had framed his complaint on a breach of contract or conversion theory and so did not have to plead negligence. Defendant now contends that this distinction is without merit, on the grounds that the burden of proof should not depend merely on the form of the pleadings and that regardless of the theory of the complaint the burden of proof on the issue of negligence should be upon plaintiff. It contends that when goods are destroyed by fire, the only breach of contract, if any, is the failure of defendant to exercise due care, and that under the system of code pleading it is immaterial whether plaintiff alleges such failure as a breach of contract or as negligence.

[5, 6] Although the court in the Crown Transfer case recognized that the cases decided before the adoption of the uniform act had been reconciled on the basis of the pleadings, it did not intend to make the burden of proof in cases involving storage contracts governed by the uniform act turn on whether plaintiff chose to allege only the contract and its breach instead of alleging that while stored under contract the goods were destroyed as a result of defendant's negligent custody. Thus the court disapproved dicta in Runkle v. Southern Pacific Milling Co., 184 Cal. 714, 195 P. 398, 16 A.L.R. 275, and Atwood v. Southern California Ice Co., 63 Cal.App. 343, 218 P. 283, that the burden of proof on the issue of negligence was on plaintiff, although in the Runkle case plaintiff had adopted a negligence theory in his complaint, and in the Atwood case he had sued on the theory of conversion. It is clear, therefore, that in cases governed by the provisions of the uniform act, the burden of proving that the goods were not lost because of negligence is on the defendant, whether plaintiff frames his complaint on a negligence or a breach of contract theory. Since it cannot be said as a matter of law that defendant has sustained this burden, the findings that defendant breached its contract and was negligent in the care of plaintiffs' goods cannot be disturbed for insufficiency of the evidence.

Defendant next contends that the trial court committed prejudicial error by admitting into evidence the opinions of plaintiffs' experts that the fire was caused by careless smoking. Defendant relies on Feeney v. Standard Oil Co., 58 Cal.App. 587, 209 P. 85, and Yore v. Pacific Gas & Electric Co., 99 Cal.App. 81, 277 P. 878, for the proposition that smoking by an employee is an act done not in the course of employment but for the enjoyment of the employee. Defendant contends, that it would be liable for careless smoking only if it permitted smoking in places where it would create a hazard to the goods or retained in its employ known violators of its rule against smoking.

Various rules have been developed by courts that have considered the liability of an employer for damages caused by the smoking of employees. The Restatement of Agency in comment d of section 235 apparently follows the rule of the English courts that the act of smoking in itself is not in the course of the employment, but that if smoking on the job makes negligent the manner of performing an act in the course of employment, the employer will be liable for damages caused by smoking. Williams v. Jones, 159 Eng.Reprints 528, affirmed, 159 Eng.Reprints 668; Jefferson v. Derbyshire Farmers, Ltd., [1921] 2 K.B. 281; Adams v. Southern Bell Telephone & Telegraph Co., 4 Cir., 295 F. 586, 589; Tomlinson v. Sharpe, 226 N.C. 177, 183, 37 S.E.2d 498; Herr v. Simplex Paper Box Corp., 330 Pa. 129, 131, 198 A. 309; Kelly v. Louisiana Oil Refining Co., 167 Tenn. 101, 104, 66 S.W.2d 997; Shuck v. Carney, 22 Tenn.App. 125, 130, 118 S.W.2d 896. Thus smoking in a woodshop has been held not to result in a negligent job of carpentry and the employer is not liable, but smoking while delivering gasoline results in a negligent job of delivery and the employer is liable.

Other courts, instead of attempting to determine whether smoking directly affects the job being done for the employer, determine whether smoking on the particular job creates an unreasonable risk to the property of third persons. If it does, these courts hold the employer liable despite the care he has taken to prevent smoking or the fact that smoking does not result in negligent performance of an act done in the course of the employment. Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp., 10 Cir., 49 F.2d 146, 150; McKinney v. Bland, 188 Okl. 661, 662, 112 P.2d 798; see also, Vincennes Steel Corporation v. Gibson, 194 Ark. 58, 106 S.W.2d 173, 175.

[7, 8] In Feeney v. Standard Oil Co., 58 Cal.App. 587, 209 P. 85, the court stated by way of dictum that defendant would not be liable for careless smoking on the part of its gasoline delivery man, but held defendant liable for the failure of its employee to clean up spilled gasoline before he carelessly tossed a match into it. In Yore v. Pacific Gas & Electric Co., 99 Cal.App. 81, 277 P. 878, the court, relying principally on the dictum in the Feeney case, held that smoking on the part of defendant's linemen was outside the scope of their employment and that defendant was not liable for damages caused by a grass fire resulting from careless smoking of the linemen. The Feeney case is opposed to the limited rule of liability of the Restatement, and the Yore case is opposed to those authorities that measure liability by the risk involved in smoking. It is clear, however, at least in bailments, that an employer is liable for negligent use of fire by his employees while on the premises whether or not the particular act is strictly directed toward the advancement of the employer's interest. A bailee's employees while on the job are acting as custodians of the bailments, and any conduct on their part that creates an unreasonable risk of damage to the bailments renders them negligent as custodians. As custodians they are within the course of their employment, and their negligence in smoking may be imputed to their employer. Wilson v. Southern Pacific R. Co., 62 Cal. 164, 174; Runkle v. Southern Pacific Milling Co., 184 Cal. 714, 719, 195 P. 398, 16 A.L.R. 275; see, Rest., Agency, § 235, comment d.

Moreover, in Carr v. Wm. C. Crowell Co., 28 Cal.2d 652, 171 P.2d 5, this court in holding the employer liable for an assault committed by his employee in a dispute arising out of the employment, said, "The employer's responsibility for the tortious conduct of his employee 'extends far beyond his actual or possible control over the conduct of the servant. It rests on the broader ground that every man who prefers to manage his affairs through others remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others' while acting in the scope of their employment. Chase v. New Haven Waste Material Corp., 111 Conn. 377, 379, 380, 150 A. 107, 68 A.L.R. 1497. * * * Such injuries are one of the risks of the enterprise. [Citations] In the present case, defendant's enterprise required an association of employees with third parties, attended by the risk that someone might be injured. 'The risk of such associations and conditions were risks of the employment.' Cardozo, J., in Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 472, 128 N.E. 711, 13 A.L.R. 522. Such associations 'include the faults and derelictions of human beings as well as their virtues and obediences. * * * They involve risks of injury and these risks are inherent in the working environment.' Hartford Acc. & Ind. Co. v. Cardillo, 72 App.D.C. 52, 112 F.2d 11, 15; * * *." 28 Cal.2d at pages 655–656, 171 P.2d at page 7; see also, Fields v. Sanders, 29 Cal.2d 834, 841, 180 P.2d 684, 172 A.L.R. 525. In the present case, defendant's enterprise required the presence of employees in the warehouse and was attended by the risk that smoking on the part of an employee would set fire to the bailments. This risk is one arising out of the employment. Evidence that the fire was caused by careless smoking would not, therefore, absolve defendant of liability.

[9, 10] The question remains whether the opinion evidence was admissible on the question of the cause of the fire. In St. Paul Fire etc. Co. v. Southern Pac. Co., 30 Cal.App. 140, at page 143, 157 P. 247, 248, it was held that the cause of fire is not ordinarily a question for expert opinion, "but is a deduction which the court or jury is equally competent to draw from the visible facts presented in evidence." In Gallichotte v. California etc. Ass'n, 23 Cal.App.2d 570, 74 P.2d 73, 535, the court limited the

rule of inadmissibility of the St. Paul case to situations where the expert had not been personally present at the fire. In Manney v. Housing Authority, 79 Cal.App.2d 453, 180 P.2d 69, however, the court pointed out that the admissibility of expert testimony does not depend on whether the expert has made a personal examination but on whether the fire is of a type whose cause the court or jury could not readily infer unaided by expert testimony. See, Vallejo etc. R. Co. v. Reed Orchard Co., 169 Cal. 545, 571, 147 P. 238; Code Civ.Proc., § 1870(9); 7 Wigmore on Evidence [3rd Ed.] §§ 1918, 1923. The possible causes of warehouse fires are sufficiently beyond the common experience of the ordinary judge or juror to justify the admission of expert opinion testimony on that issue.

[11-13] Defendant contends, however, that the experts were allowed to give opinions based largely on hearsay statements made to them, and that it was denied the opportunity to examine the experts on voir dire. Both experts were present at the fire and made personal investigations, including interviews with defendant's employees, which served as the basis of their opinions. Ordinarily an expert must base his opinion either on facts personally observed or on hypotheses that find support in the evidence. Commercial Union Assur. Co. v. Pacific Gas & Electric Co., 220 Cal. 515, 524, 31 P.2d 793; Manney v. Housing Authority, 79 Cal.App.2d 453, 461, 180 P.2d 69; Maggart v. Bell, 116 Cal.App. 306, 311, 2 P.2d 516; Nelson v. Parker, 104 Cal.App. 770, 778, 286 P. 1078; see, 2 Wigmore on Evidence, 3rd Ed., §§ 674-682. In this case the experts set forth in detail the facts and reasons on which they based their opinions. Their conclusion that the fire was caused by careless smoking was reached by a process of elimination of other possible causes. Although they testified early in the trial, the record shows that direct evidence was later introduced in support of most of the facts not personally observed by them. They excluded arson as a cause because unauthorized persons were not allowed on the second floor, a fact of which there was independent evidence, and because defendant's employees all denied having any grudge against defendant. It is doubtful whether the trial court, in evaluating the experts' opinions in connection with the reasons on which they were based, gave any weight to the self-serving statements made to the experts by defendant's employees. Furthermore, there is nothing to indicate that defendant was prejudiced because of the denial of voir dire examinations of the experts. Defendant fully cross-examined them, and there is no question raised as to their qualifications. Since it is improbable that different findings would have been made had the expert testimony been limited to opinions based on facts personally observed or been adduced by the use of hypothetical questions derived from facts supported by evidence in the record, the error in the presentation of the experts' opinions was not prejudicial.

On the question of damages, defendant contends that any recovery for the destruction of plaintiffs' goods must be limited to the declared value of the goods stated in the warehouse receipt. In October 1943, plaintiff wife wired defendant from Oregon, "Wire immediately if you will store my five rooms of valuable furniture." She received an affirmative reply. The goods were shipped to Los Angeles by the Navy and received by defendant on or about January 22, 1944. On February 24, 1944, a non-negotiable warehouse receipt was mailed to plaintiffs together with an "identification card." This card was signed by both plaintiffs and returned to defendant. The warehouse receipt was labelled "Non-Negotiable Warehouse Receipt and Contract" and contained on its face the following single paragraph: "Received for the account of Lt. Raymond George (hereinafter called the Depositor) whose latest known address is * * * by Bekins Van & Storage Company (hereinafter called the Company) the goods described in the schedule below (contents and condition of contents unknown) to be handled on monthly storage in warehouse situated at 3625 S. Grand Avenue, Los Angeles, Calif., subject to the provisions, limitations, terms and conditions herein printed on the face and the reverse side hereof, all of which are agreed and assented to by the Depositor for himself and his heirs; and to be delivered to said Depositor upon payment of all charges. The Company's rates and its responsibility under this contract are based on the Depositor's declared value of $10.00 per 100 lbs. per article. See Provisions, Limitations, Terms and Conditions on the Reverse Side." The words "Depositor's declared value" were printed in bold-face type somewhat larger than the rest of the printing. The reference to the provisions on the reverse side was also in bold-face type. On the back of the receipt were printed twelve paragraphs. Paragraph 2 provided: "2. Storage Rates It is agreed that the storage rate charged is based upon the space occupied by the goods and upon the declared valuation herein stated, and for the purpose of fixing such charges, the Depositor declares that the value of any article, box, package, bundle or receptacle including the contents thereof * * * shall not exceed ten dollars per 100 pounds per article, unless the Depositor fixes a greater value in writing at the time of the delivery thereof to this Company and the same is receipted hereon, in which event the Depositor agrees to pay an additional charge therefor." Paragraph 6 provided: "6. Liability of Company * * * (c) The company shall only be liable for failure to use ordinary care and then only on the basis of the Depositor's declared valuation of said goods." The identification card signed by plaintiffs provided: "I hereby acknowledge receiving your warehouse receipt and contract number J–9806–22, accepting its terms and conditions and affix hereto my official signature for your files." The reasonable value of plaintiffs' goods was $3,126.15, and the value based on weight at $10 per hundred pounds was $501.40. The trial court found that plaintiffs never agreed to the declared value, that defendant knew that the actual value exceeded the declared value, and gave judgment for the full value of the goods destroyed.

Defendant contends that its declared valuation clause is a valid term in a warehouse receipt under section 3 of the uniform act and that plaintiffs agreed to the declared value of the property by retaining the warehouse receipt and forwarding their acceptance to defendant. We agree with this contention.

[14, 15] Section 3 of the Uniform Warehouse Receipts Act provides: "A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not * * * (a) Be contrary to the provisions of this act. (b) In anywise impair his obligation to exercise that degree of care in the safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own." 3 Deering's Gen.Laws, Act 9059, § 3. Although there is a conflict among the jurisdictions whether this section prohibits declared value clauses, see, 4 Williston on Contracts, Rev.Ed., § 1046, p. 2927; annotation, 142 A.L.R. 776, it is settled in California that such clauses are permissible under the uniform act. Page v. Ace Van & Storage Co., 87 Cal.App.2d 294, 196 P.2d 816; Rosenberg v. San Francisco Storage Co., 81 Cal.App. 715, 717, 254 P. 909; McMullin v. Lyon Fireproof Storage Co., 74 Cal.App. 87, 100, 239 P. 422; see, Wilson v. Crown Transfer etc. Co., 201 Cal. 701, 714, 258 P. 596. These cases are governed by analogy to those decided under section 2175 of the Civil Code with respect to carriers. Section 2175 provides: A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants." In interpreting this section this court said: "At common law a common carrier might make any other contract relative to the carriage of property intrusted to it, save one exempting it from liability for any kind of negligence. * * * The prohibition of the common law against a carrier limiting his liability from any kind of negligence is declared in this state by section 2175 only to apply to the limitation for gross negligence. But, in so declaring, our statute has added nothing to the restrictive force of the common-law rule. * * In fact, section 2175, as it is but a declaration of that rule, as far as it applies to contracts limiting liability for gross negligence, should not be interpreted as restricting the right of contract as to an agreed valuation of property for the purpose of fixing responsibility any further than it was restricted under the common-law rule. At com-

mon law such agreed valuation was not considered a limitation of liability for either ordinary or gross negligence. In jurisdictions in this country where the common-law rule obtains, it is the prevailing doctrine that there is a wide distinction between a contract by a carrier providing for exemption from liability for its negligence and a contract, fairly entered into, whereby, in consideration of a reduced rate of compensation for the transportation, the shipper and carrier agree upon a fixed valuation therefor under which the responsibility of the carrier in case of loss shall be measured." Donlon Bros. v. Southern Pacific Co., 151 Cal. 763, 770, 91 P. 603, 605, 11 L.R.A., N.S., 811, 12 Ann.Cas. 1118; see also, Franklin v. Southern Pac. Co., 203 Cal. 680, 687, 265 P. 936, 59 A.L.R. 118; Mering v. Southern Pacific Co., 161 Cal. 297, 300–301, 119 P. 80; Pierce v. Southern Pacific Co., 120 Cal. 156, 166–167, 47 P. 874, 52 P. 302, 40 L.R.A. 350; Robinson on Admiralty, § 76, p. 538. The validity of such valuation clauses does not depend on the relationship between the actual value and the stipulated value, or on whether the carrier or bailee has knowledge that the actual value is greater than the stipulated value. Reid v. Fargo, 241 U.S. 544, 551, 36 S.Ct. 712, 60 L.Ed. 1156; Pierce Co. v. Wells Fargo & Co., 236 U.S. 278, 284, 35 S.Ct. 351, 59 L.Ed. 576; Hart v. Pennsylvania Railroad Co., 112 U.S. 331, 337, 5 S.Ct. 151, 28 L.Ed. 717; Mering v. Southern Pacific Co., 161 Cal. 297, 299–301, 119 P. 80; Donlon Bros. v. Southern Pacific Co., 151 Cal. 763, 776, 91 P. 603, 11 L.R.A., N.S., 811, 12 Ann.Cas. 1118; Page v. Ace Van & Storage Co., 87 Cal.App.2d 294, 196 P.2d 816; see, Wilson v. Crown Transfer etc. Co., 201 Cal. 701, 712–714, 258 P. 596; 4 Williston on Contracts [Rev.Ed.] § 1110, p. 3154. England v. Lyon Fireproof Storage Co., 94 Cal.App. 562, 271 P. 532, which held that a declared value clause was invalid when the bailee knew the actual value of the goods, erroneously construed the clause there involved as one exempting the bailee from liability for his own negligence, and is not in accord with the cases cited above and is disapproved.

[16, 17] The question remains whether plaintiffs agreed to the stipulated value of their goods in this case. When goods are delivered to a warehouseman for storage and no warehouse receipt is issued at the time of delivery, an implied contract of storage arises containing those terms required by law. If this contract is to be superseded by the contract contained in the subsequently issued warehouse receipt, it is necessary that the bailor agree to the written contract as proposed by the bailee. Ordinarily such assent may be found in the acceptance and retention of the warehouse receipt by the bailor. Taussig v. Bode & Haslett, 134 Cal. 260, 266, 66 P. 259, 54 L.R.A. 774, 86 Am.St.Rep. 250; see, Wilson v. Crown Transfer etc. Co., 201 Cal. 701, 712–713, 258 P. 596; 1 Williston on Contracts [Rev.Ed.] § 90B, p. 266. It is not necessary, however, to decide in this case whether the mere retention of the warehouse receipt would bind plaintiffs to the terms therein. Plaintiffs signed and returned to defendant a written acceptance of the warehouse receipt and contract. By so doing they accepted defendant's offer to store the goods at a rate based on the value clearly stated on the face of the receipt. The identification card was not designed to conceal the fact that it was to be used as a form for acceptance of the contract. It contained only two sentences, the first of which recited acceptance of the terms of the warehouse receipt and contract.

Furthermore the warehouse receipt itself was not designed in any way to conceal its nature. It was clearly labelled "Warehouse Receipt and Contract." The reference to declared value was in bold-face type on its face followed immediately by reference in bold-face type to the terms on the reverse side. The paragraphs on the reverse side were short and headed by large upper-case bold-face titles indicating their content. If plaintiffs had read the receipt and been dissatisfied with its terms, they could have rejected it, thus leaving the implied contract in force unmodified until they could agree on new terms with defendant or arrange other storage. Instead they sent their acceptance to defendant, and it is immaterial on the facts in this case that neither read the contract they accepted. Constantian v. Mercedes-Benz Co., 5 Cal.2d 631, 634, 55 P.2d

841; Gridley v. Tilson, 202 Cal. 748, 752, 262 P. 322; Taussig v. Bode & Haslett, 134 Cal. 260, 266, 66 P. 259, 54 L.R.A. 774, 86 Am.St.Rep. 250; Nichols v. Hitchcock Motor Co., 22 Cal.App.2d 151, 155, 70 P.2d 654; Greve v. Taft Realty Co., 101 Cal. App. 343, 352, 281 P. 641; Cunningham v. International Com. Y.M.C.A., 51 Cal. App. 487, 490, 197 P. 140; U Drive, etc. v. System Auto Parks, 28 Cal.App.2d Supp. 782, 787, 71 P.2d 354; see, Rest., Contracts, § 70; 1 Williston on Contracts [Rev.Ed.] § 90A, p. 257.

[18] By issuing its warehouse receipt defendant proposed the terms to plaintiffs on which it would continue to store the goods. Plaintiffs accepted this offer, and defendant's continued performance of the contract as bailee was adequate consideration to support the limitation clause.

[19] Even assuming that continuing to act as bailee was not sufficient consideration, the reduced rate at which the goods were stored was adequate consideration to support the limitation of liability. Regardless of what defendant charged plaintiffs for the first month's storage, they were entitled to propose to plaintiffs rates for the future based on the valuation of the goods. Plaintiffs cannot complain if defendant chose to charge them less for the first month than they would have charged had they been informed of the exact value plaintiffs placed on the goods. It is immaterial what rate defendant adopted for storage between the time it received the goods and was able to conclude a contract with the bailor in which the rates for the future were fixed with reference to the stipulated value. The fact is that if plaintiffs had not agreed to the stipulated value and had specified a higher value, they would from that time forward at least have been charged a higher rate. The advantage to plaintiffs of the lower rate for the future was adequate consideration for the limitation of liability.

[20] There is no indication that had plaintiffs on receipt of the warehouse receipt specified a higher value for their goods, that defendant would not have charged them the higher rate for the first month. Defendant billed plaintiffs on the assumption that the stipulated value was ten cents per pound. The amount billed was qualified by that valuation and had plaintiffs not agreed that the stipulated value was correct, defendant would have been at liberty to revise its charges for the first month. There was an express finding of the trial court, supported by evidence, that "the storage charges paid by plaintiffs and accepted by Bekins Van and Storage Company, a corporation, were based upon valuation as declared" in the warehouse receipt. From this finding it is clear that had plaintiffs stipulated a higher value for their goods defendant would have charged them a higher rate from the outset of the bailment. Although it is true that had the goods been destroyed before the warehouse receipt was issued, defendant would have been liable for an amount not in excess of what he was informed by the depositor or had reason to suppose the goods were worth, Civ.Code § 1840, his rates in that case would have reflected the higher value. Defendant was not maintaining the same rate while at the same time seeking to reduce his liability to plaintiffs. Defendant was maintaining the same rate because plaintiffs agreed that defendant's liability based on the value of the goods proposed by defendant was correct.

Maryland Casualty Co. v. First Nat. Bank, 5 Cir., 82 F.2d 465, does not support a contrary position. In that case defendant issued its one year policy of robbery insurance to plaintiff for an agreed premium. Thereafter defendant sought to attach a rider to the policy reducing the coverage provided for in the previously accepted policy. Plaintiff accepted the rider because of innocent misrepresentations of defendant's agent in reference to its effect. Defendant did not offer to reduce the premium in consideration for the reduced coverage nor did it inform plaintiff that it would exercise its right to cancel the insurance if the rider were not accepted or a higher premium paid. The court held that the attempted modification was invalid because of mutual mistake and because defendant did not give up its cancellation rights in consideration of the reduced coverage. In the present case, however, the rates were in fact determined by the declared value and had the declared value not been agreed to by plaintiffs the rates would have been increased in accord with the statement to that effect in the warehouse receipt. See, Bassi v. Springfield Fire etc. Ins. Co., 57 Cal.App. 707, 712, 208 P. 154.

[21] Plaintiffs' motion to dismiss the appeal on the ground that it was not taken from the final judgment in the action was denied by the District Court of Appeal, George v. Bekins Van & Storage Co., 83 Cal.App.2d 478, 189 P.2d 301, and hearing was denied in this court. That ruling must be deemed final. Easton v. Ash, 18 Cal.2d 530, 539, 116 P.2d 433; Hartfield v. Alderete, 26 Cal.App. 604, 605, 147 P. 991; Edwards v. Brockway, 16 Cal.App. 626, 631, 117 P. 787; see, White v. Fresno Nat. Bk., 98 Cal. 166, 167, 32 P. 979. In Re Estate of Stierlen, 199 Cal. 140, 248 P. 509, relied on by plaintiffs for the rule that the granting of hearing by this court on the merits reopens an earlier decision denying a motion to dismiss made on the same grounds, the order denying the motion to dismiss the appeal was entered simultaneously with the decision on the merits. See, In re Estate of Stierlen, 49 Cal.App.Dec. 62. In this case the order denying the motion to dismiss became final before the decision on the merits by the District Court of Appeal.

The motion to dismiss the appeal is denied. The judgment is modified by striking therefrom the figures $3,126.15 and inserting therein in lieu thereof the figures $501.40. As so modified the judgment is affirmed. Each side is to bear its own costs on this appeal.

GIBSON, C. J., and EDMONDS and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I agree with that part of the majority opinion dealing with negligence and burden of proof, but I am unable to agree with the conclusion reached with respect to the damages to be recovered by plaintiffs or the reasons assigned therefor. I am in accord with a statement made in 37 Columbia Law Review 248, 262, to the effect that the provision of the Uniform Warehouse Receipts Act against exculpation of the warehouseman has been judicially emasculated by way of the valuation device. The conclusion reached in this case is an excellant illustration of that statement, and is, moreover, without foundation in contract law.

In October, 1943, plaintiff wife wired defendant from Oregon as follows: "Wire immediately if you will store my five rooms of valuable furniture." She received an affirmative reply. The goods were shipped to Los Angeles by the Navy and received by defendant on or about January 22, 1944. On February 24, 1944, (over a month later), a non-negotiable warehouse receipt was mailed to plaintiffs, together with an "identification card". The effect of the wire, the acceptance, the delivery of the goods and the acceptance of them by defendant, and the fact that the goods remained in storage for over a month before the receipt was sent to plaintiffs, appears to have been overlooked by the majority. It was the instrument labeled "Non-negotiable Warehouse Receipt and Contract" which contained the clause purporting to limit the defendant's liability. The question first to be decided is at what time did the contract of bailment become effective?

Section 1814 of the Civil Code provides that: "A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving the depositary." It would appear that the bailment became effective upon delivery of the furniture to the defendant and acceptance by it.

Upon delivery of the goods to the defendant, the mandatory provisions of the warehouse receipt statute then in effect became part of the implied contract for storage between the parties. Voyt v. Bekins Moving & Storage Co., 169 Or. 30, 119 P.2d 586, 127 P.2d 360; French v.

Bekins Moving & Storage Co., 118 Colo. 424, 195 P.2d 968. No other limitations on the common-law liability of the warehouseman can avail him unless they were brought to the attention of the bailor and assented to *at the time of the bailment, or thereafter agreed to for a valuable consideration.* French v. Bekins, etc., supra; Brasch v. Sloan's Moving & Storage Co., 237 Mo.App. 597, 176 S.W.2d 58; Colgin v. Security Storage & Van Co., 208 La. 173, 23 So.2d 36, 160 A.L.R. 1107; Healy v. New York Central, etc. Co., 153 App.Div. 516, 138 N.Y.S. 287. It is the section dealing with permissive conditions which a warehouseman may insert in a receipt, issued by him, with which we are here concerned. Section 3, Uniform Warehouse Receipts Act.

In the present case, the Warehouse Receipt contained this provision: "It is agreed that the storage rate charged is based upon the space occupied by the goods and upon the declared valuation herein stated, and for the purpose of fixing such charges, the Depositor declares that the value of any article, box, package, bundle or receptacle including the contents thereof, packed, transported, received, handled or stored hereunder or later received for the account of said Depositor shall not exceed ten dollars per 100 pounds per article, unless the Depositor fixes a greater value in writing at the time of the delivery thereof to this Company and the same is receipted hereon, in which event the Depositor agrees to pay an additional charge therefor."

The Depositor here declared the goods to be valuable, and a month thereafter, after the contract of bailment arose and had been partially executed, the defendant sought to modify the contract by limiting its liability to ten cents per pound. Where is the consideration for this contract as modified? There is nothing in the record to show that defendant brought to the attention of plaintiffs at the *time of the bailment* the fact that if they wished to store their goods and impose liability on the bailee (in the event of loss) for the full reasonable value of the goods that they must pay a higher rate.

"It frequently happens that a warehouse receipt containing a clause limiting the warehouseman's liability is not given to the bailor simultaneously with the acceptance of the goods by the warehouseman but is sent to him at a later time, and the question then arises whether the bailor is bound by this clause regardless of the fact that he has no actual knowledge thereof * * *. The general rule seems to be that where at the commencement of the bailment no mention of the stipulation limiting the liability of the warehouseman is made, the contract cannot subsequently be changed by provisions in the warehouse receipt without the consent of the bailor." 160 A.L.R. 1112, 1117.

Plaintiff wife, by wire, informed defendant that she considered the goods valuable. The reasonable value of the furniture was found to be $3,126.15; the liability of defendant, under the limitation clause in the warehouse receipt, was $501.40. Thus, defendant, by the limitation clause in the warehouse receipt, is modifying the original contract by providing that plaintiffs shall consider their furniture worth one-sixth of its reasonable value.

There are numerous cases from other jurisdictions, decided under the Uniform Warehouse Receipts Act, in which the courts have refused to enforce such a contract. Section 57 of the Act provides that "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." The Act is in effect in all of the forty-eight states. In Cothren v. Kansas City Laundry Service Co., Mo. App., 242 S.W. 167, at page 168, the court said: "Limitations of liability, even those permissible under the law, 'must be contained in or made a part of the original contract of bailment,' for that arises upon the delivery of the goods to the bailee, and the latter cannot afterward impose conditions nor limit his liability resulting from such bailment." In Brasch v. Sloan's Moving & Storage Co., supra, 176 S.W.2d at page 60, the court said: "When it is said that the Act becomes a part of the contract between the owner and the warehouseman, what is meant is that the agreement made between them must be deemed to have embodied all the various terms required by the Act as to which the parties are necessarily charged with knowledge. In other words, when the receipt is accepted, the parties are to be regarded as having mutually agreed to all the terms and conditions made mandatory by the Act; but as to terms and conditions not made mandatory by the Act and not inconsistent with its provisions, the parties are left free to contract as they wish, and an express meeting of the minds as to all such terms and conditions is no less essential than in any other character of contract. It follows, therefore, that as to the terms and conditions made mandatory by Section 15501 (section 2, Uniform Act), the owner, when he accepts his receipt, is constructively charged with knowledge of them since they are not alone for the advantage of the warehouseman, but inure to his own benefit as well; but as to terms and conditions not made mandatory by Section 15501, but which are merely permissive under Section 15502 (section 3), which redounds primarily to the benefit of the warehouseman, the owner is not charged with notice unless such terms and conditions are brought to his attention and he thereupon assents to them so as to make them a part of the contract between himself and the warehouseman." Colgin v. Security Storage & Van Co., supra; Voyt v. Bekins, etc., supra.

The majority opinion concedes that at the time the bailment took place, plaintiff's goods were stored under an implied contract by which defendant would have been liable for their reasonable value. The goods were in storage for over one month before the receipt was issued. Plaintiffs paid, as the storage rate for that month, the sum of $7.60. This is the *same rate* that was paid thereafter for the valuation of $501.40 which was placed on the goods in the receipt issued by the *bailee.* This brings to light the fact that a bailor may, in consideration of reduced liability on the part of the bailee, pay a reduced rate. The effect of the holding in the majority opinion is to say that a partially executed contract may be modified by one of the parties without a new consideration. This is not the law, either in cases involving warehouse receipts, or other types of contracts.

"There can be no doubt of the principle contended for by the appellant, that an agreement adding to the terms of an existing agreement between the same parties, and by which new and onerous terms are imposed upon one of the parties without any compensating advantage, requires a consideration to support it, though this, of course, may consist either in a new consideration, or in some favorable modification of the original contract. * * * 'But * * * the variation of a contract is as much a matter of contract as the original agreement.' Festerman v. Parker, supra [10 Ired.Law, N.C., 474]; and a contract for such variation equally with other contracts, requires a consideration." Main St. etc. Co. v. Los Angeles Traction Co., 129 Cal. 301, 305, 61 P. 937, 938; Peachy v. Witter, 131 Cal. 316, 63 P. 468; 6 Cal. Jur. 185; Anderson v. Adler, 42 Cal.App. 776, 184 P. 42; Bonifacio v. Stuart, 52 Cal.App. 487, 199 P. 69; Bassi v. Springfield Fire etc. Ins. Co., 57 Cal.App. 707, 208 P. 154; Krobitzsch v. Middleton, 72 Cal. App.2d 804, 165 P.2d 729; Berkowitz v. Tyderko, Ltd., 13 Cal.App.2d 561, 57 P.2d 173; Voyt v. Bekins Moving & Storage Co., supra; State ex rel. Terry v. Ace Storage & Moving Co., Mo.App., 135 S.W.2d 363; Moore v. Williamson, 213 Ala. 274, 104 So. 645, 42 A.L.R. 987, 996, 1101; Torrey v. Adams, 254 Mass. 22, 149 N.E. 618, 43 A.L.R. 1451, 1454. In the latter note is found the following statement: "And a new agreement supplementing or modifying an existing contract is in legal contemplation an independent contract, requiring for its validity all the elements of a contract." In Maryland Casualty Co. v. First Nat. Bank, 5 Cir., 82 F.2d 465, after issuance and delivery of a bank robbery policy, a rider was attached thereto restricting coverage on money not under time-lock protection to 15 per cent of the total robbery insurance without reduction or concession in cost, and the rider was held unenforceable for lack of consideration.

The rule stated in Wilson v. Crown Transfer etc. Co., 201 Cal. 701, at page 714, 258 P. 596, 602, that "The right of warehouse owners to limit their liability by such a notice is given in order that they may protect themselves from unreasonable and excessive demands for loss of goods without any previous knowledge of their real value. No such reason for applying this rule applies in the present action. The appellant was fully advised by respondents as to the true value of their goods. Appellant was, therefore, in a position to protect itself by giving the respondents' property the care and supervision its rather large value required, and to *make a charge therefor based upon such valuation"*, is applicable here. [Emphasis added]. Defendants were advised and knew of the valuation placed by plaintiffs upon the goods. It was defendant's responsibility to make a charge for storage commensurate with that valuation if it wished to protect itself. But defendant chose to attempt to modify the contract by arbitrarily placing upon the goods a valuation of ten cents per pound and making a charge in accordance therewith. I submit that this attempted modification of the contract which arose upon the receipt and acceptance of the goods by defendant and which was executed more than a month thereafter was void for want of consideration. A void contract gives rise to no rights or liabilities, and is unenforceable, and it would seem quite immaterial whether the plaintiffs accepted the warehouse receipt or not. A bare promise to accept less than that to which one is entitled under a contract is not binding. Hughes v. Davis, 40 Cal. 117; Pierson v. McCahill, 21 Cal. 123; Restatement of the Law of Contracts, section 75. "Want of consideration renders a contract unenforceable". In re Gregson's Estate, 96 Cal.App. 767, 274 P. 991, 992; 6 Cal. Jur. 186. An agreement void for lack of consideration is, in effect, no agreement. Bliss v. Richardson, 12 Cal.App.2d 380, at page 385, 55 P.2d 591.

As the annotation in 160 A.L.R. 1112, at page 1117, points out, the decided cases draw a distinction between situations where the warehouse receipt and contract is given at the time of the receipt of the goods and those where the goods are accepted and subsequently the contract and receipt is made out. The cases cited in support of the following statement found in the majority opinion involve the situation where the receipt was given at the time of delivery of the goods: "The validity of such valuation clauses does not depend on the relationship between the actual value and the stipulated value, or on whether the carrier or bailee has knowledge that the actual value is greater than the stipulated value." In Mering v. Southern Pacific Co., 161 Cal. 297, at page 300, 119 P. 80, 81, plaintiff shipped a mare over defendant's railroad lines under a special contract, and "As executed the contract was entirely acceptable to the plaintiff at the time. Its provisions were thoroughly discussed between plaintiff, who was a practicing attorney, and the agent of the defendant, before it was executed." Donlon Bros. v. Southern Pacific Co., 151 Cal. 763, at page 764, 91 P. 603, 11 L.R.A., N.S., 811, 12 Ann.Cas. 1118, involved the shipment of horses. It appears that plaintiff applied to defendant for the transportation of the animals. "The result of the negotiations between them was that Delaney chartered for forty two dollars a whole car to transport the horses, and a certain document in relation thereto was executed by himself and the agent of the defendant." In Page v. Ace Van & Storage Co., 87 Cal. App.2d 294, 196 P.2d 816, plaintiff and the agent of defendant dealt on a face to face basis, and the "work order" and "certificate" were signed by plaintiff *at the time of the delivery of the goods to the defendant's agent.* In Wilson v. Crown, etc. Co., 201 Cal. 701, 258 P. 596 (a case which does not appear to be authority for the statement quoted), the receipt for the goods was delivered *after* they were deposited with defendant.

In the United States Supreme Court cases cited in the majority opinion as authority, the parties were in mutual agreement, and the receipt or bill of lading appears to have been delivered to the shipper at the time the goods were delivered. In Reid v. Fargo, 241 U.S. 544, 36 S.Ct. 712, 60 L.Ed. 1156, the situation was slightly different from that under consideration here. The shipper delivered a car to an express company, informing it that the car was worth $3,900; the express company delivered the car to a steamship company to be sent to New York, and accepted a bill of lading limiting the liability of the steamship company to $100. The express company was held liable for the loss of the car by the steamship company for any deficiency over and above the $100 limited liability imposed on the steamship company because the express company knew of the great value of the car. Pierce Co. v. Wells Fargo & Co., 236 U.S. 278, 35 S.Ct. 351, 59 L.Ed. 576, involved parties who had had previous dealings. When the cars were delivered to the railroad, the agent of the automobile company accepted a bill of lading in which there was no declaration of value and which contained a limitation of liability on the part of the railroad to $50 per car. This omission (since the cars previously shipped had been valued at a high rate) was expressly called to the attention of the agent who replied that it was an intentional omission and the result of a new policy of his company. In Hart v. Pennsylvania Railroad Co., 112 U.S. 331, 5 S.Ct. 151, 28 L.Ed. 717, horses were delivered to the carrier by the shipper and a bill of lading containing a limitation of liability was delivered to the shipper.

There is no doubt that, as stated by the majority, the *validity* of the valuation clauses does not depend on the relationship between the actual value and the stipulated value, or whether or not the bailee has knowledge of the actual value of the goods, but the statement must be qualified. The validity and enforceability of such limitation clauses depend upon the law of contracts which prescribes, among other things, that there must be mutual assent and consideration, and that these are essential elements of a binding and enforceable contract.

For the reasons above stated, I would affirm the judgment as rendered.

SHENK and SCHAUER, JJ., concur.

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91 Cal.App.2d 741

ELMERS et al. v. SHAPIRO et al.

Civ. 13902.

District Court of Appeal, First District,
Division 1, California.

May 11, 1949.

Rehearing Denied June 10, 1949.

Hearing Denied July 7, 1949.

1. Appeal and error ⚷1011(1)

Where evidence was conflicting, finding of the trial court must be upheld.

2. Army and navy ⚷51

A trade, in which the property traded by veteran is deliberately and admittedly undervalued so as to bring the property received by the veteran ostensibly within the ceiling price, violates the statute. Veterans' Emergency Housing Act of 1946, §§ 1(a), 5, 6, 7(b, c, d), 8(a), 60 Stat. 207, 50 U.S.C.A. Appendix, § 1821 et seq.

3. Army and navy ⚷51

In action by veteran to recover difference between maximum price and price exacted for property, evidence showed that there was no bona fide trade, but that builder of duplex exacted and received $19,250 notwithstanding a ceiling price of $13,700. Veterans' Emergency Housing Act of 1946, §§ 1(a), 5, 6, 7(b, c, d), 8(a), 60 Stat. 207, 50 U.S.C.A. Appendix, § 1821 et seq.

4. Army and navy ⚷51

Under statute providing that when person selling housing accommodations violates a regulation or order prescribing maximum selling price, person who buys such housing accommodations may bring an action for amount by which the consideration exceeded maximum selling price, etc., willfulness plays no part and the only question presented is whether in fact an overcharge has been made. Veterans' Emergency Housing Act of 1946, § 7(d), 60 Stat. 207, 50 U.S.C.A. Appendix, § 1821 et seq.

5. Contracts ⚷138(3)

General rule is that neither party to an illegal transaction may secure restoration of property or money transferred in course of illegal transaction, but rule does not apply to a transaction illegal because in violation of statute which was enacted to protect one of parties to the transaction, and in such a case one protected by law may recover money paid even though the illegal transaction is pleaded.

6. Army and navy ⚷51

The fact that veteran paid more than ceiling price for property did not prevent veteran from recovering difference between ceiling price and amounts so paid under the statute. Veterans' Emergency Housing Act of 1946, § 7(d), 60 Stat. 207, 50 U.S.C.A. Appendix, § 1821 et seq.

7. Army and navy ⚷51

That cost of construction may have exceeded maximum ceiling price was immaterial as respects seller's liability to veteran for difference between ceiling price and amount exacted on sale of property, since builder's remedy was judicial review of F.H.A.'s determination fixing the maximum ceiling price. Veterans' Emergency Housing Act of 1946, § 7(d), 60 Stat. 207, 50 U.S.C.A. Appendix, § 1821 et seq.

8. Army and navy ⚷51

Builder, who sold duplex to veteran greatly in excess of maximum ceiling price by means of a series of subterfuges, was liable to veteran for amount of overcharge. Veterans' Emergency Housing Act of 1946, § 7(d), 60 Stat. 207, 50 U.S.C.A.Appendix, § 1821 et seq.

9. Army and navy ⚷51

A real estate broker who did not receive overcharge for property in excess of maximum ceiling price was not liable to veteran either under the statute or on theory or fraud or conspiracy, where trial court's finding that there was no fraud or conspiracy was based on conflicting evidence and the property was worth more than veteran had paid for it. Veterans' Emergency Housing Act of 1946, § 7(d), 60 Stat. 207, 50 U.S.C.A.Appendix, § 1821 et seq.

10. Army and navy ⚷51

Straw men, used by builder and seller of duplex to veteran to evade statute fixing maximum ceiling price, were not liable to veteran where they received none of the overcharge and the property was worth more than the veteran paid for it. Veterans' Emergency Housing Act of 1946, § 7(d), 60 Stat. 207, 50 U.S.C.A.Appendix, § 1821 et seq.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Harry B. Elmers and Margaret Elmers against Harry Shapiro and others to recover amount by which amount paid exceeded maximum selling price of house purchased. From a judgment for defendants, the plaintiffs appeal.

Judgment affirmed in part and reversed in part.

Arthur T. Bridgett, San Francisco, for appellant.

Kirkbride, Wilson, Sutton, Harzfeld & Wallace, San Mateo, for respondents Harry Shapiro, Molly Shapiro, Leonard E. Shapiro, and Amelia G. Shapiro.

Cosgriff Carr, McClellan & Ingersoll Burlingame, for respondents John B. Cockroft and Luther M. Carr.

PETERS, Presiding Justice.

Plaintiffs, Harry B. Elmers and his mother, Margaret Elmers, purchased a duplex dwelling located on Woodside Way, in San Mateo. This building had been constructed with priority materials secured under federal permits, and, pursuant to federal legislation, the proper federal agency had placed a ceiling price of $13,700 upon it. Plaintiffs purchased the duplex for $8,000 in cash and a five-room house owned by them on Laurel Avenue in Burlingame. This house was valued in the deal at $5,700, but, as an integral part of the transaction, was sold for $11,250. After the transaction was closed plaintiffs brought this action to recover a claimed overcharge, it being their theory that the price charged them for the duplex was in fact $19,250 ($8,000 cash, plus their house sold for $11,250), and that this sum far exceeded the ceiling price of $13,700. The principal defendants are Harry Shapiro, who is a contractor, the builder of the house in question, its former owner, and who actually received $19,250 for the duplex, less expenses ,and John B. Cockroft the real estate broker who handled and worked out the somewhat complicated series of transactions, hereafter described, by which the deal was consummated. After a trial before the court without a jury, judgment was entered in favor of all the defendants. Plaintiffs appeal.

Statement of Facts:

Harry B. Elmers is an honorably discharged veteran of World War II, and, as such, was entitled to certain preferences and protections in the purchase of housing under the Veterans' Emergency Housing Act of 1946, a federal statute. He desired to sell or to trade the Laurel Avenue house, owned by him and his mother, for a duplex, in order to live in one unit and to secure an income from the other. The value of the Laurel Avenue house is one of the basic questions in dispute. In this transaction the Elmers were credited with $5,700 for this property. Just prior to the closing of the deal the Bank of America appraised the Laurel Avenue property as having a "trading value" of $9,250, and a "loan value" of $11,000. Cockroft appraised it at $9,000, while Shapiro valued it at $7,000. Elmers thought it was worth $12,000. Before Shapiro consented to the sale of the duplex, and as an integral part of the transaction, Cockroft arranged for a sale of the Laurel Avenue property to the Carrs for $11,250.

Harry Shapiro, a contractor, purchased a lot on Woodside Way in San Mateo upon which he desired to build a duplex. He drew plans for the building, and these, together with the proper documents, he submitted to the Federal Housing Authority, in order to secure priorities for certain building materials then unavailable without such priorities. The law required preferences to be given to veterans in the purchase of such properties and required the fixing of a ceiling price on such structures. Shapiro requested that the ceiling sales price be fixed at $17,000 and the rental value per unit be fixed at $80, the maximums provided by the law for a duplex. In August of 1946 the F.H.A. fixed a ceiling sales price of $13,700 and a rental ceiling of $70 per unit. This was communicated to Shapiro, who took no legal steps to challenge the order as permitted by the law, but did informally request the F.H.A. to adjust upward its order, but this request was refused. Shapiro started construction with full knowledge that the duplex lawfully could not be sold for more than $13,700. Sometime before October, 1946, and while the duplex was still under construction, Shapiro orally told Cockroft that he was building the duplex, and to "watch out for a trade," it being his belief that the F.H.A. was not interested in the value of properties traded for properties subject to a ceiling price. He testified, and the trial court found, that he was so informed, orally, by an employee of the F.H.A.

Early in October, 1946, Harry Elmers visited the real estate office operated by Cockroft to inquire about the availability for purchase of a duplex. Some of the conversations he then had were with Cockroft's son or other employees of the firm, but it is admitted that all such employees were acting in the course and scope of their employment with Cockroft and that he is legally responsible for their actions, so that all such conversations and dealings will be treated as if they were had with Cockroft personally. In this first conversation Elmers told Cockroft that, before he could purchase a duplex or other income property, he would have to dispose of his Laurel Avenue house. Cockroft showed Elmers several pieces of property, including the duplex being constructed by Shapiro, in which Elmers immediately evidenced a lively interest. Cockroft told Elmers that the duplex could not be purchased directly, but could only be secured on a trade because the ceiling price was $13,700 and the duplex could not be constructed for less than $17,500. Elmers talked with Shapiro and discovered that Shapiro was only interested in a trade. Elmers then told Cockroft that he was interested and was willing to sell his home on Laurel Avenue in order to purchase the duplex. Cockroft had the Laurel Avenue property appraised, with the results already mentioned.

[1] There was a major dispute over whether Cockroft or Shapiro ever told Elmers about the ceiling price. Both testified that they told him that the ceiling price was $13,700 and that Shapiro would not sell at that figure. Elmers denied this testimony. In addition, both defendants testified, as did others, that there was an F.H.A. placard on the property stating the ceiling price. Elmers testified that, although he visited this property frequently, he never saw this placard. He further testified that, although he knew such properties had to have a ceiling price, he made no inquiry as

to the ceiling price on this property and did not learn of it until February of 1947, after the deal had been closed and he had moved into the duplex. The trial court found that Elmers was informed of the ceiling price, and, in view of the conflict in the evidence, this finding must be upheld.

After some discussion of the problem, Cockroft suggested to Elmers that Elmers should make an offer for the duplex, and suggested that Elmers should offer to turn in the Laurel Avenue property, and, in addition, assume a $9,000 construction loan Shapiro had placed on the duplex. Elmers told Cockroft that this was too high a price, but several days later, on October 8, 1946, he signed a formal offer of exchange offering to buy the duplex for the Laurel Avenue property and $8,000, and authorizing Cockroft to handle the transaction. The agreement specifically provided that Elmers was to pay Cockroft a commission of $450 if the deal was consummated. This commission, computed at the normal 5%, fixes the value of the Laurel Avenue property at $9,000.

When Cockroft submitted Elmers' offer to Shapiro the latter did not sign it, or otherwise accept it, but he told Cockroft that he had again approached the F.H.A. with a request to raise the ceiling price but that the request had been denied. About a week later Shapiro told Cockroft that he would not accept the Laurel Avenue property in a direct trade; that he had originally intended to accept Elmers' offer and to give the Laurel Avenue property to his son and his wife, but that now they did not want it; that he would not sign the acceptance of the offer, but that he would orally agree not to sell or to trade the duplex to anyone else for two weeks, during which time Cockroft was to try to sell the Laurel Avenue property and cash it out.

Elmers testified that he knew that he had the legal right to withdraw his offer at any time before the deal was closed because Shapiro had not signed the acceptance. He also knew, because of a veteran's loan necessary for him to secure, that a government agency had to pass on the transaction and would appraise the duplex. Although he knew that a ceiling price had to be placed on the duplex, he made no inquiries as to the ceiling price or as to the amount of the appraisal made by the government.

On October 25, 1946, Cockroft secured from Raymond and Mary Carr a signed offer, accompanied by a $500 deposit, to buy the Laurel Avenue property for $11,250. That property was still in the names of Elmers and his mother, but Cockroft told the Carrs that he was representing Shapiro in the deal.

The transaction was completed by two escrows, one for the sale of the Laurel Avenue property, and the other for the sale of the duplex. In the instructions prepared by Cockroft and signed by Elmers the transaction was treated as an exchange of the Laurel Avenue property, plus $8,000 for the duplex, with $450 to be paid by Elmers to Cockroft as a commission.

The other escrow was more complex. The Elmers deeded the Laurel Avenue property to the Shapiros. They, in turn, deeded it to their son Leonard. The title company was instructed to deliver the deed to Leonard upon his payment to his father of $5,700. Thus, it was made to appear that Harry Shapiro only got $5,700 for the Laurel Avenue property, which, with the $8,000 in cash, is the exact amount of the ceiling price of the duplex. Leonard then deeded the Laurel Avene property to the Carrs (his father actually signing the instructions) upon their payment of $11,250. Admittedly, Leonard did not pay $5,700 or any other sum for the Laurel Avenue property, and admittedly he did not receive one cent of the $11,250 received from the Carrs. Admittedly, the $11,250, less expenses, was paid to and for the use of Harry Shapiro. Admittedly, Harry Shapiro paid income tax on the total profit realized from the transaction. Admittedly, neither Cockroft nor Shapiro ever told Elmers of the amount that was being realized on the sale of the Laurel Avenue property to the Carrs.

Thus, so far as the form of the transaction is concerned, Harry Shapiro received but $13,700 for the duplex, and a statement prepared by the title company in the Laurel Avenue escrow so declares. Actually, however, Shapiro received $19,250 for his duplex, less commissions and title company expenses. Actually, the transaction was not a trade at all, in the normal sense of those words. Elmers offered to trade, but that offer was never accepted. Shapiro refused to go ahead at all unless the Laurel Avenue property was sold and cashed out. So far as he is concerned, he wanted and got $19,250 for his duplex.

Cockroft, who maneuvered this series of transactions, received the following commissions:

From Elmers on the sale of Laurel Avenue	$450.00
From Shapiro on the sale of Laurel Avenue	562.50
From Shapiro on the sale of the duplex	237.50
Total	$1,250.00

It is an admitted fact that the duplex in the hands of Elmers is still subject to the ceiling price of $13,700, and that he cannot lawfully sell it for more than that figure. Elmers admitted that he has never offered to rescind if Shapiro would give him $19,250, and he testified that he would not sell the duplex for that amount.

Shapiro testified that a Mr. McGregor, who was apparently a valuator in the F.H.A., told him that he could lawfully enter into a trade because the F.H.A. was only interested in what the records showed, and not interested in the actual value of the traded properties, and that he, Shapiro, proceeded with the transaction in reliance upon this representation. McGregor was not available as a witness during the trial proper, but before judgment was entered Elmers moved to reopen the case to take the testimony of McGregor. This motion was accompanied by McGregor's affidavit denying, in substance, the statements attributed to him by Shapiro. The trial court denied the motion.

It is also an admitted fact that under F.H.A. regulations all deeds conveying properties subject to ceiling prices were required to contain a statement setting forth the selling price. Such a provision was not contained in the Shapiro-Elmers deed to the duplex.

Findings of Fact:

The trial court found that Elmers sought out the services of Cockroft for the purpose of securing his help in purchasing a duplex, and made a written offer to exchange his home on Laurel Avenue plus $8,000 for the duplex; that Elmers then knew "that there was an application for priority and a ceiling price of $13,700.00 on said duplex"; that Elmers, between October 8th and December 1, 1946, continuously and frequently importuned and requested Shapiro to accept his offer; that Shapiro told Elmers of the ceiling price, and told him that he could not enter into the transaction without the approval of the F.H.A.; that Shapiro consulted a representative of the F.H.A. and was told by him that the government was not interested in the value of property taken in a trade, or what such property might later be sold for; that the escrow records show that the duplex was sold for $13,700, and that the trade in value of Elmers' house was $5,700; that the cost and value of the duplex was in excess of $13,700; that its value at the time of the exchange was approximately $17,850 and was so appraised by the Veterans Administration; that its value at the time of trial was $21,000; that the actual value of the Laurel Avenue property was approximately $8,000 less than the actual value of the duplex; that the commissions received by Cockroft were customary and reasonable. These findings are all supported by substantial evidence. The court also found that no fraud was practiced upon Elmers, and that Shapiro and Cockroft "have not violated any of the provisions of the Veterans' Emergency Housing Act of 1946, or any regulations thereunder."

Pertinent Provisions of the Statute:

The controlling statute is the Veterans' Emergency Housing Act of 1946, effective May 22, 1946. 60 Statutes 207, 50 U.S.C.A. Appendix, § 1821 et seq. Various sections of this act were repealed by the Housing and Rent Act of 1947, effective June 30, 1947, 61 Statutes 193, 50 U.S.C.A.Appendix, § 1881, but were in effect at all times here pertinent.

Section 1(a) of the 1946 act states that the statute is aimed at alleviating the housing shortage, particularly as it affected veterans of World War II and their families, by giving preferences to such veterans "at sales prices or rentals within their means." A housing expediter was appointed with various broad powers, including the power to establish maximum sales prices, and to allocate and fix priorities for housing materials. Sales in excess of the ceiling price were prohibited.

Section 5 of the act is one of the provisions here involved. It reads as follows: "It shall be unlawful for any person to effect, either as principal or *broker,* a sale of any housing accommodations at a price in excess of the maximum sales price applicable to such sale under the provisions of this Act, or to solicit or attempt, offer, or agree to make any such sale. It shall be unlawful for any person to violate the terms of any regulation or order issued under the provisions of this Act. Notwithstanding any termination of this Act as contemplated in section 1(b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, as to rights or liabilities incurred or offenses committed prior to such termination date, for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

Section 6 provides for judicial review of any action or ruling made pursuant to any regulation or order issued under the authority of the act.

Section 7 provides for the civil and criminal penalties for violations of the act. So far as criminal responsibility is concerned, the violation must be willful. Subsec. b. Subsection (c) gives the district, state and territorial courts concurrent jurisdiction of all proceedings brought under this section.

Section 7(d) reads as follows: "If any person selling housing accommodations violates a regulation or order prescribing a maximum selling price, the person who buys such housing accommodations may, within one year from the date of the occurrence of the violation, bring an action for the amount by which the consideration exceeded the maximum selling price, plus reasonable attorney's fees and costs as determined by the court."

Section 8(a) contains the following definition: "The term 'maximum sales price' means the maximum price for which any housing accommodations the construction of which is completed after the effective date of this Act may be sold and includes the total consideration which may be paid by the buyer for such housing accommodations with accompanying land and improvements, excluding only those incidental charges, such as brokerage fees or commissions or charges, which buyers or sellers of such housing accommodations customarily assume in the community where such accommodations are located and which actually have been incurred for services rendered at the buyer's or seller's request."

It will be noted that under § 5 it is made unlawful for any person including an owner or broker to effect a sale in violation of the act. But under § 7(d), which is the specific section dealing with the right of the veteran to recover sums paid in excess of the ceiling price, it is the "person selling housing accommodations" that is made responsible.

Basic Question Involved:

The basic question involved is whether or not a veteran buyer who pays more than the ceiling price can recover the excess when he knew of the price ceiling, when he knowingly made an offer in excess of the price ceiling, when he importuned the seller to accept the offer and when the seller acted in good faith.

Main Contentions of the Parties:

Appellants argue that the purpose and object of the act was to protect veterans, and that whenever a veteran, voluntarily or involuntarily, pays more than the ceiling price for the property, he may recover the excess. The fact that the veteran entered the transaction with his eyes wide open and with full knowledge of what he was doing, or that the nonveteran acted on representations of employees of the F.H.A., are immaterial factors, in a civil action, according to appellants.

Shapiro makes several arguments in reply. He contends that the evidence and findings demonstrate that he acted in good faith, and in reliance upon the representations of an F.H.A. employee that a trade would not violate the act, and urges that this alone is a complete defense to the action. He also contends that appellants were not damaged and were in pari delicto. Cockroft, in addition, argues that the statute places no civil liability on a broker.

Liability of Shapiro:

[2] All of the arguments of Shapiro are unsound. In the first place, as a matter of law, under the provisions of the act and particularly under the definition of "maximum selling price" contained in § 8(a), quoted supra, it is quite clear, and no serious contention can be made to the contrary, that a trade in which the property traded by the veteran is deliberately and admittedly undervalued so as to bring the property received by the veteran ostensibly within the ceiling price, violates the act. If this were not the law the statute might just as well not have been passed. There would be a loophole in the act as big as the act itself. All of the war-inspired price ceiling and price regulation statutes follow the same pattern. The courts have quite uniformly condemned trade in transactions where the value of the property traded was deliberately undervalued by the seller of the price regulated property as a device to avoid price limitations. Fuller v. Borkin, 4 Cir., 163 F.2d 887, illustrates how far the courts have carried this principle. That was an action by a buyer of a used automobile against the seller to recover an overcharge in claimed violation of O.P.A. price regulations. The transaction involved a bona fide trade. The buyer was given a credit of $115 for the car traded-in by him. The seller expended $32.70 on repairs, and sold the traded-in car for $225. The District Court held that the fair value of the trade-in was the test of whether there had been a violation, and fixed such fair value at $192.30 ($225 selling price, less $32.70 on repairs). It then used this fair value figure in determining the amount of the overcharge. This was unanimously affirmed. The case is quite significant here not only because it holds that in a trade for price controlled property the traded-in property must be valued at its fair market value, but also because of the method used by the court to determine the amount of the overcharge—the price for which the car was resold within a short period. Using that measure here, appellants' property would be valued at $11,250, the amount for which it was sold to the Carrs.

[3] In the second place, if it be assumed contrary to law that a bona fide trade transaction would not violate the act, or if it be assumed that if it did violate the law that an estoppel could be predicated upon the representations of an F.H.A. employee that a trade would not violate the law, and that good faith reliance on such representation would be a defense (which assumptions are all contrary to law), the undisputable fact here is that this transaction was not a bona fide trade. Elmers offered to trade, the title papers in his transaction gave the appearance of a trade, and he actually thought he was entering into a trade, but the true fact is that Shapiro never accepted that offer. The uncontradicted evidence is that he told Cockroft he would not accept the Elmers' house in trade, and admittedly he never accepted Elmers' offer. He told Cockroft that he would give him two weeks to sell the Elmers' property and get the cash. If the Elmers' property had not been cashed out in the transaction, appellants would have had no legal right to secure the duplex. The title papers were then prepared to give the appearance of a trade from appellants to Shapiro. He in turn deeded the Elmers' property to his son for a fictitious consideration of $5,700, which was never paid, and the son deeded it to the Carrs for $11,250, which sum was admittedly then paid to Shapiro. The transaction was clearly not a trade at all but, at least so far as Shapiro is concerned, a clear-cut sale of the duplex for $19,250. Thus there could not have been good faith reliance on any representation that a trade would not violate the act because no trade was ever made.

[4] The third and complete answer to the points urged by Shapiro is that even if it be assumed, contrary to the fact, that Shapiro relied and acted in good faith reliance upon the representations of the F.H.A. representative, such assumption would not assist Shapiro. Under the terms of the statute above quoted, willfulness plays no part in a civil proceeding brought to recover an overcharge. The only question presented in such a civil proceeding is whether in fact an overcharge has been made. Good faith or willfulness are not integral parts of the cause of action. They become important only in criminal prosecutions under the act. This is clearly demonstrated by a reference to the statute. Section 7(b) provides for criminal prosecutions where the violation has been "willful," but § 7(d), which permits a civil action by the purchaser, omits the word "willful" and provides that such an action will lie where "any person selling housing accommodations violates a regulation or order prescribing a maximum selling price." The purpose of the civil remedy is to allow recovery of the excess paid and to prohibit the seller from receiving and keeping such excess. The good faith or intent of the seller is immaterial in such an action.

We have been cited to no case, and we have found none, so interpreting the statute under discussion, but there are many cases decided under the Emergency Price Control Act of 1942, § 205, 50 U.S.C.A. Appendix, § 925, so holding, and that statute is substantially similar in language and purpose to the one under consideration. Under § 205(e) of that statute a buyer was permitted to recover from the seller all overcharges. The statute provided that if the violation were "willful" the buyer could collect treble the amount of the overcharge, but where not willful the buyer could only recover the amount of the overcharge. In Bowles v. Hasting, 5 Cir., 146 F.2d 94, it appears that a seller of lumber overcharged the buyer for some lumber. The District Court found the violation was not willful, denied damages but granted an injunction against future violations. This was reversed by the Fifth Circuit, that court stating 146 F.2d at page 95: "Wilfulness in violation is made a necessary ingredient for criminal punishment * * *. It is not made necessary in the civil suit. When an excess in price is charged the damage is done, and the excess must be repaid * * *. The court has no discretion * * * to withhold the damages."

Porter v. Maule, 5 Cir., 160 F.2d 1, was an action brought against the seller of building blocks to recover treble damages. The defense was that the blocks were not subject to ceiling prices, and that the office of the O.P.A. had so informed the seller. The trial court determined that the seller had acted in good faith and in reliance on the agency's approval. This was reversed on the ground that, although such a defense might avert liability for treble damages, it was not a defense to an action to recover the amount of the overcharge.

Even where the action is brought by the government, and the defendant proves he relied upon the advice given him by the local rent examiner, the court has no discretion but must grant damages against the defendant. This was the precise holding in Porter v. Deer, 5 Cir., 160 F.2d 394, page 396, where it was held that: "* * * the fact that appellee acted upon the suggestion of the rent examiner in re-registering the house is no defense, even though the advice of the rent examiner was given with full knowledge of the facts. At most, such a showing would establish only the good faith of the appellee and reduce the penalty to the actual overcharge." In Fleming v. Hanscom, 9 Cir., 162 F.2d 164, the defendant acted in reliance upon an unofficial interpretation of a price regulation contained in a letter from the O.P.A. The Ninth Circuit held that, while this showed good faith, this only operated to reduce the damages to the amount of the overcharges, and stated 162 F.2d at page 166: "Appellees were not entitled to rely on an unofficial interpretation, nor was the Administrator thereby estopped from prosecuting this action."

These cases demonstrate that in such actions all that is involved is the question of whether there was an overcharge; if so, it may be recovered, and good faith is entirely a false issue. See 50 U.S.C.A. Appendix, § 925, where many cases are collected on this point.

[5] Shapiro next urges that appellants are in pari delicto and therefore cannot prevail in this proceeding. It is pointed out that the trial court has found that Elmers, with full knowledge of all the facts, offered to trade his house and $8,000 cash for the duplex, and then importuned Shapiro to enter into the transaction. It is, of course, a general rule that neither party to an illegal transaction may secure the restoration of property or money transferred in the course of the illegal transaction. Such parties are said to be in pari delicto and neither may recover from the other. There has always been a judicial aversion to aiding a malefactor in profiting from his own wrong so that in such cases the court will leave such parties where it finds them. But such rules have no application to transactions illegal because in violation of a statute, where such statute is aimed at protecting one of the parties to the transaction. In such cases there is no parity of delictum, and the one protected by the law may, at any time, resort to the law to recover money paid even though the illegal transaction is completed. 2 Restatement of Contracts, § 601; 12 Am.Jur. p. 734, § 217; see many cases collected and commented upon Fergus County v. Osweiler, 107 Mont. 466, 86 P.2d 410, 120 A.L.R. 1461.

[6] The present statute was obviously passed to protect veterans. It so states. The penalties are all imposed upon those who deal with veterans and violate the law. None is imposed on veterans. The veteran commits no offense in paying an excessive price. Although we are not aware of any case decided under the present statute, there are many cases decided by both state and federal courts under the Emergency Price Control Act, and other price fixing statutes passed during and after the war, which have held that knowledge of the illegality of the price being paid does not bar the buyer in a civil action from recovering the overcharge. See Schaubach v. Anderson, 184 Va. 795, 36 S.E.2d 539; Zwang v. A. & P. Food Stores, 181 Misc. 375, 46 N.Y.S.2d 747. In Kenney v. Hood, 5 Cir., 158 F.2d 226, the plaintiff brought an action for treble damages on a claimed overcharge in the sale of a refrigerator. The defense was that the seller had agreed to sell at a fixed price provided there was no ceiling price, and that the buyer, after ascertaining that there was a ceiling price, bought the refrigerator without informing the seller of the ceiling, and for the purpose of obtaining treble damages. The trial court held that this lack of willfulness was a defense to the action to recover treble damages, but was no defense to recover the amount of the overcharge. The Fifth Circuit in unanimously affirming this holding stated 158 F.2d at page 227: "What appellant is urging, that the sale was the result of fraud on plaintiff's part or of mutual mistake, might well have availed him if he had brought a timely action to rescind. It is completely unavailable as a defense to a suit under the section for an overcharge. This has been decided so many times in this and other circuits that one or two citations will suffice. Bowles v. Hastings, 5 Cir., 146 F.2d 94; Bowles v. Indianapolis [Glove Co.], 7 Cir., 150 F.2d 597; Shearer v. Porter, 8 Cir., 155 F.2d 77."

[7] The fact that Shapiro's costs of construction may have exceeded the maximum ceiling price is an immaterial factor. His remedy was by judicial review of the F.H.A.'s determination specifically accorded him under § 6 of the act. This remedy he did not elect to pursue. He proceeded to construct the building with priority material with full knowledge of the ceiling price, apparently in the hope that the statute would be repealed. The case of United States v. Duke Building Corporation, D.C., 79 F.Supp. 681, is a good illustration of how the courts have construed such statutes. That case arose under the Housing and Rent Act of 1947, the act that succeeded the one here involved. There, at the request of the purchasers, and before the contract of sale had been entered into, the sellers agreed to make certain changes and additions to the house not called for or included in the plans approved by F.H.A.

These were installed at actual cost and no priority materials were used in making them. The purchasers agreed to pay for these additions with full knowledge of all the facts. The sellers were compelled to refund the sums received for such additions. In so holding the Court stated the applicable principles as follows, 79 F.Supp. at page 683: "It was the purpose of Congress to insure a fair distribution of critical materials when it passed the Housing and Rent Act of 1947, * * * and whoever received a priority rating bound himself to comply with the terms of his application which in this instance fixed the selling price at $7,750. If for some valid reason he desired a change of plans or price it was necessary that he make written application to the Administrator and receive prior authority from him before making any change. Congress declared a general policy and one who takes advantage of the act must follow its terms strictly. His accepted application amounts to a contract with the government and the only way he can deviate from its terms is as authorized by the act. In this case the defendants agreed if given a priority rating they would build these houses according to the plans filed and sell them for $7,750. They are bound by it. They cannot plead estoppel or agreement to the contrary of the application without first receiving authority from the Administrator. If this were not the law one could very easily evade its terms after having received his priority rating and this is one of the things Congress intended should not be done." The rule of this case is clearly applicable here.

[8] For these reasons it is quite clear that Shapiro is liable for the amount of the overcharge, and that as to him and his wife, the judgment must be reversed.

Liability of Cockroft:

Cockroft makes all the contentions made by Shapiro, and, in addition, contends that in any event the statute involved does not make the broker civilly liable. This contention is based upon the fact that § 5 of the act, by express language, makes the act of a broker, in handling the sale of housing accommodations in excess of the maximum ceiling, unlawful, and § 7(b) provides for the criminal prosecution of such acts. Section 7(d), the section which provides for the civil action by the purchaser, and the section under which the present action is brought, uses language fundamentally different from that used in section 5. It allows the purchaser to bring the action against "any person selling housing accommodations." The question is whether or not a broker is a "seller" of housing accommodations within the meaning of § 7(d). Under comparable statutes the cases are in conflict. In Bowles v. Cardinal Cutlery Corporation, 69 F.Supp. 435, the District Court for the Southern District of New York gave exhaustive consideration to this problem and concluded that "seller" meant the retailer or wholesaler, or the owner of the property, and did not include officers of the corporation that had negotiated the sale. The District Court for the Southern District of California came to the same conclusion in Porter v. Schaefer, 69 F.Supp. 1013, where the salesman of a wholesale firm was held not subject to a civil action by the price administrator although the court pointed out that he would be subject to criminal prosecution or to the injunctive process. In Cochran v. Nelson, Wash., 173 P.2d 769, the Supreme Court of Washington held that an auctioneer was not liable to the buyer for an overcharge paid on the purchase of a washing machine. There are cases the other way. They are cited and commented upon in Porter v. Schaefer, and Bowles v. Cardinal Cutlery Corporation, supra.

[9] The reasoning of the above cases seems sound to us. The statute clearly makes a distinction between civil and criminal liability. The purpose of § 7(d) is to permit the veteran to recover the overcharge from the person who received it. It is not a general damage statute at all. The broker did not receive the overcharge and is therefore not liable under § 7(d).

Nor can the broker be held liable under the theory of fraud or conspiracy. It may be assumed that, had the trial court found that Cockroft was fraudulent or that he conspired to violate the act, such findings would be supported. Nevertheless, the trial court, on conflicting evidence, has found the other way. Moreover, if, as we have already held, the provisions of the statute impose no liability on the broker, it is most difficult to sell how appellants were damaged by such fraud or conspiracy. Without the statute, there would be no damage. Admittedly, the duplex is worth more than was paid for it. Admittedly, the duplex is worth $8,000 more than the Elmers' property. Therefore, there were no general damages. While the broker concealed from Elmers the fact that his home was being "cashed out" in the deal for $11,250, Elmers testified that he thought his home was worth $12,000, and yet was not only willing, but was anxious to enter into the transaction. It appears from the record that, had appellants known every fact now claimed to have been concealed, nevertheless they would have insisted upon going through with the transaction.

[10] For the same reasons Shapiro's son and daughter-in-law cannot be held liable.

The judgment as to John B. Cockroft, John B. Cockroft & Co., Leonard E. Shapiro and Amelia G. Shapiro is affirmed; as to Harry Shapiro and Molly Shapiro it is reversed.

WARD and BRAY, JJ., concur.

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91 Cal.App.2d 918

PEOPLE v. RAZE.

Cr. 4332.

District Court of Appeal, Second District,
Division 3, California.
May 19, 1949.

1. Criminal law 🔑1023(10)

No appeal lies from a sentence.

2. Criminal law 🔑680(2)

Proof of the "corpus delicti", that the specific offense charged has actually been committed by somebody, should be made prior to the presentation of evidence of admissions or confessions.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Corpus Delicti".

3. Criminal law 🔑412(1)

Where statements or declarations of accused are essential in order to establish that specific offense charged was committed such statements and declarations are admissible as proof of the corpus delicti.

4. Gaming 🔑98(3)

In prosecution for holding or forwarding money to be bet, on a horse race, proof of the corpus delicti was established by evidence that somebody received or purported to receive money or equivalent thereof to be wagered upon the result or purported result of a horse race. Pen. Code, § 337a, subd. 3.

5. Gaming 🔑98(3)

Evidence that defendant accepted a wager on a horse to win and on another horse to show sustained conviction for receiving, holding or forwarding money to be bet on a horse race notwithstanding that the wagers were not accompanied by cash. Pen.Code, § 337a, subd. 3.

6. Criminal law 🔑412(1)

In prosecution for receiving, holding or forwarding money to be bet on a horse race statements made by defendant to an officer at time of placing bets were admissible as proof of the corpus delicti. Pen. Code, § 337a, subd. 3.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Floyd E. Raze was convicted of a violation of penal code, § 337a, subd. 3, penalizing a person who holds money for purpose of being wagered on a horse race and he appeals from the judgment and sentence.

Appeal from sentence dismissed. Judgment affirmed.

Max Solomon, Los Angeles, and John J. Bradley, Los Angeles, for appellant.

Fred N. Howser, Attorney General, and Kent C. Rogers, Deputy Attorney General, for respondent.

VALLÉE, Justice.

[1] Appellant was convicted of a violation of Penal Code, section 337a, subdivision 3, which provides that every person who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, or consideration of value, or the equivalent thereof, bet or wagered, or to be bet or wagered, or offered for the purpose of being bet or wagered, upon the result, or purported result, of any contest, or purported contest, of skill, speed or power of endurance between horses is guilty of a public offense. He appeals from the judgment and from the sentence imposed. As no appeal lies from the sentence, that appeal is dismissed. People v. Tallman, 27 Cal.2d 209, 215, 163 P.2d 857.

On August 10, 1948, a police officer in civilian clothes entered the premises at 2800 North Figueroa Street, Los Angeles, which is a pool room and bar. The following conversation occurred between the officer and appellant: Officer: "You were lucky not to have been taken with Bill." Appellant: "Yes, those dumb cops missed the best ones, Roy and I. I hid a bunch of markers under my shirt." Officer: "Well, give me two to win and two to show on 'Bill Bartlem' in the 8th at Del Mar." Appellant: "Okay." Appellant immediately went to the phone and the officer heard him phone that bet in. Appellant then said to the officer: "I know you had 'Mine', a winner, in the 5th, because I heard you give it to Roy. So you have money coming. And I'll put this bet under cash sales and you can collect tomorrow from Roy. Okay?" Officer: "Okay."

The officer went to the premises on August 11, 1948, at 3:30 p. m. and saw appellant. He testified: "This defendant was in this poolroom shortly after 3:30, a few minutes after, when I gave the first defendant, Mr. Cardno, a $2.00 show bet on 'Lady Lassitor' in the 4th at Del Mar. And defendant Cardno gave me change from the $5.00 marked bill, which I had given the defendant. And a few minutes after that, approximately a short time, well, Officer Colbern and two other officers entered.

"Q. You did not make any bet with the defendant on the 11th, is that right? A. No, I didn't."

On cross-examination the officer testified:

"Q. In other words, it has been your testimony you made wagers with all three of these men? A. Yes.

"Q. Were the three of them ever present at one time at any of your visits there? A. I believe on the first day, the 8th, at about 4:00 o'clock in the afternoon this defendant just came to work, and the first defendant, Mr. Cardno, was just leaving work, and the manager, Roy, were all three there on that one time. On most of the occasions there were just two of them there.

"Q. On most occasions two of them were there together? A. Later bets, this defendant was there by himself"; that on the occasions he was on the premises there were other people there, approximately 12, either playing pool or sitting at the bar.

"Q. Did you, besides this one man you described in one of the accidents when you were there, hear anybody ask for a wager on a horse? Did you hear anybody else make a wager? A. On the 9th there was a man seated beside me, made a wager, but I didn't hear the horse he asked for.

"Q. In other words, on all those occasions you were there you never did see, with the exception of this one person, you never did see anybody make a bet in there, did you? A. I didn't hear a specific horse named. I saw money pass.

"Q. Between whom did you see money pass? A. Between a very small individual who had a horse,—they evidently phoned in the wrong horse,—he had a $5.00 win bet on a horse that paid thirty-seven fifty, and he wasn't paid off because they had phoned in a different horse. And there was quite an uproar about it. That was on the 9th. Shortly before this Mr. Cardno was arrested.

"Q. However, you did not see any activity take place there other than what you have indicated, these two people, you did not see any wagers taken there, did you, besides yours? A. I saw money pass hands. * * *

"Q. Were your wagers, these wagers you were talking about, ever written down on anything? A. No. Immediately after a wager was made, either one of the three defendants went to the phone and phoned it in. I never saw anything written down. * * *

"Q. Officer, on these occasions when you saw money exchange hands, did you ever see the telephone used? A. Yes, sir. Immediately after some unknown man in there would hand one of the defendants bills, this person who took the money would immediately go to the phone and I didn't hear the conversation, so I can't say.

"Q. Approximately how many times did you see that occur? A. The first defendant, Mr. Cardno, I saw him go at least six times.

"Q. Let us just confine it to this defendant. A. This defendant, I saw him go three on the date I made my wager with him."

It was stipulated that a horse named "Bill Bartlem" was running at some track in the United States on August 10, 1948, and that the expression "$2.00 to win and $2.00 to show" indicated a wager.

The case was tried on the transcript of the preliminary. Appellant did not take the stand. The foregoing constitutes all of the evidence. Appellant did not object to the reception of any evidence.

Appellant claims that (1) the corpus delicti must be proved by evidence other than the extrajudicial declarations of appellant, and (2) there is no evidence of the corpus delicti other than the extrajudicial statements of appellant.

[2, 3] Proof of the corpus delicti (that the specific offense charged has actually been committed by somebody) should be made prior to the presentation of evidence of admissions or confessions. The pronouncement found in some of the cases that the corpus delicti cannot be established by the extrajudicial statements and declarations of the accused is not an accurate statement of the rule. The rule is limited to admissions and confessions. 8 Cal.Jur. 167, sec. 248. Where the gist or essence of the offense charged consists of statements or declarations of the accused,—that is, where statements or declarations of the accused are essential in order to establish that the specific offense charged was committed,—such statements and declarations are admissible as proof of the corpus delicti. There are many criminal offenses predicated upon fraud, such as false pretenses by fraudulent representations (now called theft in this state, Penal Code, section 484), in which the corpus delicti obviously cannot be established without proof of statements or declarations of the accused.

[4-6] Proof of the corpus delicti in the case at bar was established upon evidence that somebody "gratuitously, or otherwise" received, or purported or pretended to receive or hold, "in any manner whatsoever," any money or consideration of value or the equivalent thereof to be bet or wagered, or offered for the purpose of being bet or wagered, upon the result or purported result of a horse race. The evidence as to what occurred on August 10, 1948, established not only the corpus delicti but also appellant's connection with the offense. Appellant accepted a wager of $2 to win and $2 to show on "Bill Bartlem" a horse running in the 8th race at Del Mar on August 10, 1948. That he did not receive cash is of no consequence. He pretended and purported to receive the equivalent of money, a profit which the officer had made on another race which was held by his associate who was taking wagers on the same premises. The court was warranted in inferring that appellant and his two associates were acting in concert operating a bookmaking establishment and that money held by appellant's associate was held by appellant. Statements made by appellant to the officer were admissible as proof of the corpus delicti. The corpus delicti was established. The conviction of appellant was not a miscarriage of justice.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

91 Cal.App.2d 695

PEOPLE v. BURTON et al.

Cr. 2082.

District Court of Appeal, Third District, California.

May 6, 1949.

Rehearings Denied May 19, 1949.

Hearing Denied June 2, 1949.

1. Criminal law 🔑1159(6)

The law makes no distinction between direct and circumstantial evidence, and if circumstances relied upon by prosecution reasonably justify an inference of guilt, but an inference of innocence might also reasonably have been drawn, question of guilt or innocence is for jury, and appellate court cannot interfere unless evidence obviously does not warrant inference of guilt adopted by jury.

2. Conspiracy 🔑43(12)

In prosecution for conspiracy to commit grand theft, state was not required to prove that defendants actually came together, discussed their common design, and, after reaching a formal agreement, set out upon their previously agreed course of conduct.

3. Conspiracy 🔑44½

The extent of the assent of minds which are involved in a conspiracy may be inferred from proof of facts and circumstances, which, when taken together, apparently indicate that they are parts to the same complete whole.

4. Criminal law 🔑1159(2)

Right to draw proper inferences from evidence is function of jury, and, if inference drawn does not do violence to reason, appellate court will not interfere.

5. Conspiracy 🔑47

Evidence sustained conviction of insurance adjuster for conspiring to commit grand theft by procuring payment by insurers of nonexistent loss resulting from fire and interruption of business, to insured owner of shoe store and building.

6. Criminal law 🔑1165(1)

In prosecution of insurance adjuster for grand theft and conspiring to commit grand theft, by procuring payment by insurers of nonexistent fire loss, essential element of existence of insurance was not required to be proved by actual policies, and failure of state to introduce involved policies was not prejudicial error in view of other evidence showing existence of policies.

7. Criminal law 🔑564(1)

In prosecution of insurance adjuster for grand theft and conspiracy to commit grand theft, by procuring payment by insurers of nonexistent fire loss, evidence established commission of overt acts in county in which prosecution was brought, so as to confer jurisdiction upon trial court. Pen.Code, §§ 182, 781.

8. Criminal law 🔑112(3)

Conspirators may be prosecuted in any county in which an overt act was accomplished. Pen.Code, § 182.

9. Criminal law 🔑112(3)

Under statute permitting conspiracy cases to be prosecuted in county in which overt act tending to effect the conspiracy is done, and statute stating jurisdiction of prosecution of public offense to be in either county under certain conditions, superior court of county in which some act or effect thereof occurred which was requisite to completion of conspiracy had jurisdiction of prosecution for conspiracy to commit grand theft, although act or effect thereof was not essential to commission of grand theft. Pen.Code, §§ 182, 781.

10. Indictment and Information 🔑10

An indictment is invalid if it is unsupported by any evidence produced before the grand jury, but courts will not inquire into its sufficiency if there is some evidence to support indictment.

11. Criminal law 🔑1158(1)

Transcript of proceedings before grand jury showed existence of some evidence supporting indictment for grand theft and conspiracy to commit grand theft by procuring payment by insurers of nonexistent fire loss so as to preclude appellate court from inquiring into sufficiency of evidence to justify indictment.

12. Criminal law 🔑1186(4)

In prosecution of insurance adjuster for grand theft and conspiring to commit grand theft, by procuring payment by insurers of nonexistent fire loss, alleged erroneous failure to exclude evidence offered by adjuster, and alleged erroneous failure to rule as to which joint defendant admitted evidence, which was too remote as to adjuster, was applicable, was not prejudicial, particularly in view of evidence supporting conviction. Const. art. 6, § 4½.

13. Witnesses 🔑267

Trial court has discretionary power over cross-examination.

14. Criminal law 🔑1186(4)

Where evidence of defendant's guilt was clear and convincing, appellate court would not hold action of trial court in restricting defendant's cross-examination of a witness to be prejudicial, even if the trial court abused its discretion. Const. art. 6, § 4½.

15. Criminal law 🔑1186(4)

Where evidence was sufficient to establish venue in county in which prosecution for grand theft and conspiracy to commit grand theft was brought, and evidence of defendant's guilt was convincing, so that instruction in regard to a special verdict submitted on question of venue, even if improper, did not mislead jury, and its verdict was not result of a misconception of law, instruction would not be held to be prejudicial to defendant. Const. art. 6, § 4½.

16. Criminal law 🔑1186(4)

Where evidence sustained conviction of grand theft and conspiracy to commit grand theft, without considering testimony of an alleged accomplice, failure to give an instruction on its own motion as to what constituted an accomplice and necessity for corroboration of testimony of accomplice was not reversible error. Const. art. 6, § 4½.

17. Criminal law 🔑1186(4)

Where evidence convincingly established guilt of defendant charged with grand theft and conspiracy to commit grand theft, conduct of district attorney in requesting leave in presence of jury to file a subpoena which had been served on a prosecution witness, if misconduct, was not prejudicial. Const. art. 6, § 4½.

18. Insurance 🔑31

Evidence sustained conviction for preparing a computation of a nonexisting stock loss from fire sustained by insured shoe store owner, with intent to allow computation to be presented to insurer in support of false claim for loss. Insurance Code, § 556.

19. Indictment and Information 🔑130

Different offenses may be joined in a single indictment, even though they do not relate to the same transaction or event, if there is a common element of substantial importance in their commission.

20. Indictment and Information 🔑130

Charge against insurance adjuster of grand theft and conspiring to commit grand theft by procuring payment by insurers of nonexistent fire loss could be joined in single indictment with charge against another defendant of preparing a computation of a nonexistent stock loss from fire, where there was a common element of substantial importance in each charged offense. Insurance Code, § 556; Pen.Code, §§ 954, 1098.

21. Criminal law 🔑622(1)

Action of trial court, in denying a defendant's motion for a trial separate from other defendants with whom defendant is jointly charged, is to be determined upon factual situation existing when motion for separate trial was made, and not upon what transpired thereafter. Pen.Code, § 1098.

22. Criminal law 🔑622(1)

Fact that damaging testimony, or admissions or confessions of a codefendant, might be admitted against codefendant, and would not be admissible against a defendant jointly charged with codefendant, does not render action of trial court in refusing to grant defendant a separate trial from codefendant an abuse of discretion. Pen.Code, § 1098.

23. Criminal law 🔑622(2)

In prosecution for grand theft and conspiracy to commit grand theft, refusal to grant motion for separate trial of another defendant charged with preparing a computation of nonexistent stock loss from fire sustained by insured shoe store owner, with intent to allow computation to be presented to insurers in support of false claim of stock loss, was not an abuse of discretion. Insurance Code, § 556; Pen. Code, § 1098.

24. Criminal law ⚿622(1)

Legislature can vest trial court with authority to decide whether there shall be separate or joint trial of defendants jointly charged. Pen.Code, § 1098.

25. Constitutional law ⚿268

Denial by trial court, pursuant to its statutory authority, of motion for a separate trial made by a defendant jointly charged with other defendants, did not deprive moving defendant of due process of law, within prohibition of Fourteenth Amendment. Pen.Code, § 1098; U.S.C.A. Const. Amend. 14, § 1.

◆

Appeal from Superior Court, San Joaquin County; R. M. Dunn, Judge.

Don Burton and Frank Martin were convicted of grand theft and of conspiracy to commit grand theft, and Ben Sugarman, was convicted of preparing a computation of a nonexisting stock loss from a fire sustained by insured shoe store owner, with intent to allow it to be presented to insurer in support of false claim of stock loss, and they appeal. The appeal was dismissed as to defendant Don Burton, upon suggestion of his death.

Affirmed.

Harold Wyatt, and Maxwell M. Willens, both of Stockton, Irving Sugarman, and Hanna & Morton, of Los Angeles, for appellants.

Jas. O. Reavis, of Delano, Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

PER CURIAM.

Defendants Burton, Martin and Sugarman were prosecuted upon an indictment containing nine counts, which may be summarized as follows:

Count 1. Burton, Martin and Sugarman were charged with conspiracy to commit grand theft of $15,550.59 from the Phoenix Assurance Company on or about March 1, 1946.

Count 2. Burton, Martin and Sugarman were charged with grand theft of said amount from said company on or about said date.

Count 3. Burton and Martin were charged with conspiracy to commit grand theft of $12,827.06 from the same company on or about October 25, 1946.

Count 4. Burton and Martin were charged with grand theft of a like amount from the same company on or about the same date.

Count 5. Burton and Martin were charged with conspiracy to commit grand theft of $6716.57 from St. Paul Fire and Marine Insurance Company on or about the same date.

Count 6. Burton and Martin were charged with grand theft of said amount from the same company on or about the same date.

Count 7. Burton and Martin were charged with conspiracy to commit grand theft of $2029.61 from Connecticut Insurance Company on or about February 19, 1947.

Count 8. Burton and Martin were charged with grand theft of said amount from that company on or about the same date.

Count 9. Sugarman was charged with violation of section 556 of the Insurance Code on or about February 28, 1946.

It thus appears that counts one and two alone pertain to all of the three defendants, counts three to eight, inclusive, pertain to Burton and Martin, and count 9 charges defendant Sugarman alone.

Burton filed a written motion to set aside the indictment upon the ground that he had been committed without reasonable probable cause. Sugarman filed a motion to quash the indictment on the grounds that it was void and that the court was without jurisdiction to proceed in that there was no evidence before the grand jury tending to support the charge in said indictment against him. Martin filed a like motion to set aside a like indictment on the ground that it was void in that the court was without jurisdiction to proceed because there was no evidence before the grand jury tending to support the charges against him and on the further ground that the indictment was not found, endorsed and presented as prescribed in section 940 of the Penal Code. After argument the motions were submitted and denied by the court. Separate demurrers were thereafter filed on behalf of each defendant and were denied. Thereupon each of the defendants entered pleas of not guilty to the crimes as charged. Writs were then sought in this court to restrain the trial in the Superior Court of San Joaquin County, which were denied by this court. Similar proceedings were filed in the Supreme Court and likewise denied. The trial court also denied the motion of Sugarman for a separate trial. At the conclusion of the trial the jury found all three of the defendants guilty as charged. Motions for arrest of judgment and for a new trial were thereafter made, and denied by the trial court. Each defendant was sentenced for the term prescribed by law. As to Martin the sentences on counts one and two were imposed to run concurrently, and the sentences on counts three, four, five, six, seven and eight to commence at the expiration of the sentences in counts one and two, and likewise to run concurrently. A like sentence was pronounced on Burton. Sugarman was also sentenced to state prison for the term prescribed by law, the sentences pronounced on counts one, two and nine to run concurrently. Motions for a stay of execution under section 1243 of the Penal Code were granted as to each defendant.

Subsequent to the filing of the Clerk's and Reporter's transcript in this court Burton was accidentally killed, and upon suggestion of this fact to the court by means of stipulation of counsel for said defendant and for respondent, his appeal was dismissed as moot.

We will endeavor to summarize in narrative form the voluminous record of over six thousand pages as it pertains to both of the remaining defendants. Following such summary we will consider separately the appeal of defendant Martin and the appeal of defendant Sugarman.

On February 2, 1946, Burton and Mary Burton were the owners of an office building known as the Don Burton Building in the city of Stockton. Burton was also the owner and operator of a shoe store situated on the ground floor of said building. He carried two policies of fire insurance with the Phoenix Assurance Company, one policy covering the fire insurance on the building and a second policy covering the stock or merchandise located in the ground floor shoe store. He also carried a policy of fire insurance with the St. Paul Fire and Marine Insurance Company, covering furniture, fixtures and equipment in the building. A further policy of insurance known as use and occupancy or business interruption policy was carried with the Connecticut Fire Insurance Company.

At approximately the hour of 3:45 o'clock p. m., on Saturday, February 2, 1946, the Stockton Fire Department responded to a fire alarm from the Burton building. The fire station was situated in the same square or block in which the Burton building is located. Various employees of the fire department testified concerning the condition which they found upon responding to the call, which testimony was in general that an oil fire, which covered an area of approximately three by two feet and approximately three feet in height, was burning on the cement floor in front of the main boiler in the basement of said building. From the time the fire department received the call until the blaze was extinguished no more than three to five minutes had elapsed. The smoke, which was confined to the furnace room, was insufficient to cause discomfort to the firemen or to discolor their clothing or faces. The captain in charge of the company responding to the call remained in the basement for approximately thirty minutes before leaving, and at that time the smoke had cleared. The fire was extinguished by making two passes over the blaze with what is known as a booster line equipped with what is termed a dual-purpose nozzle opened to the fog position, which operation consumed approximately one quart of water. After putting out the fire and cleaning up the basement some of the firemen went into the shoe store with the idea of ventilating it but observed no smoke and took no further action. These witnesses noticed no excitement among the clerks or customers in the shoe store. The chief of the Stockton Fire Department, who had thirty-five years of experience as a fire fighter, testified that as a result of the fire there was no damage whatever. Other members of the fire department went through the upper floors of the building but noticed no smoke, heat or soot. One member, who was serving as a watchman after the company had returned to their station, had occasion to examine merchandise in the basement storeroom and noticed that while the shoes there stored were dusty there was no trace of soot upon them.

Employees of the shoe store testified that some smoke was noticed coming through the ventilators which was the reason for calling the fire department, that the smoke caused no discomfort to the employees or to the customers then in the store and that business went on as usual. These employees further testified that they saw no soot or other damage to the shoes on display nor did they observe any of the merchandise or show cases being cleaned. They did not know of any merchandise which was exchanged or returned on account of smoke or fire damage, nor did they know of any special sales or price reductions on account of the damage resulting from the fire. Some of these witnesses also testified that they observed no soot or smoke damage to the carpets or other furniture or furnishings in the store after the fire although prior to that time the ceiling of the store was not clean and needed painting. The elevator operator in the building testified that the elevator was operating during the time of the fire and that there was neither smoke in the lobby nor in the elevator shaft until she opened the basement door. She further testified that her hat, which was left on a shelf in the basement, was not damaged by smoke or soot. Two janitresses who reported for work about five o'clock that afternoon testified that although they had both heard of the fire neither of them saw any evidence of it. Their work clothes which were always hanging on hangers in the basement, and were so hanging during the entire time, showed no evidence of soot or smoke damage. These witnesses also testified that during the cleaning of the upper floors of the building they noticed no evidence of any damage. The building manager gave similar testimony concerning the condition of the basement, the upper floors and the shoe store. An expert witness from the University of California testified that in his opinion little or no smoke from the fire would have found its way above the street level of the building. The electric motor which drove the oil burner was not damaged. It protruded in front of the furnace and was located some twenty inches above the ground directly over the fire. Witnesses who had been customers in the store during the time of the fire smelled and observed smoke but suffered no inconvenience therefrom.

On the morning after the fire Martin was called by a Sacramento insurance agent and asked to proceed to Stockton with reference to the fire loss. The insurance agent also made an appointment for Martin and Burton, and the two drove to Stockton that afternoon. At that time Martin had not been definitely employed by the insurance companies. This fact was made known to Burton, who also was told by Martin that he would go to San Francisco the following day and personally see the insurance companies in an attempt to secure the authority to handle the losses. Martin then drove to San Francisco with advance adjuster's reports and delivered two of them to a Mr. English, manager of the Phoenix Assurance Company. He informed said manager that there had been a very great loss and requested the aid of a salvage man. He further inquired whether the company would have any objection to the employment of Sugarman to render such aid, to which the manager replied that they had none. English had known Sugarman for approximately thirty years, while Martin and Sugarman had been acquainted for eight years, and at the time of said interview Martin was in Sugarman's employ for the purpose of appraising certain property in Portland, Oregon. Martin stated to English that he knew that Phoenix had other adjusters in Stockton but that the Sacramento agent desired him to handle the adjustment, and English agreed to this suggestion. Martin next went to a Mr. Schulte in the office of the St. Paul Fire and Marine Insurance Company, where he reported that he was to be the adjuster for the Phoenix Assurance Company and solicited the job of adjusting the loss of the St. Paul Company. Mr. Schulte thereupon directed him to handle the necessary adjustment for his company. Martin next went to the Connecticut Fire Insurance Company where he made a similar request, and a Mr. Wendland directed him to represent the Connecticut Company. Thereafter Martin went to the office of Sugarman Brothers, where he met the two brothers, Harry and the defendant Ben. He informed them of the fire at Stockton on the preceding Saturday and that English had chosen Sugarman to handle the salvage. The following day, February 5, Sugarman drove alone to the shoe store in Stockton which was the first trip he made to the Stockton store. There he was introduced by Martin to the manager of the store and proceeded to inspect the merchandise in the store and stock rooms. Sugarman testified that at that time he determined the merchandise had been damaged but was unable to determine the salvage thereof as the merchandise inventories were in Sacramento. He and Martin then made a date to meet in Sacramento the next day.

The following day Sugarman drove from San Francisco to Sacramento and met Martin in front of the Burton Shoe Store in that city at about eleven o'clock in the morning. Martin introduced him to Burton. The testimony is contradictory as to the conversation between these defendants and an employee of Burton, a Mr. Saunders. Martin testified that Burton objected to having his stock taken over for salvage while Sugarman testified that he was left alone with Saunders while Martin and Burton held a private conversation. Sugarman then requested that inventory figures, in addition to what was then shown him, be placed at his disposal and directed Martin to call him when this was ready. Martin encountered some difficulty in obtaining these figures from Burton and it was not until the middle of the following month that they were made available to Sugarman. Some of this information was contained on adding machine tapes which were furnished Martin and which were later incorporated by him in his proof of loss. These adding machine tapes were shown by Martin to Sugarman who placed the figures and computation on a sheet of paper which ultimately was admitted in evidence. No written report was given by Sugarman to Martin as to whether or not the Phoenix Company should take over the Burton stock for salvage, but instead he prepared one of his own in writing, all of which later became "People's Exhibit No. 3". The figures set forth in this exhibit were thereafter incorporated in their entirety into Martin's final proof of loss for the Phoenix Company, upon which payment was made to Burton by that company. Martin informed Sugarman he was going to use the percentage arrangement which Sugarman had worked out in said exhibit as the basis of settlement with Burton, and on cross-examination Sugarman admitted he knew Martin planned to do so. The figures so prepared by Sugarman were identical to the figures used by Martin, and the same was paid by the Phoenix Assurance Company.

During February 1946 Burton, acting upon the suggestion of Saunders, hired one Harry Ex, an adjuster, to represent him. Ex and Sugarman had known one another and had been together in business deals for twenty years. In 1941 they had been associated in the Pacific Trading Company, and a Mr. Bartlett, who had been an adjuster for Sugarman Brothers in Los Angeles had known Ex for ten years. They had shared offices together and during that time both sent remittances to Sugarman Brothers in San Francisco. Martin, who had full knowledge of the activities, of Ex, was asked by Burton to explain the functions of Ex to one Knittle, the income tax expert for Burton, and to a Miss Brudigan, head bookkeeper for Burton. Martin later explained to Miss Brudigan that the large fee paid by Burton to Ex was none of his concern as it was entirely between Burton and Ex. Upon arriving in Sacramento Ex advised Burton not to let Sugarman know he was on the case and submitted a contract for his employment, which Burton signed. The manager of the Stockton store prepared a detailed inventory for Ex and thereafter he and Burton had three or four telephone conversations in which Ex advised Burton how to handle his claim. Ex called at Burton's Sacramento office on March 1, and desired to know the basis on which the claim had been settled. When Burton informed him that the settlement was for a bit more than $15,000. Ex insisted upon an immediate settlement of ten per cent upon the whole inventory if he succeeded in saving the stock. To settle this demand of Ex, Burton gave him a check that day for $8,500. Burton's settlement with Martin was made without a final consultation or approval of Ex. The following day, March 2, 1946, Ex appeared at the San Francisco main branch of the Bank of America and presented the $8,500 check, which was drawn on the Capital National Bank of Sacramento against the account of Don L. Burton. At that time Ex filled out an application for exchange requesting that a cashier's check be purchased. People's Exhibit 39 indicated that a cashier's check in the sum of $3312.50 was then purchased. The residue, $5187.50, was then transferred over to the commercial department and that amount taken in cash. On said People's Exhibit appears the notation, "M. J. Simpson for Harry Ex". The debit slip which went through the commercial department indicates that it was paid in cash. Two names appear at the bottom of the document, "A. Semenza", the receiving teller who was an assistant cashier in charge of the exchange department, and "M. J. Simpson", a vice president of the bank. Simpson indicated that he either received the money or an authorization for the payment thereof. The record further discloses that from February 28, 1946, to September 23, 1946, defendant Sugarman and said Simpson were joint tenants of safe deposit box number 9016 in the San Francisco main office of said bank. From the latter date, September 23 to May 24, 1947, safe deposit box number 409 in said branch of said bank was in the name of defendant Sugarman and his brother Harry Sugarman, with power of attorney or agency held by said Simpson. On May 24, 1947, the tenancy of the last numbered safe deposit box was placed exclusively in the name of Ben Sugarman. This was the same day that M. J. Simpson was subpoenaed to give testimony before the San Joaquin County Grand Jury. On March 5, 1946, Ex negotiated cashier's check of $3312.50 through the Union Bank and Trust Company in Los Angeles and was paid by Bank of America on March 6, 1946. On June 22, 1946, a deposit of $770 was made to the account of Frank O. Martin, general adjuster, in the Tule Lake Branch of the Bank of America. $520 of this deposit was represented by a check drawn against the account of Sugarman Brothers on the main office of the Bank of America in San Francisco.

During the month of February, 1946, Burton engaged one Wolters, who gave Martin an estimate of the painting job. Wolters was told by Martin to proceed with the painting of the basement, the shoe store and the halls and stairway. Wolters thereafter re-painted the shoe store, necessitating it being closed for one day. He also painted the basement, two storage rooms, the back stairs, all of the corridors, including ceiling, walls and woodwork on every floor of the building. He also painted some thirty-six offices in the building. His statement in the sum of $9,610.60 was mailed to defendant Don Burton at Sacramento, together with a blank bill head. Therafter a Mrs. O'Neil, a stenographer for Martin in his Sacramento office, and at his direction filled in the blank bill head raising the amount to $14,952.51. Burton paid Wolters from time to time during the course of the painting three checks in the sum of $2500 each, and a final check in the sum of $2110.60, making a total of $9,610.60. Burton, however, received the sum of $14,952.51 from the Phoenix Company by reason of Martin's acts in raising the painting bill.

On October 1, 1946, Martin went to Stockton and handed Wolters a check in the sum of $1957 which he asked Wolters to cash and return the proceeds to him. Martin requested Wolters to show this check on his books and also told him that he would take care of any increase in Wolter's income taxes. Martin also accompanied Sugarman and Sugarman's son to see Wolters in 1947 when Wolters was told to keep quiet and not talk to any one. On February 4, 1946, Martin prepared the adjuster's report to the St. Paul Company, wherein he estimated a twenty per cent loss to the insurance company. The following month he forwarded to the company a report in which he raised his estimate of loss from twenty to fifty-five per cent. In this report Martin mentioned that the immense volume of smoke "permeated not only the involved store but also the entire office building, making it necessary to immediately close down the store and rush the customers out * * * the oily smoke turned the walls and ceiling to a deep brown and badly damaged the rugs and draperies and counters and show cases."

On July 20, 1946, a further letter was forwarded by Martin to the St. Paul Company advising them that the estimate of loss should be raised from fifty-five per cent to eighty-five per cent. On October 24 Martin filed his final adjuster's report to the St. Paul Company, which was submitted in connection with the certain statements of proof of loss executed by Burton. Attached to the Martin final report and Burton's proof of loss were appended statements for draperies, carpets and other materials, labor and window lettering. Upon receipt of these documents the St. Paul Company issued a draft to Burton for $6,716.57 in payment of the claim of loss. Martin also forwarded a statement to the St. Paul Company in the sum of $132.50 which likewise was paid. On February 4, 1946, Martin prepared an adjuster's report to the Connecticut Company estimating a loss of ten per cent on the use and occupancy policy carried with that company. In a previous letter from Martin to that company he stated that the store did not open at ten o'clock a. m. on five different days, and that there were two days when the store was closed, and that there was a loss of business from 3:15 to 5:30 o'clock p. m. on the day of the fire. Martin's final adjuster's report and the proof of loss sworn to by Burton was forwarded to the Connecticut Company and thereafter that company issued its draft to Martin in the sum of $166.96 as payment for his services and issued its draft for $2029.61 to the Don L. Burton Shoe Salon in payment of the proof of loss submitted or claimed by him. After Martin had surrendered to the district attorney of San Joaquin county in the office of the Department of Justice in Sacramento, he turned over to the department certain records and files from his office and included therein was the previously referred to Exhibit No. 3, which Martin stated was the computation of the stock loss as drawn up by Sugarman and that it was in the latter's own handwriting. Martin further stated at that time that the figures so set forth were the basis of the computation of the loss submitted and that his schedule dated February 2, 1946, relating to shoes, carpets, furnishings and other merchandise show an alleged damage of $15,550.59 were prepared from the information given him by Sugarman. The figures having been copied by Martin are without correction or alteration as to his statement of the cash value and loss submitted to the Phoenix Company.

Appeal of Defendant Martin.

Martin first contends that there is no substantial evidence to support the finding that he acted dishonestly. This contention is amplified by the argument that had the prosecution been able to establish that there had been no fire at all then the judgments of conviction clearly would be proper. But he argues that as the actuality of the fire was clearly established then it cannot be asserted that there was no damage, and hence the mere fact that Burton secured an advantageous settlement or that conclusions might differ as to the extent of the damage are not proof of any wrong doing on the part of this appellant. He further contends that all of the evidence against him is negative and circumstantial; that such evidence shows that he relied upon the representations of others and that the state produced no evidence to rebut this fact.

Although defendant takes up separately the evidence regarding each of counts one to eight inclusive, it would appear unnecessary to discuss each at length herein since the applicable rules attach with equal propriety to each count.

[1] The record herein presents the usual conditions in cases where the evidence on the part of the prosecution is circumstantial and is contradicted by direct evidence on the part of defendant. However, "the law makes no distinction between direct and circumstantial evidence * * * therefore, if the circumstances relied upon by the prosecution reasonably justify an inference of guilt, but an inference of innocence might also reasonably have been drawn, it was for the jury, as between these two inferences, to choose, and unless it is obvious that the evidence does not warrant the inference of guilt adopted by the Jury, this court is powerless to interfere." People v. Rubio, 75 Cal.App.2d 697, 707, 171 P.2d 737, 742.

[2, 3] In proving the conspiracy herein charged it was not necessary for the state to prove that the parties actually came together, mutually discussed their common design, and after reaching a formal agreement set out upon their previously agreed course of conduct. The extent of the assent of minds which are involved in a conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from the proofs of the facts and circumstances which, when taken together, apparently indicate that they are parts to the same complete whole. People v. Jones, 136 Cal.App. 722, 29 P.2d 902; People v. Benenato, 77 Cal.App.2d 350, 175 P.2d 296.

The evidence as previously summarized amply supports the rule as stated. Although what we have heretofore said in that regard applies equally to each count yet by reason of the strenuous attack by appellant upon the evidence relied upon by the prosecution in support of counts seven and eight further discussion of this question would appear necessary. Even if it be true, as appellant contends, that the prosecution labored under a complete misunderstanding of the coverage involved in the use and occupancy policy issued by the Connecticut Fire Insurance Company, nevertheless such misunderstanding was not fatal, as the essential elements remained. An agent of the company testified concerning the nature of the coverage set forth in the policy and was cross-examined at length in this regard. There is evidence that the store was closed for one day only. Contradictory to this is the statement contained in a letter from defendant to the company that on five days the store did not open until twelve o'clock rather than the usual hour of ten, thereby losing two hours each day. Further, that the store was closed for two full days while the repainting was in progress and that there was additional loss on the day of the fire from 3:15 o'clock to 5:30 o'clock p. m. The letter also included a statement by defendant that he had verified such information by conversations with the painter and store manager. Appellant attempts to show that such statement was wholly immaterial, that is, that whether the store was wholly closed or not or that business was interrupted is immaterial as both conditions were covered by the same policy. However, the fact remains that such a report was made and that there is evidence that the information therein contained was false. In fact both of the persons therein named, the painter and the store manager, denied such statements when called as witnesses.

[4, 5] Under such circumstances we cannot say that the jury was not reasonably justified in drawing an inference of guilt from the evidence. The right to draw proper inferences is one of the functions of the jury and if the inference so drawn does not do violence to reason this court will not interfere. People v. Latona, 2 Cal.2d 714, 43 P.2d 260.

[6] It likewise appears immaterial whether or not the actual policies of insurance were introduced into evidence by the state. As stated, agents of the companies testified at length and were cross-examined by defendant's counsel. No objection was made to their testimony on any ground. While the fact of insurance was an essential element of the People's case the actual policy was not. The existence thereof was shown by the testimony of the agents as well as a general statement of the contents. In view of this showing in the record and defendant's failure to object we cannot say that prejudicial error

resulted from the failure of the state to introduce the policies in evidence.

[7, 8] Appellant's next contention relates to the sufficiency of the evidence to show the commission of any overt act in San Joaquin county as charged in the first, third, fifth and seventh counts in the indictment. From our examination of the evidence it appears, and in fact is not denied, that Martin made numerous trips to Stockton. He inspected the premises, he engaged a painter to redecorate the shoe store and he also requested Wolters to cash a check, which check was issued by Burton to Wolters, who in turn gave the proceeds to Martin. As stated in Loser v. Superior Court, 78 Cal.App.2d 30, 177 P.2d 320, conspirators may be prosecuted in any county in which an overt act was accomplished. Martin as a principal was responsible for the acts in furtherance of the defendant's concerted plan to commit the crime. It is apparent that the offenses charged were partly committed in Sacramento, San Joaquin and San Francisco counties, giving jurisdiction to each county. People v. Benenato, supra.

[9] Appellant next asserts that the evidence is insufficient to show venue in San Joaquin county for the prosecution of any of the eight offenses charged against him. Appellant premises his contention on the ground that the acts requisite to the consummation of the various offenses were: (1) Preparation of the proofs of loss, (2) execution of the proofs of loss, (3) mailing proofs of loss to the companies, (4) securing drafts from the insurance companies, and (5) accepting payment from the insurance companies, and that none of them were committed within San Joaquin county. Section 182 of the Penal Code provides in part that "all cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done." Additionally Penal Code section 781 provides that "when a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occure in two or more counties, the jurisdiction is in either county." Under these provisions it is sufficient if some act or effect thereof occurred in San Joaquin county which act or effect is requisite to the completion of the offense although not essential to its commission. People v. Megladdery, 40 Cal.App.2d 748, 106 P.2d 84; People v. Loser, supra. That such acts or effects thereof did occur in San Joaquin county is apparent from the foregoing statement of the evidence.

[10, 11] Appellant next asserts that there was not sufficient evidence produced before the grand jury to justify his indictment and that the court thus erred in denying his motion to quash the indictment on that account. Appellant refers to Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713, in which it was held that an indictment is invalid if it is unsupported by any evidence produced before the grand jury. In so holding the court expressly recognized that if there is some evidence to support the indictment, the courts will not inquire into its sufficiency. An examination of the transcript of the proceedings before the grand jury reveals that there was "some" evidence produced supporting the indictment and therefore no error was committed by the trial court in denying the motion to quash.

[12] Appellant next contends that portions of the evidence admitted by the court were too remote to be admissible as to him and that the court erred in not ruling as to which of the joint defendants the evidence so admitted was applicable. Additionally appellant asserts that the court erred in excluding certain evidence proffered by him. The record, which consists of upwards of 6000 pages of testimony is obviously too long to permit this court to set forth the numerous instances of asserted error in this regard contained therein and in part referred to in appellant's brief. Nevertheless, the record has been carefully examined and while it is true that some of the specifications appear to be meritorious we see no error of such a prejudicial nature as to entitle the defendant to a reversal of the judgment in the light of Article VI, section 4½ of the Constitution. Particularly is this true in view of the ample evidence in support of the judgment contained in the record.

[13, 14] Appellant next contends that the court unduly restricted the cross-examination of the witness Wolters, allegedly to the prejudice of appellant. Again, the bulk of the record pertaining to the direct and cross-examination of the witness prescribes against setting forth the substance thereof. The rule is well established that the trial court is vested with discretionary power over cross-examination. When the evidence of a defendant's guilt is clear and convincing as it is in this case it cannot be said that prejudicial error resulted from the attacked restriction of defendant's cross-examination of such witness. People v. Carson, 74 Cal.App.2d 834, 169 P.2d 677. We are satisfied that in view of the record herein even if it be conceded that the trial court abused its discretion in this regard that appellant did not sustain such prejudice within the meaning of Article VI section 4½ of the Constitution as to require a reversal.

[15] Appellant next urges error in the instruction given by the court in regard to a special verdict submitted to the jury upon the question of the jurisdiction (venue) of the court. Complaint is made to the language employed in regard thereto as well as to the alleged prejudicial effect thereof. Appellant's attack upon the sufficiency of the evidence to establish jurisdiction (venue) in San Joaquin county has been discussed above and decided against appellant as has his attack upon the sufficiency of the evidence to sustain the judgment. Thus, even if it be conceded that the instructions were improper we are unable to conclude that the jury was misled or its verdict the result of a misconception of the law. See People v. Honeycutt, 29 Cal.2d 52, 172 P.2d 698; Art. VI, sec. 4½, Const.

[16] Appellant further urges that the failure of the court to give an unrequested instruction as to what constitutes an accomplice and the necessity for corroboration of the testimony of an accomplice constitutes reversible error. Appellant argues that Wolters, who was retained by appellant to do the painting after the fire, was an accomplice in the commission of the crimes of which appellants stand convicted. While certain portions of the record substantiate this contention it does not follow that the failure of the court to give an instruction upon its own motion constituted reversible error. It is apparent from the statement of the evidence, supra, that there is sufficient evidence to support the judgment without considering the testimony of the alleged accomplice. Under such circumstances the failure of the court to give an instruction upon its own motion does not constitute reversible error. See People v. Warren, 16 Cal.2d 103, 104 P.2d 1024.

[17] Appellant Martin's last contention, which is not joined in by appellant Sugarman, is that Mr. Watson, the district attorney, was guilty of prejudicial misconduct in "demanding a bench warrant for the arrest of prosecution witness Harry Ex," in the presence of the jury. All that the record shows that the district attorney did in this connection was to request leave to file a subpoena which had been served on Harry Ex, and to state, on inquiry by attorney for defendant Sugarman whether said witness was to be there, that as far as he knew he was not there. Thereupon the court stated: "Very well, you may take a bench warrant." At that point Martin's counsel, Mr. Wyatt, asked permission to question the district attorney regarding the subpoena, saying he thought the matter "should go on record." The court then asked if they did not think such matters should be taken up in the absence of the jury, to which Mr. Wyatt said it was "too late." He then proceeded to question Mr. Watson, apparently in an attempt to show that the latter was not acting in good faith in connection with the subpoena, and the failure of the witness to be present. The court, apparently on its own motion, then instructed the jury that the fact that the court issued a bench warrant for witnesses did not constitute any evidence against defendants whatsoever; that it was not to consider any statements in reference to the applications for the issuance of the bench warrants as evidence in the case, nor draw any inferences "from any matters here that have been stated either by the court or the attorneys in the case." This admonition was subsequently repeated in substance. Appellant argues that the testimony given by Mr. Watson,

and also testimony subsequently educed from assistant district attorney, Mr. Firth, indicates that in securing the issuance of the bench warrant for Harry Ex the district attorney was not acting in good faith. Whatever may be the fact in that respect, it must be conceded that his only conduct in the presence of the jury was to ask leave to file the subpoena, and that all that was thereafter brought out on the subject in the presence of the jury was brought out by the attorneys for appellants, after being questioned by the court as to the wisdom of such course.

We are unable to say that the conduct of the district attorney in the presence of the jury did or could result in a miscarriage of justice. On the contrary, if, as appellant contends, the evidence which he brought out shows that the district attorney did not act in good faith, the inferences to be drawn from such showing would seem to be unfavorable to the prosecution rather than to the defendants.

In view of the voluminous record which discloses ample evidence of the guilt of appellant we are unable to perceive that the misconduct of the district attorney, if it was such, had a material effect upon the determination of the jury and therefore we are constrained to hold that it was not of such a prejudicial nature as to lead to the conclusion that a miscarriage of justice has resulted therefrom. See People v. Macias, 77 Cal.App.2d 71, 174 P.2d 895.

Appeal of Defendant Sugarman.

Appellant Sugarman raises several points in his appeal, many of which are substantially the same as those raised by appellant Martin and the disposition of those points in the Martin appeal likewise governs the disposition on this appeal. Consequently, mention will only be made herein of those points raised by Sugarman which were not raised by Martin.

[18] This appellant first contends that the evidence is insufficient to support the judgment appealed from. While this point was not specifically considered in the Martin appeal as applied to this appellant, nevertheless, the law enunciated therein is equally applicable and it is our judgment that the detailed summary of the evidence, supra, reveals substantial evidence to support the judgment appealed from.

[19] Appellant next contends that the court erroneously overruled his demurrer to the indictment which was based on an alleged misjoinder of causes of action. In arguing this point he asserts that separate offenses against separate defendants were charged in a single indictment. In a recent decision, the Supreme Court held that different offenses may be joined, even though they do not relate to the same transaction or event, if there is a common element of substantial importance in their commission. In re Pearson, 30 Cal.2d 871, 186 P.2d 401.

[20] It clearly appears that in each of the main circumstances the occurrence of the fire, the subsequent attempts to defraud the insurers, and the filing of false claims and appraisals, is a common element of substantial importance in the offenses included in the indictment so as to permit their joinder. Whether or not such joinder is permissible, when in addition to the joinder of separate offenses separate defendants are involved, presents a question more difficult of solution. However, separate offenses were charged against separate defendants in People v. Flores, 62 Cal.App.2d 700, 145 P.2d 318, and it was there decided that such joinder was authorized by Penal Code sections 954 and 1098. People v. Guerrero, 22 Cal.2d 183, 137 P.2d 21, is to the same effect. On the basis of the foregoing authorities we hold that the trial court did not err in overruling appellant's demurrer.

[21, 22] Appellant's next contention is that the court erred in denying his motion for a separate trial in that much of the evidence introduced at the trial pertained to the charges against Martin and Burton and not to him. His argument is that prejudice resulted therefrom in that it was impossible for the jury to segregate the large mass of evidence introduced and apply it to the applicable defendant. Appellant concedes the established rule that the action of the trial court in denying the motion for a separate trial is to be weighed and determined upon the factual situation exist-

ing at the time the motion was made and not upon what transpired thereafter. People v. Erno, 195 Cal. 272, 232 P. 710; People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951. The law does not confer a right to a separate trial upon a defendant jointly charged with others, but to the contrary vests the trial court with discretion in granting a separate trial with which an appellate court will not interfere in the absence of a showing of an abuse of discretion. People v. Baa, 24 Cal.2d 374, 150 P.2d 1. In People v. King, 30 Cal.App.2d 185, at page 206, 85 P.2d 928, 940, where a like question was raised, the court stated as follows:

> "Since the enactment of section 1098 of the Penal Code, in its present form, a defendant jointly charged is not entitled to a separate trial as a matter of right, and the question of severance rests entirely in the discretion of the trial court. * * * It is not an abuse of discretion to refuse to grant a motion for a severance because damaging testimony or the admission or confessions of a codefendant might be admitted in evidence against such codefendant, and not be admissible against the moving defendant." See also People v. Baa, supra.

[23] In view of the foregoing and the fact that much of the evidence relating to the fire and the extent of the damage, if any, thereby caused would necessarily have to be introduced if appellant were tried separately, we are unable to conclude that the trial court abused its discretion in this regard.

Appellant lastly contends that the effect of the action of the trial court in denying his motion for a new trial whereby he was forced to submit to a joint trial constituted a violation of due process of law in violation of section 1, Article XIV of the Constitution of the United States. Since we have concluded that the trial court acted within the discretion with which it was vested by section 1098 of the Penal Code, such contention in reality attacks the validity of said statute.

[24, 25] It is sufficient to state that as the court said in People v. Yeager, 194 Cal. 452, 229 P. 40, 55, "It is within the province of the Legislature to vest the trial court with authority to decide whether there shall be a separate or a joint trial of defendants jointly charged." In People v. Dowell, 204 Cal. 109, 266 P. 807, 809, wherein the validity of the statute was in issue, the court stated that "there is no federal question, constitutional or otherwise, involved."

The judgments and orders appealed from are affirmed.

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91 Cal.App.2d 722

PEOPLE v. SYED SHAH.

Cr. 2560.

District Court of Appeal, First District,
Division 1, California.

May 9, 1949.

Rehearing Denied May 24, 1949.
Hearing Denied June 2, 1949.

1. Criminal law 🔑543(2)
Depositions 🔑90

Due diligence, within statute providing that testimony taken before committing magistrate or deposition of state's witness, whose testimony is taken conditionally in defendant's presence because of witness' inability to give security for his appearance at trial, may be read after satisfactory showing to court that witness cannot be found in state with due diligence, need not be proved by legally competent evidence, but only by satisfactory evidence. Pen.Code, § 686, subd. 3.

2. Criminal law 🔑1153(6)

Reviewing courts will not interfere with trial judge's ruling permitting absent witness' testimony to be read as deposition, in absence of abuse of such judge's discretion. Pen.Code, § 686, subd. 3.

3. Depositions 🔑90

The trial court's permission of district attorney to read absent prosecuting witness' testimony as deposition was not error, though such witness was in state on previous dates set for trial of case, which was continued at district attorney's suggestion because of crowded calendar, in absence of claim by defendant that trial on either of such dates was possible, showing that any official was derelict in failing to subpoena witness, or indication in record that defendant was deprived of substantial right. Pen.Code, § 686, subd. 3.

4. Criminal law ⚷761(8)

In prosecution for assault with deadly weapon, instruction defining deadly weapon as any object, instrument or weapon capable of producing, and likely to produce, death or great bodily injury, when used in manner shown, was not erroneous as assuming that a deadly weapon was used, where defendant admitted that he used a hammer and there was no contention that it was not a deadly weapon.

5. Assault and battery ⚷67

A defendant's conduct must be judged, not on basis of what circumstances appeared to be to him, but on how a reasonable person would have acted under same circumstances, in determining whether defendant acted in self-defense.

6. Criminal law ⚷829(5)

Refusal of defendant's requested self-defense instructions sufficiently covered by given instructions in similar language was not error.

7. Assault and battery ⚷67

The kind and degree of force, which a person may lawfully use in self-defense, are limited by what a reasonable person in same situation, seeing and knowing what person defending himself sees and knows, would believe necessary, and any use of force beyond that is excessive.

8. Assault and battery ⚷67

Though one is unlawfully attacked, he may not inflict, in self-defense, any injury on assailant after danger from assailant no longer exists as situation would appear to reasonable man in same position.

9. Criminal law ⚷814(17)

In prosecution for assault with deadly weapon, where vital issue in case was not dependent on circumstantial evidence, instructions on such subject were unnecessary.

10. Criminal law ⚷1186(4)

Failure of circumstantial evidence instruction to state principle that, to justify conviction on such evidence, facts or circumstances must not only be entirely consistent with theory of defendant's guilt, but inconsistent with any other rational conclusion, in substantially such language, is not necessarily ground for reversal of conviction, in view of constitutional rule prohibiting reversal on ground of misdirection of jury, unless error resulted in miscarriage of justice. Const. art. 6, § 4½.

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Appeal from Superior Court, City and County of San Francisco; Daniel R. Shoemaker, Judge.

Syed Shah was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Kenneth Carlton Zwerin, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

WARD, Justice.

Defendant appeals from a judgment of conviction of assault with a deadly weapon and from an order denying a new trial. The information in two counts charged assaults on different parties. The jury failed to reach a verdict on the first count. The second count is the basis of this appeal, and alleges an assault with a deadly weapon upon one Walter Szajna.

It is claimed that the court erred in permitting the testimony of an absent witness to be read as a deposition. It is also urged that the court committed error in giving and refusing to give certain instructions.

Testimony taken before a committing magistrate may be read if the trial court is satisfied that the witness cannot, after due diligence, be found within the state. Penal Code, sec. 686, subd. 3. It is defendant's contention that "no competent legal evidence was introduced" to show that Szajna was not in the state. It appears that Szajna was in the state on previous dates when the case had been set for trial, but was continued, at the district attorney's suggestion, on account of a crowded calendar. Defendant does not claim that it was possible to try the case on the previous dates. Szajna was definitely placed in Chicago a short period before the trial.

[1] The words "due diligence" as used in Penal Code section 686 need not be proved by "legally competent" evidence as defendant claims, but by "satisfactory evidence." "Deposition" and a "preliminary examination" before a committing magistrate are often used interchangeably. However, "deposition" in the section specifically refers to the testimony of a witness who probably will be unable to be present at the trial and whose testimony is taken conditionally in the presence of the defendant and read at the trial, if the witness does not appear in person. The transcript of the testimony of a witness given in the presence of the defendant and to whom there has been given an opportunity to cross-examine at the preliminary hearing may likewise be used as evidence "upon its being satisfactorily shown to the court that he * * * cannot, with due diligence, be found within the state."

[2, 3] A number of citations are presented by each side, but they are of little assistance, as in each opinion the facts of the case and the activity of officials or attorneys are considered as applicable to the particular case. Unless there is an abuse of the discretion used by a trial judge, reviewing courts will not interfere. In the present case it does not appear that any official was derelict in failing previously to subpoena Szajna, and the issuance of a subpoena from San Francisco, California, to Chicago, Illinois, would have been a futile act. The record does not indicate that on the point raised the defendant was deprived of a substantial right.

[4] The court instructed: "A deadly weapon is any objection, instrument or weapon which, used in the manner in which it appears to have been used, is capable of producing, and is likely to produce, death or great bodily injury." The word "objection" may be assumed to mean "object." The instruction was condemned in People v. Simpson, 87 Cal.App.2d 359, 196 P.2d 933, upon the theory that it assumed that a deadly weapon was used. In the present case defendant admitted he used a hammer on Szajna. The latter testified he was hit four times—once on the head. The record discloses that the instrument is designated as a "Vulcan Ball Face hammer." There was no contention during the trial, and there is no contention on appeal, that it is not a deadly weapon. The attorney general states: "It was introduced in the evidence as Exhibit 1, and it obviously appeared as a deadly weapon to the jury when used in the manner indicated by tthe testimony of the complaining witness." In defendant's brief no further objection or reply of any kind is made.

[5-8] The court refused to give the following instructions: "You are instructed that under the law, a person may act upon appearances; the rule being that a person may have a lively apprehension that he is in imminent danger and believe that his apprehension is based on sufficient cause and is supported by reasonable grounds, ánd that such apprehension is reasonable and warranted from appearances as they present themselves to him. If, however, he acts on these appearances, he does so at his own peril since the law leaves it to no man to be the exclusive judge of the reasonableness of the appearances upon which he acts but prescribes a standard of its own, which is, that not only would the person acting on appearances himself believe that he was in deadly peril or in danger of great bodily injury, but would a reasonable man situated as the defendant was, saw what he saw, and knowing what he knew, be justified in believing himself in such danger. The jury is not to consider whether or not the defendant was, when the complaining witness was injured, in actual peril or danger, but only to consider whether the indications or appearances were such as to induce the defendant as a reasonable man into believing that he was in such danger or peril. If you, therefore, find that the defendant Syed Shah believed reasonably that he was in such peril or danger and that the complain-

ing witness was injured under such belief, even though it should appear that the complaining witness was unarmed, I instruct you that you should acquit the defendant." Also: "I instruct you that you give such weight as you deem proper to all of the circumstances surrounding the commission of an assault in determining to what extent, or if at all, they operated as mitigating circumstances."

In People v. Vezerian, 85 Cal.App.2d 708, 193 P.2d 944, it was held to be error to refuse an instruction similar to the first one quoted, but only because of the cumulative effect of the refusal, coupled with refusal to give other instructions. The second instruction is based on language covering "circumstances in mitigation" used in the opinion in People v. Wells, 10 Cal.2d 610, 76 P.2d 493, 498. In the Vezerian case and in the Wells case, the questions arose as to how far a person may act upon appearances and what constitutes mitigation or excuse. A defendant's conduct is not to be judged on the basis of what the circumstances appear to be to him, but on how a reasonable person would act under the same circumstances.

Assuming that the instructions were requested entirely upon the theory of self-defense, it appears that they were covered by other instructions, although not in the precise, but in similar language. The instructions given sufficiently covered the subject matter. "The kind and degree of force which a person may lawfully use in self-defense are limited by what a reasonable person in the same situation as such person, seeing what he sees and knowing what he knows, then would believe to be necessary. Any use of force beyond that is regarded by the law as excessive. Although a person may believe that he is acting, and may act, in self-defense, he is not justified in using a greater degree of force than that permitted by the rule just stated to you. Thus, although one has been unlawfully attacked, he may not in the name of self-defense inflict further or any injury upon an erstwhile assailant after danger from the assailant no longer exists, as the situation would appear to a reasonable man in the same position. The rule of self-defense does not authorize one to seek revenge or to take into his own hands the punishment of an offender."

[9, 10] Finally, the defendant complains that the language used in a circumstantial evidence instruction is not in the precise language adopted in People v. Bender, 27 Cal.2d 164, 163 P.2d 8. The vital issue in this case was not dependent upon circumstantial evidence, and hence instructions on that subject were not necessary. People v. Jerman, 29 Cal.2d 189, 197, 173 P.2d 805; People v. Harmon, 89 Cal.App.2d 55, 200 P.2d 32. The instruction is not quoted in defendant's brief, but appears in the transcript. Assuming that such an instruction might well have been given, "However, in view of the constitutional rule (art. VI, § 4½) that 'No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error * * * has resulted in a miscarriage of justice,' it does not necessarily follow that the failure to state the principle in substantially the language above quoted will be ground for reversal." People v. Bender, supra, 27 Cal.2d at page 176, 163 P.2d at page 15.

The judgment and the order denying defendant's motion for a new trial are affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, SCHAUER, and TRAYNOR, JJ., dissenting.

91 Cal.App.2d 716

PEOPLE v. SYED SHAH.

Cr. 2566.

District Court of Appeal, First District,
Division 1, California.
May 9, 1949.

Rehearing Denied May 24, 1949.
Hearing Denied June 2, 1949.

1. Weapons 🔑6, 7

Wrongful use of weapon is not element of crime of carrying concealed deadly weapon, though such use may be of evidentiary significance, and intent to use weapon as deadly weapon is immaterial to such offense, of which the gist is carrying of weapon concealed on the person. Gen. Laws, Act 1970.

2. Weapons 🔑17(3)

In prosecution for carrying concealed deadly weapon, evidence of defendant's knowledge of nature and character of weapon is admissible to show that carrying thereof concealed was not justifiable or excusable. Gen.Laws, Act 1970.

3. Criminal law 🔑829(12)

Where court instructed that jury was sole judge of weight of evidence and witnesses' credibility and gave instructions on presumption of innocence, reasonable doubt, and other matters essential to determination of accused's guilt or innocence, instruction that verdict must be founded on evidence introduced in court was unnecessary.

4. Criminal law 🔑800(2)
Weapons 🔑17(1)

In prosecution for carrying a concealed dirk or dagger, receipt of evidence as to definition of pocket knife or definition thereof in instructions to jury was unnecessary. Gen.Laws, Act 1970.

5. Criminal law 🔑862

Jurors are entitled to use their general knowledge of nature of commonly used articles, such as pocket knife, referred to on trial.

6. Criminal law 🔑783½

The trial court was not required to instruct jury that evidence stricken from record should not be considered, where no evidence was ordered stricken from record.

7. Weapons 🔑8

A "dagger" is any straight knife, worn on person and capable of inflicting death, except pocket knife, "dirk" and "dagger" are synonymous and consist of any straight stabbing weapon or weapon fitted primarily for stabbing, and "dagger" is generic term covering dirk, stiletto, poniard, etc.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Dagger" and "Dirk".

8. Weapons 🔑17(6)

In prosecution for carrying concealed deadly weapon consisting of dirk or dagger, character of which can be determined by direct physical examination, instruction that if there were two inconsistent theories as to whether weapon was deadly or not, jury could adopt theory favorable to defendant and acquit him, was unnecessary. Gen. Laws, Act 1970.

9. Weapons 🔑17(8)

The statute authorizing fine not exceeding $200 in addition to imprisonment on conviction of any crime punishable by imprisonment, in relation to which no fine is prescribed, includes all crimes, whether denounced in Penal Code or by special statutory enactment, and hence authorizes imposition of $200 fine in addition to sentence of imprisonment in county jail or state prison on conviction of carrying concealed dirk or dagger. Pen.Code, § 672; Gen.Laws, Act 1970.

◆

Appeal from Superior Court, City and County of San Francisco; Robt. McWilliams, Judge.

Syed Shah was convicted of carrying a dirk or dagger concealed on his person, and he appeals.

Affirmed.

Kenneth C. Zwerin, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty. and William Acton, Deputy Dist. Atty., both of San Francisco, for respondent.

WARD, Justice.

Defendant appeals from a conviction of a felony: violating section 1, chapter 339, Statutes of 1923, 1 Deering's General Laws, Act 1970. The information charged the defendant with carrying, concealed upon his person, a certain dirk or dagger.

On appeal it is urged that the evidence is insufficient to justify a conviction; that the district attorney was guilty of misconduct; that the court failed to give certain instructions and erroneously left to the jury certain legal definitions; and that "the portion of the judgment imposing a fine in addition to a jail sentence, after probation has been denied, is illegal."

Two police inspectors testified that while riding in a radio car on the date mentioned in the information they saw defendant wearing a suit of light material, and that they could discern a long narrow object approximately seven inches in length in defendant's right side pocket. Defendant admitted that the object was a knife. He was requested to enter the car. The article was taken from the pocket. It was a weapon often referred to as a dirk or dagger, of the spring type variety, that opens by pressing a button. It is described as if it has the appearance of a long pocket knife until the spring is pressed, when the blade springs to a stationary position until released. The jury's verdict indicates that it may not be classified as an ordinary knife, but an instrument that would be capable of inflicting death.

The defendant testified that he was taking money to a bank and that he needed the knife for protection. One of the officers testified that he had examined three or four hundred weapons, "not of this caliber, but of the same type;" that "This knife is constructed—it has a spring which will release this blade (indicating). There is a button on the side of the knife (indicating). When pressed, that blade will snap and stay open (illustrating). It is a fixed blade (indicating). It also has a lock where you release it; this particular knife you have to release it up on the top (illustrating). Most spring knives are built on the same type—not quite as elaborate—but it has a set lock, when you spring it open it will stay set, such as that. You can't shut that knife (indicating). Mr. Acton (for the prosecution): Q. I am going to ask you if you will close it, because I don't want anybody to get hurt. Just one more question, with your Honor's permission: At the time this knife was taken from the pocket of the defendant, was it opened in his presence? A. It was opened in his presence. It was closed while in his pocket, but when we removed it, we opened the knife. Q. Did you have any talk with him? A. At the time I personally asked Syed Shah, I said, 'You know you are not supposed to have this type of knife. I have warned you before.' He says, 'Yes, I know.' "

The district attorney sought thereafter to adduce testimony concerning previous conversations between the police officers and the defendant, and to introduce other knives taken from the defendant. In each instance, when an objection was interposed, it was sustained. However, it appears that one of the inspectors gave the above-quoted testimony without objection.

[1, 2] Wrongful use of the weapon is not an element of the crime, although it may be of evidentiary significance under certain circumstances. Intent to use it as a deadly weapon is immaterial to the offense charged in the information. Carrying the weapon concealed upon the person is the gist of the offense, but in addition, the character of this weapon is concealed until a spring is pressed. Evidence as to knowledge of its nature and character would be admissible to show that carrying the weapon concealed was not justifiable or excusable. Under the facts as presented, the district attorney was not guilty of misconduct.

[3–6] Objection is made that the trial court did not give certain stock instructions. If certain stock instructions are not applicable to the case there is no purpose in giving them. A fair example appears in the present case. The court instructed that the jury was the sole judge of the weight of the evidence and the credibility of the witnesses, on presumption of innocence and reasonable doubt, and on other matters essential to a determination of the guilt or innocence of the accused. The court did not state that the verdict must be founded upon evidence introduced in court. There was no necessity for such an instruction. The failure to give such an instruction may be coupled with the objection that the court refused to define a pocket knife. The definition of certain articles is a matter of common knowledge. It was not necessary to receive evidence, although none was offered, as to the definition of a pocket knife, or to define it in the instructions. Jurors are entitled to use their general knowledge when reference is made to articles commonly in use. 20 Am.Jur. p. 55, sec. 28. The court was not required to instruct that evidence stricken from the record should not be considered. There was no evidence ordered stricken from the record. Several other trifling objections are made which do not merit discussion.

[7] In the present case the court instructed: "Unless you believe to a moral certainty and beyond a reasonable doubt that the weapon found in the possession of the defendant comes within that definition, I instruct you that you must find the defendant not guilty. If you find beyond a reasonable doubt that it does come within that definition, and that he carried it concealed upon his person, it is your duty to convict him." Defendant cites Bivens v. State, 133 Tex.Cr.R. 604, 113 S.W.2d 921, which was reversed on the ground that the evidence failed to sustain the averments of the information. It appears that the weapon was not technically a dirk as alleged, but a bowie knife or dagger. In People v. Ruiz, 88 Cal. App. 502, 263 P. 836, the reviewing court affirmed a conviction on a count in an information for carrying a concealed weapon. The reviewing court stated, 88 Cal.App. at page 504, 263 P. at page 837: "A dagger has been defined as any straight knife to be worn on the person which is capable of inflicting death, except what is commonly known as a 'pocket knife.' 'Dirk' and 'dagger,' are used synonymously and consist of any straight stabbing weapon, as a dirk, stiletto, etc. Century Dictionary. They may consist of any weapon fitted primarily for stabbing. The word dagger is a generic term covering the dirk, stiletto, poniard, etc. Standard Dictionary. Each of the names given to the weapon properly described it. The weapon itself was in evidence, and the jury was in a position to judge its character." The definition of the weapon in the present case, although given in shorter and more concise form, follows generally the instruction in the Ruiz case.

[8] The usual claim is made that the court of its own motion should have given instructions on circumstantial evidence. It is claimed that if the use of the weapon was susceptible of two interpretations, one consistent with the weapon being deadly and the other that it was not deadly, the jury under the latter interpretation would be entitled to acquit. The weapon could be examined and its character determined by direct physical examination. It was not necessary to instruct the jury that if there were two inconsistent theories they could adopt the one favorable to the defendant. The words dirk and dagger were defined and the jury instructed that it must be found that the weapon was "fitted primarily for stabbing" and "capable of inflicting death" and "Unless you believe to a moral certainty and beyond a reasonable doubt that the weapon found in the possession of the defendant comes within that definition, I instruct you that you must find the defendant not guilty."

[9] Defendant, after verdict of guilty, presented a motion for probation. The motion was denied. Upon conviction of the offense charged an accused may be imprisoned in the state prison or the county jail. In 1935 the act to control "firearms capable of being concealed upon the person" was amended to provide that any person who "carries concealed upon his person any dirk or dagger, shall be guilty of a felony and upon a conviction thereof shall be punishable by imprisonment in the county jail not exceeding one year or in a State prison for not less than one year nor for more than five years; * * *." Stats, 1935, chap. 753, p. 2121. No fine is enumerated. The court pronounced judgment sentencing the defendant to ten days in the county jail plus a fine of $200. Penal Code, section 672 provides: "Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding two hundred dollars, in addition to the imprisonment prescribed." Defendant con-

tends that section 672 applies only to offenses enumerated in the Penal Code. The section uses the words "any crime" which is broad enough to include all crimes, whether denounced in the Penal Code or by special statutory enactment. In Doble v. Superior Court, 197 Cal. 556, at page 565, 241 P. 852, 855, the court stated: "We are of the opinion it was the legislative intention that the words 'any crime' should include all crimes —whether felonies or misdemeanors— which are known to the law of this state, and whether defined and made punishable by the Penal Code or by any other law or statute of the state."

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

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91 Cal.App.2d 801

PEOPLE v. PERTAK.

Cr. 4314.

District Court of Appeal, Second District, Division 1, California.

May 13, 1949.

1. Gaming ⇨98(3)

Evidence sustained conviction of receiving, holding, or forwarding bets on horse races. Pen.Code, § 337a, subd. 3.

2. Criminal law ⇨938(1)

Claim of newly discovered evidence warranting a new trial is looked on with disfavor.

3. Criminal law ⇨938(3), 939(1)

One who relies on newly discovered evidence as a ground for a new trial must have made every reasonable effort to produce all his evidence at the trial, and he will not be allowed a new trial to introduce evidence known to him and obtainable at time of trial, or which would have been known to him had he exercised reasonable diligence.

4. Criminal law ⇨938(1)

Where there was no showing that newly discovered evidence could not have been produced at time of trial, and it was merely cumulative of evidence received during trial, motion for new trial on ground of newly discovered evidence was properly denied.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Rudolph Pertak was convicted of receiving, holding or forwarding bets on horse races, and from the judgment of conviction and order denying motion for a new trial, he appeals.

Judgment and order affirmed.

Leland E. Zeman, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

By information defendant was charged with a violation of section 337a, subdivision 3, Penal Code, a felony, to-wit: receiving, holding or forwarding bets on horseraces. He pleaded not guilty and waived a jury trial. The prosecution's case was submitted on the transcript of the preliminary hearing; defendant testified in his own behalf and the trial court found him guilty as charged. Thereafter, defendant filed an application for probation and moved for a new trial. The motion was denied, and the court pronounced judgment and sentenced defendant to 180 days in the county jail. Execution of the sentence was suspended and defendant was placed on probation for one year upon condition that he pay a fine of $150 within the first three months of his probationary period.

This appeal is taken from the judgment of conviction and from the order denying the motion for new trial on the grounds:

1. The evidence is insufficient to sustain the verdict and the judgment;

2. The motion for new trial should have been granted.

Police officer Shea testified that about 1:00 p. m. on July 10, 1948, while sitting at the bar of a cafe in Los Angeles, he saw appellant "holding numerous conversations with people who were referring to scratch sheets"; and that after these conversations appellant would go to the telephone booth and make telephone calls. That on one occasion, a man sitting at the bar near the witness while referring to a Daily News said to appellant: "Give me two to place on Heel Stay to Sea Glory", to which appellant replied: "What are you doing? Playing the long shots?" and the man said: "Well, yes. Sea Glory is 15 to 1." That this unknown man then handed appellant a $10 bill, whereupon appellant returned $8 in change and went to the telephone booth and made a call. Immediately the witness placed appellant under arrest.

Officer Shea further testified that two National scratch sheets and a racing form for July 10th were on the bar and were being referred to by various persons then in the cafe, including appellant and the unknown man; that the Daily News was on the bar in front of the man who placed the bet on Heel Stay and Sea Glory, and was open at the front page which listed the entries at Hollywood Park for the day in question, to-wit: a horse named Heel Stay running in the first race and Sea Glory running in the second race, with odds 15 to 1.

Appellant denied that a man sitting near him at a cocktail bar on the day of his arrest said to him: "Give me two to place on Sea Glory", and further denied that he took $2 from an unknown man as a wager upon a horserace. He testified that "there were four of us in there sitting around for a couple of drinks, because it was just a few days before my birthday." That he did not have a scratch sheet.

In connection with his first point, appellant urges that his guilt was not established beyond a reasonable doubt.

Section 337a, Subdivision 3, Penal Code, makes it a crime to receive, hold or forward "in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered * * * upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; * * *."

[1] From the evidence adduced at the trial and hereinabove briefly recited, the trial judge was justified in drawing the inference that the essential elements were present to constitute a violation of the code section.

In People v. Newman, 56 Cal.App.2d 394, 395, 132 P.2d 539, a conviction of violation of section 337a, subd. 3, supra, was sustained by an officer's testimony that the defendant Newman and a man named Axelrod looked at a scratch sheet of the kind commonly used by bookmakers, which was in Axelrod's possession; that Axelrod said to defendant, "Here is a parlay bet, one to win and one to show on Connie Ann and Certainty." That defendant took two one dollar bills from Axelrod, placed them in his pocket and went out of the pool hall. He stopped, took a small match box out of his pocket and wrote "Connie Ann and Certainty" on the cover thereof, which he then returned to his pocket. Whereupon police officers stopped him and took the bills and the match box cover from him.

Likewise in People v. Taylor, 40 Cal. App.2d 324, 326, 104 P.2d 846, 847, wherein "Appellant received money from several persons on the street. The officer testified that appellant was looking at a scratch sheet with two men, received money from them and went immediately to a telephone booth and phoned two bets. The inference is clear that appellant was phoning a bet for each of these two men. This is the inference the court drew and was justified in drawing. Add to the foregoing appellant's admissions made to the arresting officers and the inference of guilt drawn therefrom by the trial court certainly does no violence to reason. We cannot, therefore, substitute any finding of ours as to such ultimate fact for that reached by the jury, or as here, reached by the trial judge without a jury. People v. Yant, 26 Cal. App.2d 725, 733, 80 P.2d 506; People v.

Latona, 2 Cal.2d 714, 725, 43 P.2d 260; People v. Kneiling, 127 Cal.App. 151, 153, 15 P.2d 561. Before a verdict can be set aside it must clearly appear that upon no hypothesis whatever is there in the record substantial evidence to support the judgment. People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467."

Appellant's motion for a new trial was made on the particular ground of newly discovered evidence, i. e., that one Charles C. Canale had presented an affidavit wherein he averred "he did not at any time enter into a bet or gambling wager with" appellant. The affidavit of said Canale made in support of appellant's motion avers that he is acquainted with appellant and recently discovered that he (Canale) was the "unknown person" referred to by police officer Shea in his testimony at the preliminary hearing; that he learned of this fact subsequent to the trial and for that reason was not present at said trial; that "at no time did he ever make a bet or enter into a gambling wager with Rudolph P. Pertak, the defendant."

[2, 3] "The claim of newly discovered evidence warranting a new trial is universally looked upon by the courts with distrust and disfavor. * * * The party who relies upon newly discovered evidence as a ground for a new trial must have made every reasonable effort to produce all his evidence at the trial. He will not be allowed a new trial for the purpose of introducing evidence known to him and obtainable at the time of trial, or which would have been known to him had he exercised reasonable diligence in preparing for and presenting his defense." 8 Cal.Jur. pp. 427-428, sec. 452-453.

[4] The showing of newly discovered evidence was insufficient in the instant cause for the following reasons:

(1) There was no showing that the evidence could not have been produced at the time of the trial. Mr. Canale's affidavit was to the effect that he was acquainted with appellant and also that he was present in the cafe at the time the alleged wager was made.

(2) The proffered evidence was merely cumulative of evidence received during the trial, to-wit: the testimony of appellant that no wager was made at the time in question. See People v. McGreary, 65 Cal. App.2d 571, 572, 151 P.2d 13.

Since the evidence presented was sufficient to sustain the judgment, and no abuse of discretion has been shown on the part of the trial court in denying the motion for new trial, the judgment and order are affirmed.

WHITE, P. J., and DORAN, J., concur.

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91 Cal.App.2d 758

HERMAN v. BROWN, Public Administrator.

Civ. 16761.

District Court of Appeal, Second District, Division 1, California.

May 11, 1949.

1. Limitation of actions ⚷142

Letters signed by maker and unqualifiedly acknowledging indebtedness and delivered to payee on June 8, 1942, and on January 9, 1945, interrupted running of four-year statute of limitations against note due August 31, 1940, and hence action on note commenced on September 10, 1946, was not barred, notwithstanding that one of letters was addressed "to my administrator". Code Civ.Proc. §§ 335–337, 360.

2. Contracts ⚷28(3)

Where it is manifest that persons have endeavored to contract one with the other, courts are constrained to find in favor of success rather than of failure of their efforts when evidence is present warranting such inference.

3. Limitation of actions ⚷13

A debtor who induces his creditor to defer action by means of promises to pay indebtedness or settle claim is estopped to plead statute of limitations. Code Civ. Proc. §§ 335–337.

4. Limitation of actions ⚷13

Maker's administrator was estopped from setting up statute of limitations to escape payment of note where payee, relying on maker's renewed promise of payment of debt, was lulled into inaction through sense of security induced thereby. Code Civ.Proc. §§ 335-337, 360.

◆

Appeal from Superior Court, Los Angeles County; John J. Ford, Judge.

Action on notes by Frances O. Herman, also known as Frances Herman, against Ben H. Brown, Public Administrator of Los Angeles County, as special administrator with general powers of the estate of Victor C. Emden, deceased. From a portion of the judgment, the defendant appeals.

Affirmed.

Jones & Hoyt and George A. Elstein, all of Los Angeles, for appellant.

Aaron Levinson, of Los Angeles, for respondent.

DRAPEAU, Justice.

Defendant appeals from that portion of the judgment herein which awards to plaintiff the sum of $6,110.41 on the first cause of action alleged in her amended complaint which was based on a promissory note for $4,000, dated September 1, 1938, due two years after date, and executed by Victor C. Emden.

The answer alleges that said cause of action is barred by sections 335 to 337, inclusive, of the Code of Civil Procedure.

At the trial respondent testified that when the maker of the note died on August 31, 1945, she was in possession of the note in question, and also of two letters dated June 8, 1942, and January 9, 1945, respectively, attached to the amended complaint as exhibits A and B, reading as follows:

"June 8, 1942.

"To My Administrator:

"The purpose of this letter is to advise that, as of this date there are outstanding two notes executed by me in favor of Solomon Herman and/or Frances Herman. One note is dated September 1, 1938, in the amount of $4000.00 and one note is dated June 1, 1942, in the amount of $2000.00.

"Should these notes be outstanding and unpaid at the time of my death, I desire that they be immediately paid out of my estate.

"In connection with these notes there is a bonus agreement which is to remain in full force and effect, and said Solomon Herman and Frances Herman are to receive the full benefits of the bonus agreement.

"VCE/s Victor C. Emden"

"The Washington Hotel
"Washington, D. C.
"Jan. 9—45

"Dear Frances:

"Thanks for the stories they are already on the seas if you have any more pass them on.

"Yes what a difference a year makes last year this time I thought it was curtains. But at this writing I am fine.

"I just thought I would mention it had I passed on you have a letter that would have taken care of our business matter.

"More stories please. It use to be banana's.

"Vic

"Hello Sol"

The court found that Victor C. Emden delivered to respondent on June 8, 1942, the writing in which he acknowledged the existence of the promissory note for $4,000, his liability thereon and promised to pay the same; that it was in the possession of respondent or her attorney at the time of the death of Victor C. Emden and at all times thereafter and until the trial of this action. Further, that the words contained in exhibit B "you have a letter that would have taken care of our business matter" which Victor C. Emden had with respondent "is that set forth in plaintiff's amended complaint."

Appellant here points out that under section 337, Code of Civil Procedure, it was necessary to bring the action on the note within four years from August 31, 1940, the date of its maturity; hence, the instant action commenced on September 10, 1946, is barred. It is further urged that the letter of June 8, 1942, does not constitute sufficient acknowledgment of the debt to extend the statute of limitations for the reason that it was addressed "To My Administrator", and not to respondent or her agent, as required by the holding in Re Estate of Azevedo, 17 Cal.App.2d 710, 712, 62 P.2d 1058, and the authorities therein cited.

Section 360 of the Code of Civil Procedure provides: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged."

The letter of June 8, 1942, hereinabove recited in full, is an unequivocal and unqualified acknowledgment of the indebtedness here sued upon, signed by the debtor. Moreover, respondent testified that it was in her possession at the time the debtor died and at all times subsequent thereto. The witness Sol Herman, husband of respondent, testified that sometime in June of 1942, his wife, the respondent, asked Victor C. Emden if he would give her something in writing to secure her if anything should happen to the debtor Emden; that the witness and respondent met Mr. Emden at lunch the next day at which time the latter gave to respondent a letter. This witness identified exhibit 2 as the letter which respondent received from Mr. Emden, which was dated June 8, 1942. To the question, "Did your wife have any letter from Victor C. Emden which would take care of any business matters other than exhibit 2, the June 8, 1942, letter?" This witness replied: "No, she had not."

[1] The foregoing evidence substantially supports the trial court's finding that the letter of acknowledgment was delivered to the respondent creditor by the debtor at the time it was written. In the circumstances, it becomes immaterial to whom the letter was addressed. It was delivered to the creditor before the statute of limitations had run against the debt, and together with the letter of January 9, 1945, was sufficient to interrupt the running of the statute against the note here sued upon.

[2] As was aptly stated in Greenfield v. Sudden Lumber Co., 18 Cal.App.2d 709, 715, 64 P.2d 1007, 1011, "Where it is manifest that persons have endeavored to contract one with the other, courts are constrained to find in favor of the success rather than of the failure of their efforts where evidence is present warranting such inference."

[3] The instant judgment may also be sustained upon the theory of estoppel. See Miles v. Bank of America, etc., Ass'n, 17 Cal.App.2d 389, 62 P.2d 177; 34 Am. Jur. 329, sec. 415, and 130 A.L.R. 34, all to the effect that "a debtor who induces his creditor to defer action, by means of promises to pay the indebtedness or settle the claim, is estopped to plead the statute of limitations."

[4] In the case now under consideration, respondent relying upon the renewed promise of payment of the debt by the debtor, was doubtless lulled into inaction through her sense of security induced thereby; hence it would be inequitable to permit the debtor to set up the statute to escape payment.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

CITY OF BEVERLY HILLS v. BRADY.

Civ. 16850.

District Court of Appeal, Second District,
Division 2, California.
April 25, 1949.

Rehearing Denied May 17, 1949.

Hearing Granted June 23, 1949.*

1. Municipal corporations 🔑601(1)

City may validly enact an ordinance prohibiting use of residential property, in an area zoned for one-family residence or purposes for any other purpose.

2. Municipal corporations 🔑631(2)

Licensed physician who resided in a zone restricting use of property to a private

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* Subsequent opinion 215 P.2d 460.

"one-family residence" or dwelling, used such premises to write a syndicated column pertaining to health problems, and employed one or two secretaries to take dictation, transcribe syndicated column and correspondence, address envelopes and enclose pamphlets requested by readers of column, was guilty of violating zoning ordinance.

3. Pleading ⚿129(1)

Allegations of complaint which are not denied are admitted.

4. Injunction ⚿89

In an action by city to enjoin violation of a residential zoning ordinance, where defendant admitted acts which under a reasonable interpretation constituted a use of his premises for a purpose contrary to ordinance, city was entitled to judgment without regard to whether defendant was or was not engaged in a business.

On Petition for Rehearing

5. Appeal and error ⚿714(5)

Since matters not in the record cannot be considered on appeal, appellate court may not consider briefs of counsel filed in the trial court which were never made a part of the record in the appellate court.

6. Appeal and error ⚿854(2)

A judgment must be affirmed if the findings supported by evidence are sufficient to warrant relief granted on any legal theory, though such theory may not be identical with that relied upon by plaintiffs or the trial court.

WILSON, J., dissenting.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Suit by City of Beverly Hills against William Brady to enjoin defendant from using his residence for purposes prohibited by zoning ordinance. Judgment for defendant, and plaintiff appeals.

Reversed.

Richard C. Waltz, City Atty. and Richard L. Sieg, Jr., Asst. City Atty., both of Beverly Hills, for appellant.

Reed & Kirtland and Robert E. Moore, Jr., all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after a trial before the court without a jury in an action to enjoin defendant from using his residence in the city of Beverly Hills for purposes prohibited by a zoning ordinance, plaintiff appeals.

Conceded Facts

Defendant, a duly licensed physician and surgeon, writes a syndicated column pertaining to health problems which appears in approximately 130 newspapers in the United States and Canada. In discussing a subject in his column defendant suggests that further information on the same topic may be obtained by writing to him for a pamphlet and enclosing a specified sum varying from 10 to 25 cents. The pamphlet is not otherwise advertised.

Defendant's residence is in zone R-1.5, Residential, which according to Ordinance 443 of the Beverly Hills zoning ordinance provides in part that no premises within any of said zones in the City of Beverly Hills shall be used "for any purpose * * * other than * * * a private, one-family residence or dwelling;" and further, "No premises within any of said zones in the City of Beverly Hills shall be used for any purpose * * * other than a purpose for which a building is permitted in the zone in which said premises is located." Defendant has a room above his garage equipped for storing printed literature, where he employs one, and sometimes two, secretaries who take dictation, transcribe his syndicated column and correspondence and devote the balance of their time to the addressing of envelopes and enclosing pamphlets requested by readers of his column. There is an average of one full mail bag of letters received each day, and about the same amount sent out. Approximately 150,000 pamphlets are mailed each year. Some are sent gratuitously. However, he has received as much as $16,400 to cover the cost of printing and mailing which does not include his overhead.

Question

Is defendant using his residence for a purpose other than a private one-family residence or dwelling in violation of the provisions of the municipal ordinance mentioned above?

[1] This question must be answered in the affirmative. The ordinance here in question prohibits the use of residential property in the zone where defendant's residence is located for *any purpose other than a private one-family residence or dwelling.* Such an ordinance is valid. (Acker v. Baldwin, 18 Cal.2d 341, 344 et seq., 115 P.2d 455.)

[2] In the present case it is obvious from the conceded facts that the activity in which defendant is engaged in his residence is one whereby he is making use of his premises for a purpose *other than a private one-family residence or dwelling.* It therefore follows that he has violated a valid city zoning ordinance and plaintiff is entitled to the relief which it sought.

[3] Paragraphs 17 and 18 of the amended complaint set forth two sections of ordinance 443, to wit, section 1 of Article IV which prohibits the use of residential property for any purpose other than a one-family residence or dwelling, a public school, library or playground; section 10 of Article VI which forbids a person "to establish or conduct any business in zones R-1, R-1.5 and R-4 which is not in compliance with all of the provisions of this ordinance * * *." Defendant, by failure to deny, admitted the truth of both allegations and the court made findings accordingly. It was alleged, admitted and found that the ordinance inhibits the use of any premises within the same zone for *any purpose* other than that for which a building is permitted in the zone; that no land used or occupied "shall be used or changed in use until a certificate of occupancy shall have been issued * * *"; that no certificate of occupancy has been issued to defendant permitting the use of any part of his premises for any business purpose. No language is to be found in the ordinance which would allow the occupant of a residence within the zone to exercise a hobby such as the daily rehearsal of his orchestra, or a continuous conducting of odoriferous chemical experiments for the mere delight or edification of his friends and visitors. Under defendant's interpretation of the ordinance a resident of the zone might amuse himself nightly by entertaining groups of Voodoo worshippers so long as such entertainment would not be "business" as defined by the ordinance. Such illustrations demonstrate the fallacy of contending that doing business is the only means by which the zoning ordinance can be breached.

[4] Defendant having admitted acts which under a reasonable interpretation constitute a use of his premises for a purpose contrary to the ordinance, plaintiff became entitled to judgment without regard to whether defendant was or was not engaged in a business.

City of Rochester v. Rochester Girls Home, Sup., 194 N.Y.S. 236, Gardner v. Trustees of Main St. M. E. Church, 244 N.W. 667; 217 Iowa 1390, 250 N.W. 740, and Murdock v. City of Norwood, Ohio Com.Pl., 67 N.E.2d 867, and similar cases cited by defendant wherein the meaning of the word "business" is defined or illustrated are inapplicable to the instant controversy for the reason that it is unnecessary for us to determine whether defendant was engaged in a business or profession since he was violating section 1 of Article IV of the ordinance, not because he was engaging in a business, but for the reason that he was using his premises for a purpose *other than a private one-family residence or dwelling.* The authorities cited by defendant defining the term "business" are not pertinent for the reason that the ordinance itself contains the definition to be used in interpreting the ordinance.

The judgment is reversed with directions to the trial court to enter a judgment in favor of plaintiff as prayed.

MOORE, P. J., concurs.

WILSON, Justice.

I dissent.

It is obvious from an examination of the record on appeal that the majority of this court have fallen into three errors:

(1) Their opinion is based on a theory never contemplated by either party to the action, never presented to the trial court either by the pleadings or by the argument, and never considered by that court. Plaintiff's concept from the commencement of the action has been that defendant's violation of the ordinance consisted in his having been *engaged in business* within a residential zone and not, as held by the majority of this court, that he has violated the ordinance merely by doing some act in a one-family dwelling other than residing there. (2) The majority have rested their decision on two sentences selected from the zoning ordinance without considering the ordinance as a whole, without coordinating and harmonizing those sentences with other substantive portions of the ordinance, and without giving effect to the overall purpose of the legislative body of the city in enacting the ordinance. (3) The record does not show that defendant has violated the ordinance by the manner in which he has conducted his affairs, whether his acts be considered with reference to the entire ordinance or the detached portions quoted in the majority opinion.

The purpose and intent of a municipal ordinance cannot be determined by extracting one or two fragmentary clauses or isolated sentences and construing them unconnected with other equally important, substantial and significant provisions on the same subject. The entire legislative act, or as much of it as is available from the pleadings and the evidence, must be given consideration.

The following portions of the extant zoning ordinance are pleaded by plaintiff as purporting to affect the right of defendant to continue the conduct of his affairs in the same manner as he has been conducting them without hindrance or remonstrance since February, 1932, more than 17 years:

(1) The erection or use of any building in Zone R–1.5 is prohibited "for any purpose other than a * * * private one-family residence or dwelling".

(2) "No person * * * shall establish or conduct any *business* outside of Zones C–3 and M–2, * * * and it shall be unlawful for any person * * * to establish or conduct any *business*" in Zone R–1.5 "which is not in compliance with all of the provisions of this ordinance and any other ordinance or ordinances now in effect, or which shall hereinafter be enacted * * * regulating the establishing and conducting of any such *business*".

(3) "No premises within any of said zones * * * shall be used for any purpose except a public playground, other than a purpose for which a building is permitted in the zone in which said premises is located * * *."

(4) For the purpose of this ordinance, "The word '*business*' and the word 'commerce' mean the purchase, sale or other transaction involving the handling or disposition of any article, substance or commodity for profit or livelihood, or the ownership or management of office buildings, offices, recreational or amusement enterprises."

(5) "No land shall be used or occupied and no building hereafter structurally altered or erected shall be used or changed in use until a certificate of occupancy shall have been issued by the Building Inspector, stating the use of the building."

The amended complaint alleges that no certificate of occupancy has been issued to defendant permitting the use of his premises for any *business* purpose, and that at the time of the adoption of the ordinance "no *business* building had been erected in the area immediately surrounding the property of defendant * * * and no property in said area was being or had been used for any *business* use except, perhaps, the use of defendant's property hereinafter stated and complained of."

The amended complaint further alleges, substantially as related in the majority opinion, the manner in which defendant prepares his syndicated column and sends out his pamphlets by mail and then avers "that the conducting of the above described *business* by defendant in said residential area in violation of said zoning restrictions and provisions tends to become a precedent for other violations" and if permitted to continue will result in opening the way for further intrusion of *business* therein, "and if such *business* encroachment is not prevented" will result in breaking down residential zoning in the city.

The prayer is that an injunction issue restraining defendant "from further using the above described premises *for carrying on the business* hereinabove described." (Emphasis added in all quoted matter.)

It is manifest from the pleaded portions of the ordinance that it was intended to prohibit business in residential zones and it is likewise manifest from the allegations of the amended complaint that plaintiff's position is and has been at all times since the commencement of the action that defendant was conducting a business in violation of the ordinance.

The record shows that the action was submitted to the superior court on briefs, after which the trial judge filed a memorandum opinion in which he defined the position taken by the parties in that court as follows: "The sole contention of plaintiff is that the offer in the syndicated articles of a pamphlet to be distributed to the reader for a money consideration constitutes doing business within the area of Beverly Hills zoned for single family residences, and that the nature of defendant's business is that of a publishing business." The opinion is a part of the record on appeal. (Rule 5(a) and (b), 22 Cal.2d 4.) Plaintiff has not questioned the correctness of the foregoing statement of the trial judge and does not now contend that any other issue was tendered in the court below. This court must accept the record and act upon it as we find it without fabricating new questions that no one has presented or argued in either court.

In its findings of fact the court found that defendant was not and is not conducting or engaged in a business within the meaning of the provisions of the zoning ordinance; that the manner in which he is carrying on his affairs at his residence will not be cited by other persons in defense of other alleged violations of the ordinance and will not result in breaking down or voiding zoning restrictions.

The briefs of both parties in this court are based upon one question only, to wit, whether defendant is or is not carrying on a business in violation of the prohibitory provisions of the ordinance. In this connection plaintiff states in its brief that defendant's principal means of livelihood is the sale of his syndicated health column which, says plaintiff, is "admittedly not a violation of the zoning ordinance," and then proceeds to argue that the receipt of letters and the transmission of pamphlets by mail is the carrying on of business.

Since the amended complaint is based solely on allegations that defendant is conducting a business at his residence and the only relief sought by the prayer is that he be enjoined from continuing to carry on such business, this court is confined in its consideration of the appeal to a determination of the question whether defendant is doing business as that term is defined in the ordinance. Plaintiff's concession that the preparation and sale of defendant's syndicated column is not prohibited by the ordinance narrows its argument to the contention that defendant's receipt of requests for pamphlets and his sending them by mail constitute doing business.

The definition of "business" for the purpose of the ordinance is found in paragraph (4) of the quotations above set forth. Defendant's acts do not constitute the purchase or sale of any commodity, nor are they transactions involving the handling of any article or substance "for profit or livelihood." Since the amounts received from persons requesting pamphlets cover the bare cost of printing and mailing but are not sufficient to pay defendant's overhead expense, he does not derive a profit therefrom nor are his receipts a part of his livelihood. He expends for such purpose more than he receives.

Since "business" is defined in the ordinance the term need be considered only so far as to show that nothing unusual is intended by the definition but that the orthodox meaning found in dictionaries and decisions is adopted. "Profit" or "livelihood" are elements in practically all definitions. "Business" is defined as "That which busies, or engages time, attention, or labor, as a principal serious concern or interest. Specif.: a. Constant employment; regular occupation; work; * * * b. Any particular occupation or employment habitually engaged in, esp. for livelihood or gain." Webster's New Int. Dict., 2d Ed., 1948, p. 362.

An occupation will not be excluded from the classification of business merely because it results in loss instead of profit, but it is essential that livelihood or profit be at least one of the purposes of the occupation in order to bring it within the accepted definition of the word. Deering v. Blair, 57 App.D.C. 367, 23 F.2d 975, 976; Chaloner v. Helvering, 63 App.D.C. 85, 69 F.2d 571, 572 and cases cited; Snow v. Johnston, 197 Ga. 146, 28 S.E.2d 270, 277; State v. Louisiana Baking Corp., La.App., 153 So. 41, 43; Flint v. Stone Tracy Co., 220 U.S. 107, 171, 31 S.Ct. 342, 55 L.Ed. 389, 421. It denotes an employment or occupation in which a person is engaged to procure a living. Goddard v. Chaffee, 2 Allen 395, 79 Am.Dec. 796; 84 Mass. 395, 79 Am.Dec. 796; Allen v. Commonwealth, 188 Mass. 59, 74 N.E. 287, 288, 69 A.L.R. 599. The idea of livelihood or profit is associated with the meaning of the term "business" and an enterprise not conducted as a livelihood or for profit does not come within the ordinary meaning of that term. City of Rochester v. Rochester Girls' Home, Sup., 194 N.Y.S. 236, 237; Francisco v. Oakland Golf Club, 193 App.Div. 573, 185 N.Y.S. 97, 98.

Since defendant did not engage in "business" within the definition in the ordinance and in the general legal acceptation of the word, the judgment in favor of defendant should be affirmed and the decision of this court should not be made to turn upon a matter not contained in the pleadings or argued either before the trial court or this court.

Turning now from the issue made by the pleadings to the point on which the majority of this court have erroneously based their opinion, it is manifest that defendant's premises (1) is not being used for any purpose other than a private one-family residence, or (2) for a purpose other than that for which a building is permitted in the zone in which his premises is located.

The receipt of mail and the transmission of pamphlets by defendant is clearly not a violation of the ordinance. Such activities are merely incidental and collateral to the preparation of his syndicated column, which plaintiff freely admits is not a violation of the zoning ordinance. Such activities have no relation to the health, safety, morals or general welfare of the community. Unless a zoning ordinance has reasonable reference to one or more of such matters it cannot be sustained since it would deprive the owners of real property of a valuable right incident to ownership. Pacific Palisades Ass'n v. Huntington Beach, 196 Cal. 211, 216, 237 P. 538, 40 A.L.R. 782; People v. Hawley, 207 Cal. 395, 411, 279 P. 136. The distribution of pamphlets from which defendant receives no profit and which do not enter into the production of his livelihood, is not only not a business but is an innocuous activity the enjoining of which would be an unreasonable and unlawful restraint upon defendant's liberty of action.

The fantastic examples of what may not be done in a zone limited to one-family residences, such as orchestra rehearsals, conducting chemical experiments, and Voodoo entertainments, add nothing whatsoever to the decision of this action. All such acts would be obnoxious and would be prohibited in any residential zone, whether set apart for single or multiple dwellings or for apartment houses and hotels. No one has ever contended, adopting the words of the majority, "that doing business is the only means by which the zoning ordinance can be breached" and the only purpose served by such grotesque illustrations is to divert attention from the sole issue raised or discussed by the litigants, to wit, whether defendant is transacting business—a question which the majority does not discuss at all.

If the arbitrary and ridiculously narrow dogma of the majority opinion should prevail a person could do but little else than eat and sleep in a one-family residence. The majority would forbid an author to dictate to his secretary (an act which plaintiff admits is permissible), a concert singer to rehearse his music, and one with a hobby such as woodworking to construct a chair or a table for use in his own home because, forsooth, each of such persons would be making use of his premises for a purpose other than a one-family residence. A mere statement of such a result which necessarily flows from the conclusion reached by the majority demonstrates its palpable erroneousness.

The judgment should be affirmed.

On Petition for Rehearing.

PER CURIAM.

This action was commenced and presumptively tried on the theory that specified acts of the defendant constituted a violation of a valid city ordinance. The admitted activities of the defendant disclosed a clear violation of that ordinance. Because the arguments in the trial court degenerated into a consideration of whether defendant was "doing business" there is no reason for digressing from the primary contention that he was violating the ordinance. Certain activities were prohibited regardless of whether they warranted the label "business" and "doing business" was not the only manner in which the ordinance could be violated.

Thus, rather than depart from the theory on which the action was commenced, this court adheres to that theory in holding that the acts complained of and admitted constitute a violation of the ordinance.

[5] Of course, as said by Mr. Justice Wilson, in People v. O'Neill, 78 Cal.App.2d 888, 892, 179 P.2d 10, 12, "We cannot entertain appellant's assertions of irregularity that do not appear in the transcript of the trial. People v. Lytle, 34 Cal.App. 360, 361, 167 P. 552. "And again in Estate of Tubbs, 82 Cal.App.2d 305, 307, 186 P.2d 7, 9, "Matters not in the record cannot be considered on appeal." Hence we may not consider briefs of counsel filed in the trial court which were never made a part of the record in this court. Such briefs attached to the petition for rehearing are dehors the record.

[6] Plaintiff's petition for a rehearing is predicated upon the fallacious arguments set forth in the dissenting opinion which utterly disregards the elementary rule of jurisprudence of this state so aptly stated in Sears v. Rule, 27 Cal.2d 131, 140, 163 P.2d 443, 448, by Mr. Chief Justice Gibson thus: "It is, of course, immaterial that the theory upon which the judgment may be affirmed is not identical with that relied upon by plaintiffs or by the trial court, since plaintiffs are required only to plead and prove facts sufficient to justify relief, and the trial court's judgment must be affirmed if the findings, supported by the evidence, are sufficient to warrant the relief granted on any legal theory."

The rehearing is denied.

WILSON, Justice.

I dissent from the order denying the petition for rehearing.

The arguments in the trial court did not digress from the theory on which the case was tried in that court. Since the appeal is on the judgment roll and the evidence is not before this court the only theory of the trial that can be presumed must be gleaned from the pleadings, the findings of fact and the opinion of the trial judge, which is before us by reason of rule 5(a) and (b), Rules on Appeal, 22 Cal.2d 4.

From these documents it is clear that the only question in the trial court was whether defendant was *carrying on a business* in violation of the ordinance, not that some specified acts which he had done were prohibited by the ordinance. The amended complaint alleges that at the time of the adoption of the zoning ordinance "no business building" had been erected in the area immediately surrounding defendant's property and no property in said area had been used "for any business use, except, perhaps, the use of defendant's property hereinafter stated and complained of. That the exact date when defendant began the use of his said residence for business purposes" is unknown to plaintiff. The amended complaint further alleges that defendant is conducting a "business" in violation of the ordinance, and the prayer is that he be enjoined from carrying on the "business." The trial judge's opinion states "the sole contention of plaintiff is that" defendant's acts described in the amended complaint constitute doing business. The court found that defendant was not "conducting or engaged in a business" within the meaning of the zoning ordinance. The findings recite that the court did not make any findings with respect to certain issues for the reason that the same were unnecessary by virtue of the court's finding that the defendant was not conducting or engaged in a business.

The majority have gone contrary to a rule to which each member of this court is definitely and unqualifiedly committed, namely, that a reviewing court will not consider a theory of a case different from that urged in the trial court and which is presented for the first time on appeal. Title Ins. & Tr. Co. v. Graham, 44 Cal.App.2d 660, 662, 112 P.2d 935; Grimes v. Nicholson, 71 Cal.App.2d 538, 543, 162 P.2d 934; Priebe v. Sinclair, 90 Cal.App.2d 79, 202 P.2d 577, 582; Ayres v. City Council, Cal. App., 191 P.2d 546, 555. It is axiomatic that an appellate court is merely a court of review and cannot determine issues not offered in the trial court. Py v. Pleitner, 70 Cal.App.2d 576, 580, 161 P.2d 393. When a case is tried on a certain definite theory the record will be reviewed on appeal accordingly, Perry v. Paladini, Inc., 89 Cal. App. 275, 288, 264 P. 580, and the parties will not be allowed to say for the first time on appeal that there was an issue different from that presented to the trial court. Grimes v. Nicholson, supra, and cases cited, Drullinger v. Erskine, 71 Cal.App.2d 492, 500, 163 P.2d 48. The ground on which the former decision in this action was based, as pointed out in my former dissent, supra, was not presented to the trial court.

Under rule 52 of the Rules on Appeal, 22 Cal.2d 33, a reviewing court cannot presume that any procedure was followed or that any action was taken that is not contained in the record on appeal. The law is settled that by reason of that rule it will be presumed that the record includes all matters material to a determination of the points on appeal and that the record is complete. Alkus v. Johnson-Pacific Co., 80 Cal.App.2d 1, 9 et seq., 181 P.2d 72; Palpar, Inc., v. Thayer, 82 Cal.App.2d 578, 582–583, 186 P.2d 748; same case 83 Cal. App.2d 809, 811, 189 P.2d 752; Estate of Pierce, 32 Cal.2d 265, 274, 196 P.2d 1, 7; Kuhn v. Ferry and Hensler, 87 Cal.App.2d 812, 197 P.2d 792, 794; Gardner v. Shreve, 89 Cal.App.2d 804, 202 P.2d 322, 325.

In defendant's petition for rehearing he has furnished us with copies of the briefs filed in the superior court. They fully justify my previous dissent in that they show that the majority opinion was based on a point not pleaded before the trial court. Plaintiff's opening brief is introduced thus: "This is an action to enjoin the defendant from using his residence in the City of Beverly Hills for a certain *business* purpose." In the course of its argument plaintiff said: "* * * the *sole contention* is that the offer contained in the syndicated article that a pamphlet will be sent upon receipt of a specified sum of money, and the mailing of the pamphlet upon receipt of that sum of money, *constitutes 'doing business,'* and that the defendant is conducting a *publishing business* in a single residence area zoned against business." (Emphasis added.) The entire brief is with reference to the subject of defendant's doing business and no other point is suggested. Defendant's reply brief refers only to the definitions of "business" and to what constitutes doing business. Plaintiff's final brief closes with this sentence: "Therefore, the defendant should be enjoined from conducting a business from his residence by soliciting for the sale of, and selling, pamphlets from his residence."

The general rule is that alleged facts not in the record will not be considered on appeal. Nevertheless, a statement of fact made in a brief and not denied by the opposing party will be accepted as stating the fact correctly. Standard Iron Works v. Maryland Casualty Co., 56 Cal.App. 600, 601, 206 P. 136; De Mirjian v. Lutinsky, 77 Cal.App.2d 915, 916, 177 P.2d 50; See also Zeigler v. Bonnell, 52 Cal.App.2d 217, 218, 126 P.2d 118; Tarvin v. Davey, 56 Cal.App. 2d 846, 848, 133 P.2d 844; Frank Graves etc. Co. v. Orange County B. & M. Corp., 111 Cal.App. 475, 477, 295 P. 859; Pendergrass v. Axx, 111 Cal.App. 478, 479, 295 P. 896.

The briefs attached to the petition for rehearing are not in the record on appeal, but in plaintiff's reply to petition for rehearing it is conceded that they were filed and constituted the arguments in the trial court.

What is said in Sears v. Rule, 27 Cal.2d 131, 163 P.2d 443, is not applicable here. The evidence introduced at the trial in the instant case is not before us for consideration in reference to any claimed "theory" and plaintiff-appellant does not contend that the findings are not supported by the evidence. Therefore, as above stated, the only theory upon which this court can consider the appeal is that which is shown by the amended complaint and findings. People v. O'Neill, 78 Cal.App.2d 888, 179 P.2d 10, is not in point. The question there raised was that the transcript was not correct, a point not in issue in the instant case.

The petition for rehearing should be granted and the judgment should be affirmed.

PEOPLE v. BEHRMANN.

Cr. 4255.

District Court of Appeal, Second District, Division 1, California.
May 11, 1949.

Rehearing Denied May 20, 1949.

Hearing Granted June 9, 1949.*

1. Criminal law 🔑1081
Stipulations 🔑14(12)

Time for filing a notice of appeal cannot be extended by stipulation of the parties or by order of the court, and a nunc pro tunc order permitting amendment of a codefendant's timely notice of appeal by adding the defendant's name thereto is void ab initio.

2. Criminal law 🔑998

Jurisdiction to add to, vacate or modify the judgment depends primarily upon the showing as to whether the sentence has been entered in the court's minutes and the defendant has been restrained thereby, since prior to the execution, the court may vacate an erroneous judgment, but thereafter may not do so.

3. Criminal law 🔑996(2), 998

If sentence has been entered in minutes of court, or if defendant has begun serving such sentence, or has been restrained by sentence imposed, court is without jurisdiction to vacate, add to, or modify sentence originally pronounced, but if sentence has not been entered by clerk in his minutes, and no legal restraint has been imposed upon defendant by reason of such sentence, court may change the sentence originally pronounced.

4. Criminal law 🔑998

Where minutes of March 24th revealed that after appellant gave oral notice of appeal and his bail-bond on appeal had been fixed, he was granted a thirty day stay of execution but record also disclosed that not only had judgment and sentence of March 24th been entered by clerk in his minutes prior to April 7th, but also that formal judgment of conviction had been entered in Book of Judgments, court was without power on April 7th to vacate judgment of conviction of March 24.

5. Criminal law 🔑1081

When appellant's oral notice of appeal was reduced to writing by clerk and was entered in minutes of court, it constituted a substantial compliance with rule on appeal, in view of fact that right of appeal in criminal cases is guaranteed by constitution and is as sacred as right to trial by jury and express provision that such rule shall be liberally construed in favor of its sufficiency. Rules on Appeal, rule 31.

6. Criminal law 🔑1159(2)

Before the verdict or findings of the trier of fact can be set aside on appeal upon ground of insufficiency of evidence, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.

7. Embezzlement 🔑44(1)

Conviction of grand theft was sustained by substantial evidence.

8. Embezzlement 🔑47

Under the statutory rule that in a prosecution for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable, such defense presents an issue of fact and not of law. Pen.Code, § 511.

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* Subsequent opinion 211 P.2d 575.

9. Embezzlement ⚷44(2)

In prosecution for grand theft defendant was not entitled to the defense of an appropriation of property openly and avowedly under claim of title preferred in good faith, in view of the evidence adduced at the trial and construction placed upon it by the trial court. Pen.Code, § 511.

10. Criminal law ⚷372(1)

It is not essential that similar transactions shall have resulted in the commission of a crime in order to be admissible in evidence, but it is sufficient if they tend to prove a scheme of the defendant which included the acts charged.

11. Criminal law ⚷372(8)

In prosecution for grand theft because the defendant unlawfully and feloniously took sums of money belonging to a client admission in evidence of taking of the money of another client was proper.

12. Criminal law ⚷260(11)

In prosecution for grand theft for feloniously taking sums of money belonging to a client, admission in evidence of conversation had between defendant and private secretary of another client concerning money of client and whether client had gone to district attorney was not so prejudicially erroneous as to warrant reversal of conviction in view of fact that trial was to the court without a jury. Const. art. 6, § 4½.

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Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Paul R. Behrmann was convicted of grand theft, and he appeals.

Judgment affirmed.

Morris Lavine, Jack B. Tenney, Owen A. Bartlett, and Milton B. Safier, all of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and James A. Doherty, Deputy Atty. Gen., for respondent.

PER CURIAM.

Defendant was charged in an information containing four counts with grand theft, a felony, to wit: (1) that he unlawfully and feloniously took $10,000, the personal property of Wanda S. Schoemann; (2, 3, 4) that he unlawfully and feloniously took the sums of $1,745, $1,000 and $7,000, respectively, the personal property of Anne Nichols.

Trial by jury having been waived, the court on February 6, 1948 found defendant "not guilty" of the offense charged in Count 1, and "guilty" of the offenses charged in Counts 2, 3 and 4 of the information. Thereafter defendant moved for a new trial. The hearing on this motion and on defendant's application for probation, and also the pronouncement of judgment and sentence were set for March 10, 1948, but were continued to March 24, 1948. On the latter date, the motion for new trial and the application for probation were denied; judgment was pronounced, and defendant was sentenced to state prison for the term prescribed by law, sentences on the three counts to run concurrently. On this date: March 24th, defendant gave oral notice of appeal, and on April 6, 1948, he filed a written notice of appeal which was ordered entered nunc pro tunc as of April 2, 1948. On April 7, 1948, said nunc pro tunc order was vacated and set aside, whereupon the court granted defendant's motion to set aside the judgment and sentence for the purpose of reconsidering defendant's application for probation. Probation was again denied and the court for a second time pronounced judgment and sentence as to Counts 2, 3 and 4. Defendant gave oral notice of appeal and on the same day: April 7, 1948, filed his written notice of appeal from the judgment of conviction and from the order denying him a new trial.

As its first point, respondent urges that the instant appeal should be dismissed for not having been taken in time. As hereinabove noted, two written notices of appeal were filed: (1) on April 6th and (2) on April 7th. Respondent argues that unless the nunc pro tunc order cured the defect, the first notice was clearly late, and the second notice was filed in time only if the setting aside of the judgment of March 24th was proper.

[1] People v. Lewis, 219 Cal. 410, 414, 27 P.2d 73, holds that the time for filing a notice of appeal cannot be extended by stipulation of the parties or by order of the court, and that a nunc pro tunc order permitting amendment of a codefendant's timely notice of appeal by adding the defendant's name thereto is void ab initio.

[2] With respect to the propriety of the court's action in vacating the judgment of conviction to reconsider appellant's application for probation, it is stated in 4 Cal.Jur.Supp., 1943 Rev. p. 886, that "jurisdiction to add to, vacate or modify the judgment depends primarily upon the showing as to whether the sentence has been entered in the court's minutes and the defendant has been restrained thereby. Prior to the execution, the court may vacate an erroneous judgment, but thereafter may not do so."

[3] In People v. McAllister, 15 Cal.2d 519, 526, 102 P.2d 1072, 1075, the following rule is enunciated: "If the sentence has been entered in the minutes of the court, or if the defendant has begun serving said sentence or has been restrained by the sentence imposed, then the court is without jurisdiction to vacate, add to, or in any manner modify the sentence originally pronounced. On the other hand, if the sentence pronounced has not been entered by the clerk in his minutes, and no legal restraint has been imposed upon the defendant by reason of said sentence, then it is proper for the court to change the sentence originally pronounced."

[4] Although the minutes of March 24th reveal that after the appellant gave oral notice of appeal and his bail-bond on appeal had been fixed, he was granted a thirty day stay of execution, the record further discloses that not only had the judgment and sentence of March 24th been entered by the clerk in his minutes prior to April 7th, but also that the formal judgments of conviction had been entered in the book of judgments. Consequently, under the ruling in People v. McAllister, supra, the court was without power on April 7th to vacate the judgment of conviction of March 24th.

Moreover, there is nothing on the face of the judgment which would indicate its invalidity; and although appellant asserts that it was void because of the failure of the court to arraign him for judgment as prescribed by section 1200 of the Penal Code, an examination of the reporter's transcript of the proceedings in the trial court on March 24th, reveals that such complaint is without merit for the reason that the trial judge before pronouncing judgment and sentence did arraign appellant and followed the procedure outlined in section 1200, supra.

Reverting to the question of the timeliness of the notice of appeal herein, section 1239 of the Penal Code, as amended in 1945, provides that "(a) Where an appeal lies on behalf of the defendant or the people, it may be taken by the defendant or his counsel, or by counsel for the people, in the manner provided in rules adopted by the Judicial Council." Power is given to the Judicial Council by section 1247k of the Penal Code "to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all criminal cases in all courts of this State."

Rule 31 of Rules on Appeal, adopted by the Judicial Council on July 1, 1943, 22 Cal. 2d 1, 22, reads as follows: "In the cases provided by law, an appeal may be taken by filing a written notice of appeal with the clerk of the superior court within 10 days after the rendition of the judgment or the making of the order, except that an appeal from an order denying a new trial shall not be taken until after the granting of probation or the rendition of judgment. * * * The notice shall be sufficient if it states in substance that the party appeals from a specified judgment or order or a particular part thereof, and shall be liberally construed in favor of its sufficiency."

The minutes of March 24th recite: "Defendant gives oral notice of appeal." Rule 31, supra, does not directly exclude oral notices of appeal, and section 1239 of the Penal Code before its amendment in 1945 permitted an appeal to be taken (1) by oral notice in open court at the time the judgment was rendered; or (2) by filing written notice within 5 days after rendition of the judgment.

[5] In view of the fact that "The right of appeal in criminal cases is guaranteed by the constitution, and is as sacred as the right to a trial by jury. Ex parte Hoge, 48 Cal. 3; In re Albori, 95 Cal.App. 42, 272 P. 321." 8 Cal.Jur. 489; and also because of the doctrine of liberality expressed in the last sentence of Rule 31, supra, it would appear that when appellant's oral notice of appeal was reduced to writing by the clerk and entered in the minutes of the court, it constituted a substantial compliance with said Rule 31.

In Estate of Hanley, 23 Cal.2d 120, 122, 142 P.2d 423, 149 A.L.R. 1250, where appellant through no fault of his own but relying upon misrepresentations of the adverse party did not take an appeal until too late, our Supreme Court held that the appeal must be dismissed and that no relief could be granted to appellant for the reason that the statutory requirement as to the time for taking an appeal was mandatory and that the court was without jurisdiction to consider an appeal which had been taken subsequent to the expiration of the statutory period, it being immaterial whether the misrepresentations were wilful or inadvertent, whether the reliance thereon was reasonable or unreasonable, or whether the parties seeking to dismiss were acting in good faith. The court there stated that in the absence of statutory authorization, neither the trial nor appellate court could extend or shorten the time for appeal.

However, the same court in the more recently decided case of People v. Slobodion, 30 Cal.2d 362, 365, 181 P.2d 868, 870, denied a motion to dismiss an appeal where it was shown on behalf of appellant that, within the statutory period, he delivered his notice of appeal to employees of the prison where he was then confined with the request that it be mailed to the proper party for filing, and that such employees negligently failed to forward the notice within the limitation specified by Rule 31 of the Rules on Appeal. The court held that the delivery of the notice to the prison authorities constituted a constructive filing thereof within the prescribed time limit and satisfied the jurisdictional requirement as contemplated by law. It was there stated that while it is the "settled rule in this state, both in civil and criminal cases, that the time requirements for the taking of an appeal are mandatory, and that the appellate courts are without jurisdiction to consider an appeal which has been taken subsequently to the expiration of the statutory period. * * * Adherence to this rule will not deprive appellant of his appeal under the distinct factual situation involved."

It cannot be seriously questioned that the oral notice of appeal entered in the minutes of the court herein conferred jurisdiction upon the appellate court. In the cited cases there was a complete failure to file notice or take any other initial step required to institute the appeals within the time prescribed therefor; in the instant case, the oral notice made by appellant in open court at the time of pronouncement of judgment and sentence and which was later written into the minutes, initiated the appeal from that judgment and fixed jurisdiction of the appellate court. In the circumstances presented, it would seem inequitable and unjust to deprive appellant of his right of appeal because of the lack of a formal written notice.

The foregoing discussion is not to be understood as passing judgment either on the validity of paragraph (a) of Section 1239 of the Penal Code, as amended in 1945, or on the power of the Judicial Council to adopt laws of procedure affecting substantial personal or property rights under the authority of paragraph (5) of section 1a of Article VI of the State Constitution.

Turning to the appeal on its merits, appellant relies upon the following propositions for a reversal of the judgment:

1. The evidence is insufficient to sustain a conviction upon any of the three counts.

2. Appellant took the money openly and avowedly and under a claim of right preferred in good faith.

3. The court erred in receiving prejudicial evidence as to other transactions, and in sustaining objections of the prosecution to evidence offered in behalf of appellant.

The instant prosecution arose out of the following circumstances:

Mrs. Wanda M. Schoemann, referred to in Count 1 of the information, met appellant in September of 1946. She was a widow then known as Wanda Martin, with two minor children and sought advice from a friend with respect to the investment of money left to her by her husband. She was referred to an insurance company which employed appellant as an agent, with the result that appellant visited her at her home to discuss such investment with her.

Mrs. Schoemann testified that in the course of her acquaintance with him, appellant informed her that in addition to being an insurance agent, he was business manager for a number of people, including Anne Nichols and others prominent in the moving picture industry; that he held their powers of attorney, paid their bills, made loans for them, wrote their checks and carried on their business in general. This business management enterprise was carried on separately from the insurance business and was done through Hollywood Management Corporation, in which appellant, a Dr. Gourson, and Bert De Wayne Morris, Jr. were the stockholders.

This witness further testified that in October of 1946, appellant asked her if she would be interested in making a loan of $10,000 to Anne Nichols. After thinking about it for a week and discussing it with her mother, Mrs. Schoemann gave appellant a check for $10,000 payable to him and took back a promissory note for the same amount which was signed by appellant. The witness testified that on the evening the loan was made she stated to appellant: "* * * with the confidence I have in you and with the feeling that it will be repaid by Anne Nichols when her money (from Abie's Irish Rose) comes in, I will make the loan to Anne Nichols." She further stated that appellant told her he was attorney-in-fact for Anne Nichols and had power of attorney to handle her affairs, and for this reason he asked that the check for $10,000 be made out to him. It is undisputed that this check was deposited in Anne Nichols Trust Account and later charged against Mrs. Schoemann's bank account.

On cross-examination, Mrs. Schoemann testified that she had a conversation with appellant at the time in question and that "he said he had just repaid a loan for Anne Nichols and it was a nice way of making money. He had given this man a five hundred dollar bonus for the use of the money for two months, for ten thousand dollars, and he said 'She needs some more money.' And he said, 'I am her business manager. I take care of her affairs.' And he said, 'I would like for you to loan her ten thousand dollars and you will get the same sort of a bonus only instead of three months we will set yours up for six months because her picture 'Abie's Irish Rose' won't be released until March and she won't have the money until then.'" After she made the loan, Mrs. Schoemann was worried about it and called appellant on the telephone and said: "With the confidence I have in you, Mr. Behrman, I feel that you will see that the money is repaid to me, that is the loan of Anne Nichols; but I said supposing something happens to you, Mr. Behrmann, how will I know for sure that I will get my ten thousand dollars back? * * * So he said, 'Well, what is there to worry about? Nothing is going to happen to me', he said 'if you will feel a little better about it, supposing I take out a policy on myself and I will assign it to you and then if anything happens to me, if Anne doesn't repay it, you will be sure of getting you ten thousand dollars.' * * * That was just a few days after I had made the $10,000 loan to Anne Nichols."

There was introduced in evidence a so-called loan and note sheet the first item of which reads as follows: "November 1st, 1946, Paul R. Behrmann, due date May 1st; amount of loan $10,000.00; interest paid 6%." The witness Schoemann testified that this sheet represented the original record of the first loan of $10,000; that it was written by her around November 1, 1946; and that the entry on said sheet "Loan to Anne Nichols" was inserted a week or two after the original entry. In answer to the question on cross examination: "Isn't it true that the entry 'Loan for Anne Nichols' was put in there when you first determined in your own mind that Mr. Behrmann had taken some money from you that he was not authorized to take?", the witness stated: "No, it was not put in that way." To the further question: "At that time however it was very clear in your mind that it was to be a loan for Anne Nichols?", the witness answered: "Yes."

Subsequently Mrs. Schoemann made a loan of $2,500 to Anne Nichols and three loans to appellant, to wit: $3,000, $3,750 and $7,945. With reference to the $2,500 loan to Anne Nichols, that check was made payable to Anne Nichols and was endorsed by appellant as Attorney-in-fact for Anne Nichols. However, it is with the money involved in the first loan of $10,000 that this case is concerned.

On November 1, 1946, the check for $10,000 was deposited by appellant in Anne Nichols' Trust Account at the Hollywood and Vine branch of the California Bank, the words "Loan from Wanda S. Martin $10,000.00" appearing on the back of the deposit slip. The Anne Nichols account book kept by Hollywood Management Corporation shows an entry of $10,000 cash received on November 1, 1946 and is identified as a loan. A financial statement entitled "Anne Nichols Receipts and Disbursements—November, 1946", carries an item of $10,000 as a loan from Wanda Martin to Anne Nichols. The $10,000 was withdrawn from the Anne Nichols Trust Account by three checks all payable to appellant. The first two were dated November 1, 1946 and were for $1,000 and $2,000, respectively. The third, also payable to appellant, was dated November 2, 1946, and was for $7,000. None of these withdrawals was with the permission of Anne Nichols and neither did she authorize appellant to use the money so withdrawn for his own purposes.

Appellant took the stand in his own defense and testified that on the evening of October 31, 1946, he had a discussion with Mrs. Schoemann with reference to the $10,000; that he told her that he had a great number of obligations and was building a house which was costing "two or three or four times" what he had expected; that he had a great number of accounts receivable and was not getting paid very readily, and Mrs. Schoemann said "Well, if you need some money I would be glad to let you have it because I have some money in the savings account earning a lousy one per cent interest, and I will be glad to let you have some. How much do you need?" Appellant said "I could use as much as $10,000.00 if she could spare it. She said, 'Well, how much interest will you pay?' I said 'I will pay you 6 per cent interest.' She said 'I get 7 and 8 per cent on all my trust deeds and I don't know why I should let you have money at 6.' I said that 6 per cent was all I would pay. She also asked me how long I expected to use the money, and I said that I thought if I could have it for six months that would be adequate. * * * She said 'Well, if you are sure I am going to have the money back in that time * * * you remind me before you go and I will give you a check." Appellant further stated that Mrs. Schoemann asked him at that time: "How do I know that I will get this money back?"; and that he particularly told her that he had accounts receivable worth between $11,000 and $15,000; life insurance renewals worth about $33,000 to $34,000 which was one of the reasons "I was stuck for cash, because that was spread over a nine year period"; that he told her his general insurance business had a value of from $17,000 to $20,000 or $21,000, but that "with the loans out and accounts receivable that I was short of cash and therefore when she offered it to me I said that I appreciated it very much that it would sure help. * * * She gave me a check before I left * * * payable to me." Appellant denied that he told Mrs. Schoemann that he was making this loan for Anne Nichols; that on the next evening he gave Mrs. Schoemann a note for the check he received the night before for the reason that Mrs. Schoemann became worried about the money and said "As long as you are alive I know I have nothing to worry about, but if you should die what would happen to it?" That he then told her she would have nothing to worry about because "my estate would pay the money and between my assets and my life insurance there will be an adequate sum to pay it. However, I said, 'If you are worried I will have an insurance policy on my life so that if anything should happen to me you will be protected.' * * * She said, 'That will be all right.' I asked her did she want the money back and she said no. I asked her would that be all? Was she entirely satisfied and she said yes." That he thereafter assigned to Mrs. Schoemann a policy on his life in the sum of $10,000.

Appellant testified that the $10,000 check was deposited at his direction in the account of Anne Nichols; that "It was deposited there because I owed the bank some money and I owed several delinquent bills and I wanted to pay them and I didn't want the creditors to come in, because they had been dunning me. I didn't want an attachment, not only because of the money, but because it would virtually ruin my business."; that he was overdrawn at two banks. That after the money was deposited in the Anne Nichols Trust Account, appellant instructed his brother to draw it out and "put it into some other account and to pay some bills with it"; that subsequently the money was withdrawn as follows: On November 2, 1946 by a check for $7,000, on November 1, 1946, a check for $2,000, and on November 1, 1946, a check for $1,000, all made payable to the order of appellant. Appellant also testified that subsequently he made a loan from Mrs. Schoemann for $1,000 on behalf of Grant Withers, and also one for $2,500 on behalf of Anne Nichols. In reply to the question: "Now, prior to making the $2500.00 loan for Anne Nichols had you made other loans in her behalf?", the witness stated: "A great number.

"Q. Were those with her knowledge or without her knowledge? A. Most of them without her knowledge.

"Q. Will you please state your reasons for making loans for her without her knowledge? * * * A. There were several reasons. First of all she had been ill and the doctor had ordered that she not be worried or disturbed, and the second reason would be that I had authorization under my power of attorney to make these loans for her and I did make them." Moreover, that he made loans to her out of his own money and that she was still indebted to him on that account.

On cross-examination, appellant testified that he was overdrawn at the bank and had received dunning letters and was afraid of possible attachment; that he wanted time—a couple of days—in which to pay out these checks to people to whom he owed money; that the $7,000 which he withdrew from Anne Nichols account on Nov. 2, 1946 he deposited in his ranch account at the Bank of America; and the $2,000 which he withdrew on Nov. 1, 1946 he deposited in the Sixth & Grand office of the California Bank; that no one attached any of these funds; that the "money was used for a purpose other than one connected with Anne Nichols"; some to pay bills owed on the house he was then building; part to pay an insurance company for delinquent insurance premiums. The witness was shown the financial statement to Anne Nichols, signed by himself, and was asked: "At the time you signed this you saw this item on here 'Loan from Wanda S. Martin (Schoemann) to Anne Nichols', didn't you? A. I probably did not because these statements were made up directly from the book, and it was receipts and disbursements and they would automatically be correct as to that they would follow the book, so whatever was in the book would follow on these pages.

"Q. You say you saw that duplicate deposit slip along about April, 1947? A. In about March.

"Q. After March, 1947, did you take steps to change these books to show that that was not a loan from Wanda S. Martin to Anne Nichols? A. I did not."

In addition to the testimony of Mrs. Schoemann in opposition to appellant's version of what occurred, Marie Barton, an accountant employed by appellant from October 23, 1946, to January 27, 1947, testified that she set up the $10,000 item in the general ledger of the Anne Nichols Trust Fund account about November 1, 1946 by an entry: "$10,000.00 net amount received from Wanda S. Martin Loan"; that the purpose of this was to show a loan from Wanda S. Martin to Anne Nichols. This witness further testified that when the three withdrawals of $1,000, $2,000 and $7,000 were made from that $10,000, she asked appellant "what he was doing with the money, and he said he would advise me later, and I waited to the end of the month, and I said, 'what happened to the money? Who shall I charge it to?' He said 'Place it in an exchange account and I will advise you later.'" That when she made her original entry of the $10,000 item from the information on the back of the deposit slip, to wit: "Loan from Wanda Martin", she also sought advice from appellant's brother, Mr. Leopold Behrmann, the general manager of the office, by asking him "Is this a loan from Wanda Martin to Anne Nichols?" and that he told her "Yes".

The witness Bert De Wayne Morris, Jr., an associate of appellant in the Hollywood Management Corporation, testified that some time in September of 1947, he, John Tully, Dr. Gourson and appellant had a meeting at the office of said corporation at which time appellant was asked about the $10,000 that went into the Anne Nichols account; that "I believe that one of us, I forget who it was, asked him what was cooking with the $10,000.00, because we went over the books and it said $10,000.00 from Wanda Martin to Anne Nichols and then over the next month I believe it was the $10,000.00 was brought out of Anne Nichols account and right on the books it said 'Loaned to P. R. B.', that is Paul R. Behrmann, and we asked him what that meant and he said that he had arranged a loan for Anne Nichols and had gotten $10,000.00 from Wanda Martin on the loan. However, Miss Nichols got some money from royalties, something of that sort, and so he brought the money back out from out of her account again." On cross-examination, this witness was asked if appellant told him that he secured a loan from Wanda Martin for himself and deposited it in Anne Nichols account, to which he replied: "Oh, to tell you the truth, I don't remember. That could have been said." However, he believed that appellant did say that he used the money, or the account, as an exchange account.

Appellant urges that the evidence is insufficient to sustain a conviction upon any of the three counts, 2, 3 and 4.

Appellant's acquittal on Count 1 of the information is a finding that the manner in which he obtained the $10,000 from Mrs. Schoemann on November 1, 1946 was not wrongful. Moreover, the conviction on the last three counts is an implied finding that the money in question was a loan by Mrs. Schoemann to Anne Nichols. There is ample support in the record for such findings: First of all, the testimony and records of Mrs. Schoemann, who at all times considered the loan was made to Anne Nichols, and whose original record of the loan carried an entry made within a week or two after November 1st identifying the loan as having been made to Anne Nichols. Secondly, there is the conduct of appellant and the members of the staff of the Hollywood Management Corporation: the money was deposited in Anne Nichols Trust Fund account at appellant's direction; the deposit slip and duplicate deposit slip were made out for the Anne Nichols account and each carried a notation on the reverse side that the money was a loan from Wanda Martin (Schoemann); the Anne Nichols account book kept by the Hollywood Management Corporation carried an entry of $10,000 identified as a loan from Wanda Martin; the statement of the Anne Nichols Trust Fund account for November, 1946, signed by appellant, identified the transaction as a loan to Anne Nichols. Also, there is the testimony of Marie Barton, appellant's accountant, that she prepared a list of expenses that needed to be paid for Anne Nichols totalling between $12,000 and $14,000, which implied that Anne Nichols was in need of a substantial loan. Further, there is the testimony of the witness Morris revealing that as late as September, 1947, appellant stated that the entry of $10,000 in Anne Nichols account was a loan from Wanda Martin.

In opposition to such evidence is appellant's claim that the $10,000 loan of November 1, 1946, was made to him personally. Supporting this is the fact that the note given for such loan is signed by appellant and the passbook for the note was in appellant's name, while subsequent loans made by Mrs. Schoemann through appellant show names of the real parties in interest, i. e.: Exhibit 4, Anne Nichols; Exhibit 5, Paul R. Behrmann; Exhibit A, Grant Withers. Such apparent inconsistency may be explained in two ways: First, the fact that Mrs. Schoemann was inexperienced, never having handled a loan before by herself. Secondly, appellant told her that he held Anne Nichols' power of attorney, and therefore his signature was sufficient. Moreover, there is evidence that during this period Mrs. Schoemann relied upon appellant for advice in financial matters. Also, in support of appellant's theory, the evidence shows that Mrs. Schoemann asked for and received security for the $10,000 loan in the form of an insurance policy from appellant and not from Anne Nichols; but it is also shown that appellant suggested the insurance policy assignment in order to allay Mrs. Schoemann's fear that she would not get her money back if anything happened to appellant.

The record discloses that additional security by way of a trust deed and a conveyance of land was given months later, in August, 1947, which according to appellant was security for all loans outstanding between him and Mrs. Schoemann, including the $10,000 loan of November 1, 1946. Mrs. Schoemann, however, denied that this security covered the $10,000 loan.

[6] Complaints in two civil actions filed in September, 1947, by Mrs. Schoemann against appellant and Anne Nichols, respectively, were read into the record. This evidence tended in some respects to impeach the credibility of Mrs. Schoemann, but what effect was given to it by the trial court is not known. However, the rule laid down by People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780, and the large number of cases which have followed it, measures the effect which this court must give to the verified complaints in the civil actions and all the other evidence presented at the trial herein, to wit: that before the verdict or findings of the trier of fact can be set aside on appeal upon the ground of insufficiency of the evidence, "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below."

[7] Because of the direct conflict in the testimony with respect to the circumstances under which the $10,000 loan was made, it became a question of fact for the trial judge, whether it was loaned by Mrs. Schoemann to appellant or to Anne Nichols. His decision on this issue is substantially supported by evidence, hereinabove briefly recited, that all parties who had knowledge of this loan considered it as having been made to Anne Nichols.

Appellant here relies upon the statutory rule that in a prosecution for embezzlement, "it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title prefered in good faith, even though such claim is untenable." Sec. 511, Penal Code.

Such claim is based upon the contention that the money was taken by appellant "under an absolute ownership"; that it belonged to him and not to Anne Nichols, hence the authorization of the latter was not necessary.

[8] The defense permitted under section 511, supra, presents an issue of fact and not of law. People v. Knott, 15 Cal.2d 628, 633, 104 P.2d 33, 128 A.L.R. 1367.

[9] In view of the evidence adduced at the trial and the construction placed upon it by the trial court, i. e., that the $10,000 was advanced as a loan to Anne Nichols, it appears that appellant was not acting in good faith and therefore is not entitled to the benefits of the code section. At all times, appellant was attorney-in-fact for Anne Nichols under a power authorizing him to "act in, manage and conduct all my affairs and for that purpose in my name and on my behalf to do and execute all or any of the following acts, deeds and things, that is to say: * * *

"IX. To deposit any moneys which may come to his hands as such attorney with any bank in my name, and any of such money or any other money to which I am entitled which now is or shall be so deposited to withdraw, and either employ as he shall think fit in the payment of any debts, or interest, payable by me, or taxes, assessments, insurance, and expenses due and payable or to become due and payable on account of my real and personal estate, or in or about any of the purposes herein mentioned, or otherwise for my use and benefit."

Appellant admitted he had made a great many loans for Anne Nichols, most of them without her knowledge; and he also admitted that he deposited the $10,000 in the Nichols Trust Fund account and drew it out for his own use. While the financial statement which he rendered to Anne Nichols shows that the three items of $7,000, $2,000 and $1,000 were paid to him as "loans", no evidence was presented by him to prove that he had any such arrangement with Anne Nichols or that he intended to borrow the money from her at the time he withdrew it.

Appellant, as his final point, urges that the trial court erred in receiving evidence of other allegedly similar transactions. While he admits that such evidence is generally admissible to show common scheme or plan with relation to an offense charged, he denies that such similarity exists in the instant case, and further objects to certain portions of the evidence as being inadmissible and highly prejudicial to his cause.

It was shown that appellant was business manager for Robert Mitchum, a motion picture actor, from January, 1947, to September, 1947, holding a power of attorney such as the one under which he acted for Anne Nichols; that in August, 1947, appellant was overdrawn at the bank in both his "trust" and "ranch" accounts; that he withdrew from the Mitchum account during that month a total of $9,000, which he deposited in his own accounts without the consent or authorization of his principal and used the money for his own purposes. It is clear from the record that in August, 1947, appellant was having financial difficulties, just as he had in November, 1946, and that he used funds from the Mitchum account during that period just as he had from the Nichols account during the earlier period.

In the Nichols transaction, appellant claimed the money he used was a loan to him by Mrs. Schoemann. In the Mitchum transaction, he claimed it was the result of an investment made by Mitchum in appellant's insurance business.

Mr. Mitchum testified that appellant asked him on the 17th of August, 1947, if he would like to go into the "business management business", to which the witness replied that "if he, as my business manager, advised my investment in Hollywood Management Corporation and showed that it would be a profitable venture with some guarantee of safety, that I would be agreeable to it but * * * I took the matter under consideration * * * he said he would bring the matter up at a further date. * * * He mentioned it a couple of times and I was agreeable to it * * * if he showed me that it was a reasonable, profitable and legitimate venture * * * that is as far as the discussion ever went"; that shortly thereafter the witness left for Oregon.

There was no showing made that the money withdrawn from the Mitchum account was ever put in either the Hollywood Management Corporation or appellant's insurance business. At any rate, the theory of an investment was apparently dropped by appellant when he prepared Exhibit 14, the agreement under which the Mitchums were to receive from him the sum of $18,000 in consideration of their having loaned him $9,000. Again, his actions here as in the Nichols transaction are consistent with the theory that he was using his clients' money for his own purposes.

[10] As stated in People v. Baker, 25 Cal.App.2d 1, 5, 76 P.2d 111, 112: "It is not essential that such similar transactions shall have resulted in the commission of a crime. It is sufficient if they tend to prove a scheme of the defendant which included the acts charged." And again in People v. Kendall, 65 Cal.App.2d 569, 570, 151 P.2d 39, 40, it is said: "For the purpose of establishing fraudulent intent in a prosecution for grand theft in the nature of embezzlement evidence is admissible of acts of a similar nature committed by defendant before and after the date of the act upon which the conviction is predicated. People v. Talbot, 220 Cal. 3, 17, 28 P.2d 1057 et seq."

[11] In the circumstances presented there was sufficient similarity between the two transactions to overcome appellant's objection to the introduction of evidence with respect to the Mitchum transaction.

With reference to the testimony of Mr. Ellis, secretary to Mr. Mitchum, regarding a conversation he had with appellant to wit: "Paul Behrmann told me that he understood Mitchum was having lunch with Mr. Copp, who was Mr. Mitchum's attorney, in connection with going to the District Attorney regarding his $9,000 that was invested. And I told Mr. Behrmann that I knew nothing of Bob going to the District Attorney and we had a long conversation regarding Mr. Mitchum and Mrs. Mitchum. Mr. Behrmann then informed me of his dislike for Mrs. Mitchum, and he felt that Mrs. Mitchum was the cause of all the troubles that might have gone on about him and Bob. He said that it was due to Mrs. Mitchum that they had gone to the District Attorney with a complaint. It of course is not true. He then told me that if Mrs. Mitchum didn't keep out of the case that he was going to do something about it, in fact that he was going to do away with her, if necessary. Of course, I told Mr. Behrmann that I didn't like for him to tell me those things because I was working for Mr. Mitchum and as a consequence I would have to go back to him with this and there might be repercussions. That was the extent of the conversation.

"Q. In that conversation, isn't it true, Mr. Ellis, that you told Mr. Behrmann that Mr. Mitchum was not going to the District Attorney but that the District Attorney was coming to see him. A. That is right."

[12] Appellants' counsel moved to strike this testimony on the ground it was not within the issues of the case. The motion was denied. It is here urged that this evidence being highly prejudicial, "perhaps contributed more to the defendant's conviction that all of the rest of the proof of the prosecution." While it may have been error to admit this testimony to prove consciousness of guilt, it was not so prejudicially erroneous as to warrant a reversal of the judgment of conviction. This is also true of the testimony of the two witnesses introduced by way of depositions.

It should be observed that this was not a jury trial, and as was pointed out in People v. Albertson, 23 Cal.2d 550, 577, 145 P. 2d 7, 20, quoting from Wharton's Criminal Evidence, sec. 360, p. 567, " 'It does not reflect in any degree upon the intelligence, integrity, or the honesty of purpose of the juror that matters of a prejudicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict. The juror does not possess that trained and disciplined mind which enables him either closely or judicially to discriminate between that which he is permitted to consider and that which he is not. Because of this lack of training, he is unable to draw conclusions entirely uninfluenced by the irrelevant prejudicial matters within his knowledge * * *.' " On the other hand, there is little, if any, justification for the belief that the trained mind of the trial judge who heard the instant cause was influenced to the prejudice of appellant by the evidence here objected to.

The record herein shows that appellant had a fair and impartial trial, and certainly no error is shown which, after an examination of the entire cause including the evidence, reasonably suggests that there has been a miscarriage of justice. Const. art. VI, sec. 4½.

For the reasons stated, the judgment and order appealed from are, and each of them is affirmed.

DRAPEAU, J., did not participate.

91 Cal.App.2d 761

PEOPLE v. ODLUM.

Cr. 4318.

District Court of Appeal, Second District,
Division 3, California.

May 11, 1949.

Rehearing Denied May 20, 1949.

Hearing Denied June 9, 1949.

1. Criminal law ⚷997

A motion to vacate a judgment and sentence entered on plea of guilty, on ground of alleged fraud of movant's attorney respecting penalty if defendant pleaded guilty, followed by apparently corroborative acts and statements of trial judge and deputy district attorney, which were in good faith relied upon by movant in pleading guilty, was an application for relief in nature of a writ of error coram nobis.

2. Criminal law ⚷1144(17)

On appeal from order denying a motion to vacate a judgment and sentence entered on plea of guilty to felony charge, denied on ground that relief sought could not be granted under theory presented, averments in affidavits supporting motion would be assumed to be true.

3. Criminal law ⚷998

Affidavits averring that movant's attorney had allegedly fraudulently misrepresented penalty to be imposed if movant pleaded guilty to one felony count of information, and reciting corroborative acts and statements of trial judge and deputy district attorney, and averring that misrepresentation and corroborative acts and statements were relied upon by movant in good faith, justified vacation of judgment and sentence entered on guilty verdict, if proved.

4. Criminal law ⚷998

On motion to vacate judgment and sentence entered on plea of guilty to felony charge on ground of alleged fraud of movant's attorney in misrepresenting penalty to be imposed if defendant pleaded guilty to felony charge, followed by apparently corroborative acts and statements of trial judge and deputy district attorney, movant was entitled to establish that delay in not presenting matter to trial court prior to his transfer to prison after three months in jail was without fault of movant.

5. Criminal law ⚷1187

On appeal from order denying motion to vacate a judgment and sentence on plea of guilty to felony charge, denied on erroneous ground that relief sought could not be granted on theory pleaded, District Court of Appeal would not vacate judgment and plea of guilty and direct trial court to permit movant to enter a plea of not guilty, since whether judgment and plea should be vacated was for determination of trial court after a hearing on the merits.

6. Criminal law ⚷274

If plea of guilty to one of four felony counts was void because of alleged fraud of movant's attorney in misrepresenting penalty to be imposed if defendant pleaded guilty to felony charge, followed by apparently corroborative acts and statements of trial judge and deputy district attorney, in good faith relied upon by movant, plea should be vacated and people and movant restored to positions in which they stood immediately before entry of guilty plea.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Jerome Odlum was convicted of issuing checks without sufficient funds, and he appeals from an order denying a motion to vacate judgment and sentence.

Order reversed.

William Strong, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., and William E. Simpson, Dist. Atty., Los Angeles County and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from an order denying a motion to vacate a judgment and sentence. While the motion is denominated as stated, we construe it to be also a motion to vacate a plea of guilty.

Defendant was charged by information with four counts of issuing checks without sufficient funds, felonies, and a prior conviction of forgery, a felony, in Minnesota, and serving a term therefor in the state prison. He pleaded not guilty to each count and admitted the prior conviction.

On December 18, 1947, the date of trial, the following proceedings took place:

"The Court: People against Jerome Odlum.

"Mr. Most [Attorney for defendant]: At this time, your Honor, the defendant wishes to withdraw his plea of not guilty.

"The Court: To four counts or one?

"Mr. Most: We will just enter a plea as to one count.

"The Court: Is that satisfactory to the people?

"Mr. Crail: Satisfactory.

"The Court: Mr. Odlum do you want to plead guilty to Count 1?

"The Defendant: Yes.

"The Court: You are doing that because you are guilty and for no other reason?

"The Defendant: Yes.

"The Court: Nobody has forced you to do it?

"The Defendant: No.

"The Court: Has anyone made you any promise of immunity or given you any hope of reward for doing it?

"The Defendant: No, sir.

"The Court: Permission will be granted to withdraw the plea. You may rearraign the defendant.

"Mr. Crail: To the offense of issuing checks without sufficient funds, a felony, as set forth in Count 1 of the information, how do you plead, guilty or not guilty?

"The Defendant: Guilty.

"Mr. Crail: To the charge of having suffered two prior convictions [defendant had suffered and admitted one prior conviction only], one being for forgery in Minnesota—

"The Court: That has been admitted heretofore.

"Mr. Crail: Oh, pardon me.

"Mr. Most: Yes. At this time, your Honor, we would like to ask permission to file application for probation.

"The Court: Do you waive time for sentence?

"The Defendant: Yes.

"The Court: Permission will be granted and the matter is ordered continued until January 21st, 1948, at nine o'clock a. m. for further proceedings."

January 21, 1948, appellant was sentenced to imprisonment in the state prison. The other counts of the information were dismissed.

September 27, 1948, appellant, by a different attorney, filed a "Motion To Vacate Judgment and Sentence." The motion was based upon the grounds (1) That the free will and judgment of the defendant were overreached by certain untrue representations made to him by his then attorney, viz., to the effect that the trial court had agreed to impose only a short jail sentence with a possible fine if defendant would enter a plea of guilty to Count One of the information; and that such untrue representations were seemingly corroborated by the acts and omissions of responsible representatives of the People; (2) That the defendant believed and relied on such representations and such seemingly corroborative acts and omissions and that but for this he would not have waived his right to a trial and would not have entered a plea of guilty to Count One; (3) That by reason of said representations and seemingly corroborative circumstances he was deprived of the right to present certain material evidence in connection with the fixing of punishment; (4) That none of said matters appear of record; (5) That he was deprived of due process of law under the federal and state constitutions; (6) That he had a good and valid defense to Count One of the information. In support of the motion appellant filed his affidavit, a supplemental affidavit, and one of Manning Post, his employer. In opposition there were filed two affidavits of Louis Most, appellant's former attorney, and one of Clifford Crail, Deputy District Attorney.

Appellant's affidavit stated that: In the second week of December, 1947, his attorney, Louis Most, told him he had had a long conversation with the trial judge and had explained to him in full detail "every aspect" of his case, including his "background as a newspaper reporter, editor, novelist and screen writer", his domestic troubles, his resultant "rather heavy" drinking, his effort, since his arrest, to straighten out his affairs by going back to work as a screen writer at a major studio, and the fact that his employer desired to assign him on a new picture, which assignment would not be made unless he was assured that appellant "would not be sent to State's Prison." His attorney then stated that the judge replied: "It appears that the problem of this man is largely financial. What he needs is some kind of business management. He is probably more irresponsible than criminal. However, on account of his past conviction he is not eligible for probation, but I can reduce this to a misdemeanor and give him a short sentence in the County Jail, if he wants to enter a plea of guilty to one of the Counts in the information and the other three will be automatically dismissed, but as a condition to all of this, I want to be sure his affairs are so arranged that he will have this matter constantly before him. He doesn't seem to realize the value of money. If I do this I'm going to require that he employ a business management firm to handle all of his money. I don't want him to make restitution of all these checks directly, but I want it done by way of deduction from his weekly earnings. He is to have no further checking accounts, but all of his money must be handled by the business management firm. They will pay his bills and arrange to make gradual restitution of these checks so that until they are paid he will have a smaller weekly drawing account to impress upon his mind that money has value. If he wants to do it this way, I will not send him to San Quentin, but I will give him thirty to sixty days in the County Jail and probably a fine." Thereafter, appellant's counsel repeatedly assured him there "was a definite agreement and understanding" with the judge "that if affiant would promise to follow the aforesaid recommendation of the said judge that the said judge would not sentence affiant to San Quentin but would impose a short-term County Jail sentence and possibly a fine, in which case he would grant a stay of execution to the affiant in order that affiant might complete the assignment as a writer on the proposed motion picture," and that the judge's proposal "was the only sensible way out of an impossible situation" since the trial judge had stated that appellant would have no chance in a jury trial because of his previous conviction. On December 15, 1947, his attorney told him he had informed Manning Post, appellant's employer, of the agreement with the judge. Appellant, pursuant to the representations of his attorney, employed a business management firm recommended by his attorney. Four days before sentence was to be pronounced, appellant borrowed $1300 with which to make restitution, believing that such act would present him to the court in a more favorable light; and at the time of pronouncement of judgment and sentence he had that sum in his possession, informing his attorney of this fact, and told his attorney that he desired to make restitution. He was told by his attorney "not to do this as it would be contrary to the recommendation of and arrangement with the trial judge." Although appellant knew he was not eligible for probation under the laws of California because of his previous conviction, nevertheless his attorney told him that he would apply for probation "for the purpose of working out with the probation officer the matter of restitution and the handling of affiant's affairs by a business management firm to insure that the recommendations of the court would be carried out." When, after his plea, his attorney applied for permission to file an application for probation, he believed that the granting of such permission "corroborated the aforesaid representation" of his attorney. When, at the time of the entry of his plea, appellant heard the Deputy District Attorney state that appellant had admitted "two" previous convictions of felonies, he immediately spoke to his attorney, who replied, "It's unimportant, it is all arranged anyway, you have nothing to worry about. Don't you see everything is working out just like I told you. We will work out a deal with the probation officer so that the judge will know that his requirements will be performed." The affidavit further states that since the statement "with respect to two previous convictions (when in fact there had only been one) was treated as a matter of no significance [it] seemed in the mind of the affiant to corroborate the purported agreement that the said offense was to be dealt with as a misdemeanor." If the representations had not been made and the circumstances had not appeared to corroborate the representations, appellant would not have waived his right to trial. After sentence was pronounced Mr. Most was paid $150 as his fee.

In his supplemental affidavit appellant stated that all of the representations made to him by his attorney were untrue "insofar as they relate to any alleged promises upon the part of the judge" but at the time he changed his plea and thereafter he believed the representations to be true and "in reliance thereon and not otherwise" he changed his plea.

Manning Post, a motion picture producer and employer of appellant, stated in his affidavit that in the early part of December, 1947, he desired to assign appellant as a writer to a picture which was then in the course of preparation for production. Not wishing to sustain loss by assigning another writer to the picture in the event appellant would be unable to carry through "the entire course of preparation of approximately two months," he spoke to Louis Most, attorney for appellant, on several occasions between December 5 and December 15, 1947. Mr. Most told him he need not worry about assigning appellant to the proposed new picture because he had made "an agreement" with the trial judge that appellant, provided he entered a plea of guilty, would not be sent to San Quentin under any circumstances but "would be given a short jail sentence and possibly a fine," and that he had a "definite understanding with and a definite promise from" the judge that in the event a jail sentence was imposed appellant would be granted a stay of execution until such time as the picture could be completed. In reliance thereon, he assigned appellant to the new picture on January 7, 1948. Immediately prior to the assignment and "on or about the first week of January, 1947," he had an additional telephone conversation with appellant's attorney, at which time the attorney stated that "everything was going according to plan and that he need have no fear of the defendant's being sentenced to San Quentin or receiving any kind of sentence other than a short term in the County Jail with a possible fine."

Clifford Crail, the deputy district attorney in charge of the prosecution of appellant, stated in his affidavit that the only agreement he had with appellant's attorney was that he would "recommend to the court that the court accept a plea of guilty to one count in the Information," and denied the making of any other agreement.

Louis Most, in his affidavit of October 19, 1948, stated that on December 15, 1947, he saw the trial judge in chambers and discussed the case with him, telling him that appellant was then working conscientiously on a good job, that he had been sober, and that he believed that appellant's full rehabilitation would result if the judge "would consider a County jail sentence rather than a sentence to San Quentin." The judge replied that in view of the fact appellant had a previous criminal record he did not "know" that he was eligible for a county jail sentence, but assured him that he would keep an open mind on the subject and be guided by the probation report. That was the extent of his conversation with the judge. No promises of any kind were made by the judge or the deputy district attorney on the case. In relating this conversation with the judge to appellant he told him: "We both know that you do not have any defense to the issuing checks without funds; if you change your plea to 'guilty' on one count on the 18th of December, 1947, we will ask for leave to file an Application for Probation, and I am sure that the Probation Officer's report will show that you have been thoroughly rehabilitated and are now holding down a responsible position. That you intend to pay all the people defrauded by reason of the issuing of the checks." He denied he ever told appellant "that he would serve only a short County Jail sentence" and stated that he said: "If you have a good Probation Report, you will be very lucky if you receive only a County Jail sentence; we can only hope for the best. I am worried about those prior convictions as that usually counts heavily against you."

In his affidavit of October 28, 1948, Mr. Most stated that Manning Post, appellant's employer, telephoned him on December 16, 1947, concerning the status of appellant's case; that he told him he had talked to the judge, who said he would keep an open mind on the subject of probation and if an application for probation was filed he would study the application "very carefully and give Mr. Odlum everything to which he is entitled." He stated that he told Post that appellant would be very fortunate "if he came out with six months to a year County jail sentence, as part of his probation." He further stated that he never, at any time, stated to Post that appellant would not be sent to San Quentin. He denied that he had been paid any fee.

The motion came on to be heard October 29, 1948. At the hearing appellant testified that he was familiar with the contents of the affidavit of Manning Post and that Mr. Post told him "of the statements that were made to him by Mr. Most." As to the statement in the affidavit of Mr. Most that he had received no fee at all, appellant introduced a telegram in evidence for the purpose of showing that Mr. Most actually received $150. The District Attorney then stated: "As far as the People are concerned our affidavits have been filed and the matter is now submitted on the affidavits on both sides, your Honor." The attorney for appellant stated: "We are not making any claim that Mr. Crail was a party in any way at all to the agreement or promises," and stipulated that, "no public official made any promises of any kind to the defendant." The District Attorney then read into the record the proceedings had on December 18, 1947, which we have quoted supra. Argument ensued. The court intimated that appellant should have spoken up at the time of sentence or during the period of three months that he was in the county jail before transfer to San Quentin. The following then occurred:

"Mr. Allen [Attorney for defendant]: May I interrupt just a moment? In summing up a moment ago I asked whether there was a question in your Honor's mind as to whether this offer had been timely made. I make an offer of proof at this time to show why. The defendant was trying to get this motion made all the time he was down here in jail. After he was sent to San Quentin he tried numerous lawyers and nobody would accept it, because corroborative material was not at that time available, and I want your Honor to know why it was not available.

"The Court: The point, Mr. Allen, is this. Right there at the time that he was sentenced was the time for him to say 'If the court please, this attorney of mine has told me that he and the District Attorney agreed that I would get a county jail sentence.'

"Mr. Allen: If your Honor please, that is exactly what happened in Judge McKay's court and it was subsequently, a long time subsequently, even after an appeal, that the matter was presented.

"The Court: As to the Gilbert case [People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657], there are several differences between that case and this one. For example, I believe that the court in fixing the sentence asked the District Attorney if he had any recommendation to make and the District Attorney there said, 'I will leave it to your Honor,' or remained mute. I don't remember exactly what the facts were.

"Mr. Allen: I think he stood mute.

"The Court: Yes, but the court did ask for a recommendation. In this case there wasn't any statement made by Mr. Crail either way. There wasn't any information asked of Mr. Crail.

"Mr. Allen: No, and there was none asked of the District Attorney in the other case.

"Mr. Sullivan [Deputy District Attorney]: Your Honor, you asked the defendant if anybody had made any promises.

"The Court: Certainly I did.

"Mr. Allen: Your Honor, that is admitted, and certainly it must have been the same thing in the Gilbert case and here a man was expected to say 'Why, certainly, my attorney said you promised this and that.'

"The Court: Not only is it admitted, Mr. Allen, that the court asked him that question, but it is admitted by affidavits that neither Mr. Crail nor the court did or intended to do anything which would make the defendant believe any representations had been made. (Further argument.)

"The Court: You still get back to the legal proposition, Mr. Allen, that when a man employs counsel he can't depend upon the fraud of that counsel to set aside a judgment such as this. After all, it would be opening the gates to all of these people who come in here and present this motion to make this same representation. The motion to vacate and set aside the judgment and sentence is denied.

"Mr. Allen: May I ask the court if the court would make findings with respect to the allegations in the affidavits, and on the propositions of law involved?

"The Court: I don't think it is necessary for the court to make any findings, Mr. Allen.

"Mr. Allen: No, there is nothing that requires is.

"The Court: No, as I stated before.

"Mr. Allen: But your Honor does feel, however, that the representations were made substantially as set forth?

"The Court: I make no finding on the allegations whatsoever. This is a motion to set aside a judgment on the grounds set forth and the motion is denied.

"Mr. Sullivan: And the defendant remanded?

"The Court: The defendant is ordered remanded to the custody of the Sheriff of Los Angeles County to be by him delivered back to the Director of Corrections at San Quentin penitentiary.

"Mr. Allen: Would your Honor hear the defendant for about two minutes?

"The Court: Mr. Allen, it is just a matter of appealing to sympathy. My hands are tied. There is nothing that I can do. There isn't a thing in the world I can do, Mr. Allen. I have no jurisdiction whatsoever in the matter."

[1] The motion was an application for relief in the nature of a writ of error coram nobis. People v. Gilbert, 25 Cal. 2d 422, 439, 154 P.2d 657. The motion was not heard or decided on the merits. It appears that the learned trial judge misconceived the effect of the decision of the Supreme Court in People v. Gilbert, supra. He proceeded on the theory "that when a man employs counsel he can't depend upon the fraud of that counsel to set aside a judgment such as this," which is directly contrary to the holding of the Gilbert case. The trial judge concluded that because the ground of the motion was fraud of appellant's attorney, he could not act and that he had "no jurisdiction whatsoever in the matter." The Attorney General conceded at the oral argument before this court that the court had jurisdiction to hear and determine the motion on the merits.

People v. Gilbert, 25 Cal.2d 422, 154 P. 2d 657, was an appeal from an order modifying to life imprisonment judgments imposing the death penalty for murder. One of the claims of the defendants was that their pleas of guilty had been procured by fraud of their own attorney. The facts were similar to those in the case at bar. The Supreme Court unequivocally held, 25 Cal.2d at pages 442, 443, 154 P.2d at page 667: "The state will not, through its courts, pronounce judgment on a plea which has been procured by fraud or duress or by any force which operates to preclude the exercise of free will and judgment by the party. * * * If facts existed which would vitiate the pleas, and which, without any fault or negligence of the defendants, were not presented to the court, then the defendants are entitled to have their pleas and the judgments vacated. * * * The record discloses evidence tending to show that the free will and judgment of one or both defendants were overreached by unjustified representations of their counsel seemingly corroborated by acts and statements of the court and deputy district attorney. While it is true that mere advice or assurances by a private attorney will not vitiate a plea entered in reliance thereon (see People v. Miller, 114 Cal. 10, 16, 45 P. 986; In re Hough, 24 Cal.2d 522, 531, 150 P.2d 448; People v. Gottlieb, 25 Cal. App.2d 411, 415, 77 P.2d 489), we are of the view that a contrary rule should prevail if the statements of the attorney amount to an unqualified factual representation (which is untrue) that the state or a responsible officer thereof, such as a judge of competent authority or a district attorney, has entered into a bargain purporting to commit the state to give the defendant a reward, in the form of immunity or a lesser punishment than he might otherwise receive, in exchange for a plea of guilty, where such representation is apparently substantially corroborated by acts or statements of a responsible state officer, is in good faith relied upon by the defendant, and actually operates to preclude the exercise of free will and judgment on the part of the defendant. The most critical point is substantial deprivation of the exercise of the free will and judgment of the party through an act participated in by the state. Mere advice and persuasion or the expression of matters of opinion by his own attorney will not suffice to vitiate the plea. Neither will unwarranted or even wilfully false statements of factual matters by his attorney suffice. The private attorney is selected by the party and is his agent. But if the representation of the private attorney presents a purported commitment by a responsible state officer which if actually made would vitiate the plea and if the acts or statements of such state officer, although innocently done or made, apparently corroborate the representation, are in good faith and without negligence relied upon by the defendant, and in truth operate to prevent the exercise of his free will and judgment, then the state in its solicitude for fairness will not accept the benefit of a plea so given." The order was reversed because the trial court had set aside the judgments without setting aside the pleas of guilty. The defendants were permitted to apply "anew in the superior court for relief in the nature of a writ of error coram nobis."

[2, 3] The record here presents just such a case. We assume, as we must for the purposes of this appeal under the circumstances narrated, that the averments in the affidavits filed in support of the motion are true. Determination of the conflict in the affidavits will be for the trial court on a hearing of the motion on the merits. The statements of attorney Most, as set forth in the affidavits of appellant and Manning Post, amount to an unqualified factual representation (which is untrue) that a responsible officer of the state, the judge who was to impose sentence on appellant, had entered into a bargain purporting to commit the state to give him a reward in the form of a lesser punishment than he might otherwise receive in exchange for a plea of guilty. The representation was unconsciously and innocently seemingly corroborated by acts and statements of the judge and the deputy district attorney. Appellant was permitted to plead guilty to only one count. Although ineligible to probation he was permitted to file an application for probation. After the plea he was allowed liberty on $1000 bail. It is averred that the false representations and the corroborative acts and statements were in good faith relied upon by appellant and actually operated to preclude the exercise of free will and judgment on his part.

[4] Appellant was not permitted to prove why he had delayed in filing the motion. He was entitled to establish, if he could, that the delay in not presenting the matter to the court was without any fault or negligence on his part.

[5, 6] Counsel for appellant at the oral argument suggested that this court should vacate the judgment and the plea of guilty and direct the superior court to permit appellant to enter a plea of not guilty. Our power is limited to review. It is for the superior court, after a hearing on the merits, to determine whether the judgment and plea of guilty should be vacated. If the plea of guilty is in fact and in law void it should be vacated, and both the People and the appellant should be restored to their original positions in all four counts of the information as they stood immediately before entry of such plea. People v. Gilbert, 25 Cal.2d 422, 440, 154 P.2d 657.

Order reversed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.

91 Cal.App.2d 914

PEOPLE v. LINDSEY.

Cr. 4331.

District Court of Appeal, Second District, Division 3, California.

May 19, 1949.

1. Criminal law 🔑1023(10)

A sentence imposed against defendant convicted of offense is not appealable.

2. Criminal law 🔑37

"Entrapment" is conception and planning of offense by officer and his procurement or inducement of commission of offense by one who would not have perpetrated offense except for officer's trickery, persuasion, fraud, or inducement.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Entrapment".

3. Criminal law 🔑37

Seduction of innocent person into criminal career by officer of law is frowned upon, but not the entrapping of a criminal.

4. Criminal law 🔑37

The fact that officer furnishes accused an opportunity to commit crime and aids accused in commission of crime for purpose of securing evidence necessary to prosecute accused is not defense, where doing of act is crime regardless of consent of anyone and criminal intent originates in mind of accused and offense is completed.

5. Criminal law 🔑37

"Entrapment" exists where officer conceives criminal design not originating with accused, and uses decoy to ensnare innocent and law-abiding person by persuasion or allurement into commission of crime, but does not exist if officer uses only persuasion necessary to make ordinary sale and accused is ready and willing to make sale, or if accused is not inveigled into commission of crime, or if accused knowingly commits crime by selling to a police decoy.

6. Criminal law 🔑37

A defendant in whose mind originated idea of receiving money as wager on horse race, and who willingly received money and took chance of arrest, and who was not persuaded by officer in plain clothes who entered premises and bought beer and inquired "did the cops take Bill" and thereafter placed bet, was not "entrapped". Pen. Code, § 337a, subd. 3.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Roy Lee Lindsey was convicted for receiving money to be wagered on a horse race. From the judgment and from the sentence imposed, he appeals.

Judgment affirmed and appeal from sentence dismissed.

Max Solomon, Los Angeles, and John J. Bradley, Los Angeles, for appellant.

Fred N. Howser, Attorney General, and Kent C. Rogers, Deputy Attorney General, for respondent.

VALLEE, Justice.

[1] Appellant was convicted of a violation of Penal Code, section 337a, subdivision 3, providing that every person who receives or holds, or purports or pretends to receive or hold, any money wagered or to be wagered, or offered for the purpose of being wagered, upon the result or purported result, of any contest or purported contest, of skill, speed or power of endurance between beasts, is guilty of a public offense. He appeals from the judgment and from the sentence imposed. As no appeal lies from the sentence, that appeal is dismissed. People v. Tallman, 27 Cal. 2d 209, 215, 163 P.2d 857.

The facts are these:

On August 10, 1948, at 3:50 a.m., a police officer in civilian clothes entered the premises at 2800 North Figueroa Street, Los Angeles. He asked appellant for and was served "a beer." The following conversation then occurred between the officer and appellant: Officer: "Did the cops take Bill?" Appellant: "Yes, they did." Officer: "Well, I wanted to make a bet on 'Mince,' in the 5th. Who will I see now?" Appellant: "I will. How much do you want to bet?" Officer: "Give me two to win and two to show on 'Mince' in the fifth at Del Mar." The officer handed appellant a $5 bill and appellant returned a $1. bill to him. Further conversation then occurred. Officer: "I'll be working in the morning and I want to phone in a bet. But I won't be near here. Where can I phone?" Appellant: "You can call me here." There was a paper and a pencil at appellant's elbow. The officer tore a piece off and wrote down the number which appellant gave him.

It was stipulated that "Mince" was a horse running on some track in the United States on August 10, 1948, and that the expression "$2.00 to win and $2.00 to show on 'Mince'" was a wager. On January 11, 1948, the officer returned to the premises and had the following conversation with appellant: Appellant: "I owe you $3.80 on 'Mince' and Ray owes you $12.90 on 'Bill Bartlem.' However, you didn't pay Ray the $4.00 that you bet, you didn't pay me the $2.00 that you phoned in this morning, that leaves me owing you $10.50." Appellant then gave the officer $10.50.

Appellant states his contention thus: "The appellant contends the misrepresentation on the part of the officer that he was personally acquainted with one 'Bill' together with the fact the officer appeared as a customer and made a purchase of beer, amounted to an inducement to the appellant which lured appellant into the commission of a criminal act which originated in the mind of the officer."

[2, 3] Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. Persuasion or allurement must be used to entrap. People v. Hall, 133 Cal. App. 40, 45, 23 P.2d 783. The officer must induce the defendant to commit a crime which he would not have committed without such inducement. People v. Makovsky, 3 Cal.2d 366, 369, 44 P.2d 536. It is not the entrapping of a criminal that the law frowns upon but the seduction of innocent persons into a criminal career by its officers. United States v. Wray, D.C., 8 F.2d 429, 430.

[4, 5] Where the doing of an act is a crime, regardless of the consent of anyone, the courts are agreed that if the criminal intent orignates in the mind of the accused and the offense is completed, the fact that an opportunity was furnished, or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense. 15 Am.Jur. 24, sec. 355. If the officer uses no more persuasion than is necessary to an ordinary sale, and the accused is ready and willing to make the sale, there is no entrapment. People v. Rucker, 121 Cal.App. 361, 364, 8 P.2d 938; People v. Harris, 80 Cal.App. 328, 331, 251 P. 823; In re Moore, 70 Cal.App. 483, 488, 233 P. 805; People v. Heusers, 58 Cal.App. 103, 104, 207 P. 908. Where the defendant is not inveigled into commission of the crime there is no entrapment. People v. Rucker, supra; In re Moore, supra. It is only when the criminal design is conceived in the mind of the officer and does not originate with the accused, and a decoy is used to ensnare the innocent and law-abiding by persuasion, deceitful representation, inducement or allurement into the commission of the crime, that there is entrapment. People v. Malone, 117 Cal.App. 629, 633, 4 P.2d 287. Where an accused knowingly commits a crime by selling to a police decoy, there is no entrapment.

The cases are legion holding that on a state of facts like those here entrapment is not established. People v. Makovsky, 3 Cal.2d 366, 370, 44 P.2d 536, and cases there cited; People v. Gelardi, 77 Cal.App. 2d 467, 476, 175 P.2d 855; People v. Grosofsky, 73 Cal.App.2d 15, 18, 165 P.2d 757; People v. Grijalva, 48 Cal.App.2d 690, 692, 121 P.2d 32; People v. Grossman, 28 Cal. App.2d 193, 203, 82 P.2d 76. Cases involving the receipt of money from a police officer as a wager on a horse race, are People v. Kennedy, 66 Cal.App.2d 522, 152 P.2d 513, and People v. Cherry, 39 Cal. App.2d 149, 102 P.2d 546.

[6] There is a complete absence of evidence of any element of entrapment. The evidence warranted the court in inferring that appellant was not persuaded or lured but that he willingly committed the crime and took the chance of arrest. The idea of receiving money as a wager on a horse race did not originate in the mind of the

officer; it originated with appellant. He had a pre-existing criminal intent. No inference of unlawful entrapment arises from the mere fact that when solicited by a decoy the accused committed a crime.

Appellant did not take the stand in his own defense. He made no claim below that he was induced, lured, persuaded or inveigled into taking the bets from the police officer. His claim is without substance here. People v. Lee, 9 Cal.App.2d 99, 109, 48 P.2d 1003.

Judgment affirmed.

SHINN, P.J., and WOOD, J., concur.

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91 Cal.App.2d 884

ROBERTS v. U. S. O. CAMP SHOWS, Inc.

Civ. 16746.

District Court of Appeal, Second District, Division 1, California.

May 18, 1949.

Rehearing Denied June 13, 1949.

Hearing Denied July 14, 1949.

1. Workmen's compensation 🔑2084

Encephalitis contracted as a result of inoculations received by professional musician pursuant to employer's directions was solely compensable under Workmen's Compensation Act and musician could not maintain in action against employer to recover damages therefor. Labor Code, §§ 3201 et seq., 3601.

2. Workmen's compensation 🔑622

Incapacity caused by illness from vaccination or inoculation may properly be found to have arisen out of employment so as to be compensable under Workmen's Compensation Act where such treatment is submitted to pursuant to the direction or for the benefit of employer. Labor Code, § 3201 et seq.

3. Workmen's compensation 🔑2084

Statute requiring employer to indemnify employee for all time necessarily expended or lost by employee in direct consequence of discharge of his duties or obedience to employer's directions does not impose an independent liability for injuries to employee where such injuries are compensable under Workmen's Compensation Act. Labor Code, §§ 2802, 3201 et seq., 3601.

4. Workmen's compensation 🔑2084

The Workmen's Compensation Act makes the right to compensation the exclusive remedy where the conditions of compensation exist. Labor Code, § 3601.

5. Master and servant 🔑258(1)

Complaint failed to state a cause of action against employer for damages on account of encephalitis allegedly contracted as a result of inoculations received in obedience to employer's direction in absence of allegation of negligence or misconduct of employer.

6. Workmen's compensation 🔑2119

Employer is liable for injuries to employee incurred without fault of employer only in cases covered by Workmen's Compensation Act. Labor Code, § 3201 et seq.

7. Master and servant 🔑87

Statute requiring employer to indemnify employee for all time necessarily expended or lost by employee in direct consequence of discharge of his duties or obedience to employer's directions does not render employer liable for injuries to employee incurred without employer's fault. Labor Code, § 2802.

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Action by Daniel G. Roberts against U. S. O. Camp Shows, Incorporated, to recover damages for encephalitis allegedly contracted as a result of inoculations received by plaintiff pursuant to defendant's directions. From a judgment of dismissal, plaintiff appeals.

Judgment affirmed.

John A. Jorgenson, Los Angeles, for appellant.

Crider, Runkle & Tilson, Los Angeles, for respondent.

DOOLING, Justice assigned.

Plaintiff appeals from a judgment of dismissal entered after demurrer sustained to his second amended complaint and his failure further to amend pursuant to leave granted. The second amended complaint alleges that plaintiff is a professional musician, that he was employed by defendant to perform services for it as a musician, that the defendant employer directed him as employee to submit to various inoculations for immunization by physicians designated and paid by defendant, that plaintiff in obedience to such directions received such inoculations and in direct consequence thereof contracted encephalitis to his damage.

[1, 2] The trial court held that the injuries alleged were solely compensable under the Workmen's Compensation Act. Labor Code, § 3201 et seq. We are satisfied of the correctness of the conclusion. So far as we are advised it has been held in every American jurisdiction in which the question has arisen that, as stated in 58 Am.Jur. at p. 775: "Incapacity caused by illness from vaccination or inoculation may properly be found to have arisen out of the employment where such treatment is submitted to pursuant to the direction or for the benefit of the employer * * *." The following cases support this rule: Spicer Mfg. Co. v. Tucker, 127 Ohio St. 421, 188 N.E. 870; Neudeck v. Ford Motor Co., 249 Mich. 690, 229 N.W. 438; Texas Employers' Ins. Ass'n. v. Mitchell, Tex.Civ.App., 27 S.W.2d 600; Smith v. Brown Paper Mill Co., La.App., 152 So. 700; Alewine v. Tobin Quarries, 206 S. C. 103, 33 S.E.2d 81.

Appellant relies on section 2802, Labor Code reading: "An employer shall indemnify his employee for all that the employee necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer * * *."

[3, 4] This section cannot be held to impose an independent liability for injuries to the person of the employee where such injuries are compensable under the Workmen's Compensation provisions of the Labor Code. Section 3601, Labor Code makes the right to compensation the exclusive remedy where the conditions of compensation exist. McLain v. Llewellyn Iron Works, 56 Cal.App. 60, 204 P. 869; Treat v. Los Angeles G. & E. Co., 60 Cal.App. 466, 213 P. 263; Gerini v. Pacific Employers Ins. Co., 27 Cal.App.2d 52, 80 P.2d 499; Jiminez v. Liberty Farms Co., 78 Cal.App.2d 458, 177 P.2d 785. If the employee were entitled to sue for damages in a court of law for every personal injury incurred "in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer" most of the litigation concerning injuries to employees would be transferred from the jurisdiction of the Industrial Accident Commission to the courts. We cannot hold that the legislature intended any such revolutionary change in established procedure by transferring the former section 1969 of the Civil Code to the Labor Code as section 2802 in 1937.

[5-7] Apart from this consideration the second amended complaint alleges no negligence or misconduct of the employer. The idea of liability for personal injuries to an employee incurred without fault of the employer is foreign to our legal system except in cases covered by the Workmen's Compensation Act. We are convinced that section 2802, Labor Code was not intended to work such a radical change in the substantive law as to allow a recovery in the courts for personal injuries to an employee incurred without the employer's fault.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

91 Cal.App.2d 794

MAY et al. v. ROSEN et al.

SORENSEN v. VASI et al.

Civ. 16783, 16784.

District Court of Appeal, Second District,
Division 1, California.

May 13, 1949.

1. Appeal and error 🔑966(1)
Continuance 🔑7

The granting or refusing of continuance is a matter of discretion with the trial court, and, except in case of a clear abuse of such discretion, appellate courts will not interfere.

2. Appeal and error 🔑966(1)

Where no abuse of discretion in denying a continuance to plaintiffs who were residents of Denmark, to take depositions of the plaintiffs, was established by plaintiffs, District Court of Appeal would not, on plaintiffs' appeal, interfere with trial court's exercise of discretion.

3. Judgment 🔑492

Judgment could not be collaterally attacked in subsequent action on ground that it was void because of want of jurisdiction for alleged reason that defendants did not authorize the appearance of counsel who represented them during the trial of the case.

4. Judgment 🔑490(2)

Where, though affidavit of mailing was defective in not specifying that summons served on defendants in Denmark was the later summons issued on amended complaint, defendants did not claim that they did not receive a copy of amended complaint and a copy of later summons issued on amended complaint, and all that they claimed was that affidavit of service was defective, judgment was not void on ground that no jurisdiction was acquired.

5. Judgment 🔑743(2)

Holding in action commenced in 1947 by residents of Denmark to quiet title, that defendants were owners in fee by adverse possession which had continued for more than five years preceding filing of action, was not erroneous because a state of war existed between Denmark and Germany until 1945 suspending running of statute of limitations, where it had been judicially determined in a prior action against residents of Denmark in 1937 that they were never seized or possessed of realty involved. Code Civ.Proc. § 354.

◆

Appeals from Superior Court, Los Angeles County; Thurlow T. Taft, Judge.

Consolidated actions to quiet title by Elly Ebbesen May and others, against Roy Rosen and others, and by Klara Sorensen against Frank Vasi and others. From judgments for the defendants, the plaintiffs appeal.

Judgments affirmed.

Combs, McIntyre & Scales, of Los Angeles, for appellants.

George A. Elstein and Joseph J. Rifkind, both of Los Angeles, for respondents, Roy Rosen and others.

Walter S. Home and Arnold Praeger, both of Los Angeles, for respondents, Frank Vasi and others.

DORAN, Justice.

The two actions, consolidated for trial as well as for appeal, involve virtually the same issues, but differ as to parties and in respect to the parcels of real estate involved. The original pleadings filed by the plaintiffs were conventional quiet title complaints. When the cases came on for trial plaintiffs asked leave to file amendments setting up a second cause of action but permission to do so was denied and the cases proceeded to trial on the original complaints.

According to the answer filed in the first case, "one Agnes J. Krupp de Celle, named as a defendant herein, from her separate funds purchased the lands and premises described in plaintiff's complaint (about June 9, 1932) and caused the title thereto to be taken in the name of Elly Ebbesen May, Ane Margrete Ebbesen and Edel Ebbesen, to be held by them in a secret trust for said Agnes J. Krupp De Celle and the said Agnes J. Krupp De Celle was the owner of the whole of the beneficient interest" therein. It is then alleged that "at the time of the purchase of said real property by the said Agnes J. Krupp De Celle and at the time of the execution of the Deed conveying title thereto to Elly Ebbesen May", et al., the Alhambra Building & Loan Association was a creditor of Agnes J. Krupp De Celle and on June 12, 1933 recovered judgment against said De Celle and husband in the Superior Court of Los Angeles County for the sum of $6,785.43, recording an abstract of such judgment in that county. There were similar allegations in the Klara Sorensen action.

Thereafter, and about November 5, 1937, the Alhambra Building and Loan Association, referred to as "Alhambra", filed an action to set aside the above mentioned deeds by De Celle, and on February 8, 1940, judgment was rendered invalidating the deeds on the ground that said conveyances were fraudulent and void as to creditors, and subjecting said lands to the lien of the Alhambra judgment. On appeal, Alhambra Bldg. & Loan Ass'n v. De Celle, 47 Cal.App.2d 409, 118 P.2d 19, this judgment was modified; setting the deeds aside only "to the extent necessary to liquidate said judgment", instead of in toto.

On October 2, 1937, Alhambra filed an action to renew the original judgment against De Celle, and on February 6, 1940 recovered judgment therein, in the sum of $9,943.65. No appeal was taken from the latter judgment and on April 16, 1940, execution was levied upon all the right, title and interest of De Celle in the property in question; there was a sheriff's sale and on July 11, 1941, a sheriff's deed was executed to the Alhambra Building & Loan Association. Thereafter Alhambra's successor, First Federal Savings & Loan Association of Alhambra, conveyed the property to Roy Rosen and other defendants; these defendants then secured a judgment quieting title as against De Celle on November 16, 1944, and Agnes J. Krupp De Celle executed to said defendants a quitclaim deed to the property.

In the present quiet title actions by Elly May Ebbesen et al., and Klara Sorensen, the trial court found in favor of defendants, reciting the previous history of the controversy hereinbefore mentioned, and decreeing that plaintiffs had no interest in the property. It was further found that the former judgment secured by Alhambra, setting aside the De Celle deeds, was res judicata so far as the plaintiffs' claims were concerned.

The first ground urged by appellants as justifying a reversal is "The failure of the trial court to grant a continuance until the written interrogatories (taken in Denmark) arrived constituted an abuse of discretion". On this point appellants' brief states that "All of the plaintiffs were residents of Denmark and the Court (in the present actions) was so informed that the written interrogatories had not arrived and that the plaintiffs' entire testimony consisted of matters covered by the interrogatories, and that their only other witness was possibly Mrs. De Celle, named in the action as a defendant".

It is further averred that "plaintiffs' attorneys had encountered many difficulties, including language and translation problems, and were unable to prepare and send the written interrogatories at an earlier date". Prevailing war conditions are also mentioned with the statement that "the trend appears to be that the courts will continue the cause until the parties have had full opportunity to come into court and offer their testimony". It is urged that the failure of the depositions to arrive in time for the trial "placed plaintiffs in an unexpected situation wherein they were injured without fault or negligence on their part", and that the denial of a continuance "was not in accordance with the Anglo-Saxon conception of justice and fair play".

Answering this contention, respondents' brief points out that on October 9, 1947, the date of trial was advanced from August 8, 1948 to January 29, 1948, of which fact appellants had due notice; that the appellants' notice of motion to take the depositions in Denmark was not served or filed until December 12, 1947, some two months after the trial date had been advanced. In denying appellants' motion for continuance the trial court stated that it would "consider whether these depositions are to be introduced at a later date, and if they are material the court will be very liberal in permitting their reception". During the trial the interrogatories were submitted and the trial court said: "I have grave doubt—this is an offhand opinion. After having gone through these questions whether any answers here that could be given would present competent testimony to establish the claim". So, respondents' brief avers, "the effect was practically the same as if the deposition had been returned and an attempt had been made by counsel for plaintiffs to read the same in evidence". Respondents also take the position that "the depositions would be inadmissible in a collateral attack on the Alhambra judgment".

[1, 2] The granting or refusing of a continuance is, as appellants' brief concedes, a matter of discretion with the trial court. Except in the case of a clear abuse of such discretion, appellate courts will not interfere with the exercise thereof. In the instant controversy appellants have entirely failed to present any evidence of abuse of the trial court's discretion. Nor does the record disclose anything which might reasonably lead to such a conclusion. Indeed, it is reasonable to believe that, had appellants acted with more promptness in instituting proceedings to take the depositions, such evidence would have been available at the time of trial. Moreover, as respondents have pointed out, since the Alhambra judgment was res adjudicata, and not subject to collateral attack, depositions attempting to impeach the validity of such judgment would be inadmissible and could avail appellants nothing. Regardless of these matters, however, since abuse has not been established, no appellate interference with the trial court's exercise of discretion is here warranted.

[3] It is argued by appellants that the judgment in the Alhambra action against appellants is void because of want of jurisdiction for the reason that the Danish defendants (appellants herein) "did not authorize counsel to appear for them in the trial of the case". It is claimed that Agnes De Celle signed the answer as agent for appellants but without authorization from such parties. The trial court found, however, that "said plaintiffs and each of them (appellants herein) were represented by counsel during the trial of said (Alhambra) action", and also that appellants were likewise "represented by counsel in the appeal which was taken from said judgment"; that the ownership of the property "was adjudicated and the matter is res adjudicata".

Respondents' brief contends that appellants were properly represented by counsel, relying on the fact that "An attorney is an officer of the court, and the presumption is that he has acted within the scope of his employment", quoting from 3 Cal.Jur. 644. It is further argued that "whether counsel was authorized to appear for Klara Sorensen and the Ebbesens is immaterial because these persons were served with summons". Respondent also points out that "A judgment cannot be collaterally attacked on the ground that the attorney for the attacking party was not authorized to represent him". In a reply brief, appellants contend that the attack on the Alhambra judgment is proper since the defect is not apparent on its face; that the matter is not res adjudicata; and that "The attack on the judgment is not a direct attack on the judgment nor is it collateral, but it is an indirect attack".

In the case of Nielsen v. Emerson, 119 Cal.App. 214, 217, 6 P.2d 281, 282, the court said: "It is also contended that the judgment roll in the action shows a lack of jurisdiction because the attorney who instituted the action was not the attorney who signed the stipulation. There is no merit in this, as the attorney appearing and acting for a party is presumed to have authority, and the validity of his acts cannot be called in question collaterally" citing various earlier California cases. The court there defined a "collateral attack" as "an attempt to impeach a judgment by matters dehors the record in an action other than that in which it was rendered".

And in Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 P. 805, 807, is found the following statement: "nothing that we have said is to be taken as intimating that a judgment valid on its face may be collaterally attacked upon the ground that the attorney who appeared for the party against whom it runs was not authorized to appear for such party". As said in respondents' brief, "It would be a strange situation, indeed, if a plaintiff in a case was required to determine, at his peril, whether or not counsel appearing for the defendant was authorized to make the appearance where there is a vigorous and able presentation by the counsel appearing".

[4] Appellants' further contention that no jurisdiction was acquired under the constructive service employed in the action by Alhambra, is predicated on the admitted fact that the affidavit of mailing recited that, pursuant to the order of publication, affiant mailed to the foreign defendants, "a copy of the Summons and Amended Complaint in this suit", whereas the original summons "had been supplemented by a Summons on an Amended Complaint". Appellant insists that "strict compliance with the statute respecting constructive service must be followed in acquiring jurisdiction", and that service of the original summons was a nullity since it had been superceded by a summons issued on an amended complaint.

Respondents' brief answers the above argument by observing that although the affidavit was defective in not specifying that the summons served was the later one issued on the amended complaint, appellants do not claim "that they did not receive a copy of the Amended Complaint and a copy of the Summons issued on the Amended Complaint. All that they claim is that the affidavit of service is defective"; that "The fact of service and not the proof of service is the important element", citing to that effect Vail v. Jones, 209 Cal. 251, 255, 287 P. 99, and other cases so holding. Still other cases hold that great liberality is allowed to show the fact of service, and that slight discrepancies not capable of misleading the defendant are immaterial. As pointed out in respondents' brief, H. S. Farrell, who made the affidavit of mailing in question, testified that the summons referred to in the affidavit was "the summons on the Amended Complaint", and stated that a copy of the summons issued on the amended complaint was mailed to each of the foreign defendants. Under the holding in Vail v. Jones, 209 Cal. 251, 255, 287 P. 99, 101, hereinbefore referred to, "It cannot avail appellant that the proof of service * * * differed from the fact of service. * * * Jurisdiction does not depend upon the proof of service, but upon the fact that service was made".

[5] The trial court found that the defendants Roy Rosen et al., "are the owners in fee by adverse possession" which had continued for more than five years preceding the filing of plaintiffs' action. This title is controverted by appellants who advance the proposition that a state of war between countries "is effective to suspend the running of statutes of limitations". This theory, say appellants, "is carried into California law in the form of Code of Civil Procedure, Section 354: 'When a person is, by reason of the existence of a state of war, under a disability to commence an action, the time of the continuance of such disability is not part of the period limited for the commencement of the action whether such cause of action shall have accrued prior to or during the period of such disability' ". However, regardless of the law on this subject, there is no merit in appellants' contention; the principles contended for are inapplicable. As respondents have pointed out, since it had been judicially determined in the case of Alhambra, etc., v. De Celle, 47 Cal.App. 2d 409, 118 P.2d 19, that "appellants were never seized or possessed of the real property herein involved * * * they obviously cannot now, nor could they ever have maintained an action". And respondents' brief further mentions the fact that "appellants did not file any complaint until June 11, 1947, although the German Armies had surrendered in May of 1945. The period of adverse possession of respondents Rosen and Elstein was continuous from February 13, 1942, and was not completed until February 13, 1947. The appellants therefore, even if seized or possessed, had they exercised due diligence, could have filed an action between May, 1945, and February 13, 1947, during which period Denmark was no longer occupied". Appellants' closing brief contains no negation or explanation of such facts other than apparent reliance

upon the "still unsettled conditions in Europe and other unforeseen difficulties involving language, etc."

There is substantial evidence in support of the trial court's findings, and no reversible error is apparent in the record.

The judgments are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

91 Cal.App.2d 615

In re RAAHAUGE'S ESTATE.

RAAHAUGE v. RAAHAUGE et al.

Civ. 7549.

District Court of Appeal, Third District, California.

May 3, 1949.

1. Trusts 🔑217(4)

Trial court in hearing proceedings under petition of testamentary cotrustee for order confirming purchase of stock was called upon to exercise special probate jurisdiction as distinguished from general law and equity jurisdiction. Probate Code, § 1120.

2. Courts 🔑198

Probate proceedings are strictly statutory, and one who would invoke such special jurisdiction must follow applicable statutory provision. Probate Code, § 1120.

3. Courts 🔑202(1)

Probate court was without jurisdiction to determine motion for new trial in proceeding by testamentary cotrustee seeking order confirming purchase of stock. Probate Code, §§ 1120, 1231.

4. Courts 🔑202(5)

Order of probate court denying petition of testamentary cotrustee seeking confirmation of purchase of stock was appealable. Probate Code, §§ 1120, 1240.

5. Courts 🔑202(5)

Where probate court in proceeding by testamentary cotrustee for order confirming purchase of stock entered adverse judgment, and cotrustee moved for new trial and filed notice of appeal within 30 days after denial, motion was beyond jurisdiction of court, and did not extend time within which appeal could be filed, and appeal otherwise late would be dismissed. Probate Code, §§ 1120, 1231, 1240; Rules on Appeal, rules 2(a), 3(a).

Appeal from Superior Court, Solano County; Harlow V. Greenwood, Judge.

Proceeding in the matter of the estate of Gertrude Raahauge, also known as Gertrude E. Raahauge, deceased, by Victor Raahauge, for an order confirming his purchase of corporate stock as a testamentary cotrustee, to which Ney Robert Raahauge and others filed objections. From the judgment, petitioner appeals.

Appeal dismissed.

See also 205 P.2d 1124.

Pillsbury, Madison & Sutro, of San Francisco, and O'Hara, Randall, Castagnetto & Kilpatrick, of Vallejo, for appellant.

Leo C. Dunnell, of Fairfield, Wallace W. Everett, of Napa, and Elden C. Friel, of San Francisco, for respondent.

PEEK, Justice.

Appellant Victor Raahauge, one of the co-trustees of a testamentary trust established by the terms of the will of Gertrude Raahauge, deceased, filed his petition in accordance with the provisions of section 1120 of the Probate Code for an order confirming and approving the purchase of corporate stock. Objections were filed by his co-trustee and two of the beneficiaries of the trust, which objections denied that the shares should be placed in the corpus of the trust or that title to the shares should be taken in the name of the two co-trustees. In addition to the foregoing, the objectors alleged that the petitioner had purchased the shares for himself and the objectors as their agent and not for the trust. After a hearing on the issues so raised the trial court entered judgment denying the petition and further declaring that the five beneficiaries of the trust were each the owners of one-fifth of the shares individually. The judgment further ordered the two co-trustees to transfer and deliver to each beneficiary the shares so adjudged to belong to him. Petitioner appeals from the judgment so entered.

The petition alleges that in accordance with the terms of decedent's will 4000 shares or 4/5ths of the corporate stock of the Mare Island Ferry, a California corporation, was distributed to the trustees who were empowered to purchase additional shares of stock of said company as they deemed expedient. The petition further alleged that with the express consent of all of the beneficiaries of the trust he entered into negotiations for the purchase of 2000 additional shares of stock of said corporation, and that he did so purchase the same for $22,500; and further that all of the beneficiaries agreed that the shares so purchased should be placed in the trust and title taken in the name of the co-trustees. The petition further averred that at the time of the purchase there were no funds in the trust estate with which to effect a purchase and therefore each of the beneficiaries furnished his proportionate share out of his personal funds in accordance with the agreement that the shares would be placed in and become a part of the trust corpus. The petition concluded with an allegation that the petitioner believed that said purchase was for the best interest of the trust and sought an order approving the purchase and declaring that said stock may become and now is a part of the corpus of the trust to be administered in accordance with the trust provisions.

The petitioner's co-trustee and remaining beneficiaries, except one, denied the existence of any agreement whereby they agreed that the shares were to become a part of the trust corpus, and in this regard affirmatively alleged that the agreement was that petitioner was to purchase the shares for them in their own names.

The trial court found that petitioner purchased the stock as agent for the beneficiaries and that each was the owner of one-fifth of the stock so purchased and entitled to have the same transferred to his name upon the books of said corporation and certificates issue therefor. Judgment was accordingly entered on November 14, 1947. On November 25, 1947, petitioner filed a notice of intention to move for a new trial, which was denied on December 31, 1947, and on January 28, 1948, he filed his notice of appeal.

Although the numerous contentions raised by appellant are interestingly and ably argued, this court has no jurisdiction to consider the appeal on its merits.

[1] From our examination of the record it would appear that appellant's petition for confirmation of the stock purchase was filed under the provisions of section 1120 of the Probate Code. The court was thus called upon to exercise special and limited probate jurisdiction as distinguished from its general law and equity jurisdiction. Estate of Smead, 12 Cal.2d 20, 82 P.2d 182; Estate of McLellan, 8 Cal.2d 49, 55–56, 63 P.2d 1120.

[2, 3] Probate proceedings are strictly statutory and hence one who would invoke such special jurisdiction must follow the applicable code provisions. Under the provisions of section 1231 of the Probate Code a motion for a new trial in probate proceedings "can be made only in cases of contests of wills, either before or after probate, in proceedings to determine heirship and interests in estates, and in those cases where the issues of fact, of which a new trial is sought, were of such character as to entitle the parties to have them tried by a jury, whether or not they were so tried." It is readily apparent that the present proceeding is neither a proceeding to determine heirship or the interest of the parties in the trust estate nor is it one where the issues of fact are of such character as to enable the parties to have it tried by a jury. It follows that since said section provides the only authority for granting new trials in probate proceedings the motion for a new trial was without the jurisdiction of the trial court, Estate of Van Deusen, 30 Cal.2d 285, 182 P. 2d 565, and hence "invalid" as that term is used in Rule 3(a) of Rules on Appeal. Lynch v. Watson, 69 Cal.App.2d 51, 158 P. 2d 250.

[4, 5] From our examination of section 1240 of the Probate Code we have concluded that the order of the trial court entered pursuant to said petition was one from which an appeal could be taken, nevertheless as appellant's motion for a new trial was not, as we have stated, a "valid notice of intention to move for a new trial" the time within which appellant could file his notice of appeal was not extended for "30 days after denial of the motion" by the trial court under the provisions of Rule 3 (a) of Rules on Appeal. Therefore as said notice of appeal was not filed within "60 days from the date of entry of the judgment" as provided in Rule 2(a) of said rules there was a fatal lack of jurisdiction and consequently the appeal must be dismissed. Lynch v. Watson, supra.

The appeal is dismissed.

ADAMS, P. J., and THOMPSON, J., concur.

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91 Cal.App.2d 941

RAAHAUGE v. SUPERIOR COURT IN AND FOR SOLANO COUNTY et al.

Civ. 7549–A.

District Court of Appeal, Third District, California.

May 3, 1949.

Appeal and error 🔑790(3)

Where testamentary cotrustee appealed from judgment of probate court and also filed petition for review of action of court in refusing to confirm purchase of stock, to prevent loss of right to review of judgment in event appellate court decided judgment was not appealable, but court decided that order was appealable and dismissed appeal, review proceeding became meaningless, and court would not consider petition further. Code Civ.Proc. § 1068.

◆

Petition by Victor Raahauge, trustee, against the Superior Court of the State of California in and for the County of Solano and Honorable Harlow V. Greenwood, Judge of that Court, for review of the Court's action in refusing to confirm the purchase of corporate stock made by petitioner as cotrustee under a testamentary trust.

Decision in accordance with opinion.

Pillsbury, Madison & Sutro, San Francisco, O'Hara Randall and Castagnetto & Kilpatrick, Vallejo, for appellant.

Leo C. Dunnell, Fairfield, Wallace W. Everett, Napa, Elden C. Friel, San Francisco, for defendants-respondents.

PER CURIAM.

In addition to the appeal taken in Estate of Raahauge, Cal.App., 205 P.2d 1122, the appellant therein also filed in this court his petition for review of the action of the trial court in refusing to confirm the purchase of the corporate stock there in question. The purpose in filing said petition for review was as stated therein "to prevent loss of his right to a review of said judgment in the event this court decides that the said judgment is not appealable." An order was thereupon issued by this court directing the respondents to appear and show cause why the petition should not be allowed. At the time of oral argument said order was submitted pending the filing of our opinion in Estate of Raahauge. Inasmuch as we concluded in our opinion filed this day in said estate that the order of the trial court was one from which an appeal could be taken this proceeding has become meaningless. C.C.P. sec. 1068. The writ is discharged.

91 Cal.App.2d 823

BUZZI v. BUZZI.

Civ. 3887.

District Court of Appeal, Fourth District, California.

May 13, 1949.

Hearing Denied July 7, 1949.

Marriage ⟹57, 60(3)

An action to annul a marriage is an action in rem, so that court can acquire jurisdiction over a nonresident defendant through constructive or substituted service, notwithstanding section 86 of the Civil Code, making judgment of annulment of marriage conclusive only as against the parties and those claiming under the parties, whereas section 1908 of the Code of Civil Procedure declares a judgment in rem to be binding on the whole world. Civ.Code, §§ 82, 86; Code Civ.Proc. § 1908.

◆

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Jane Grasselli Buzzi against Cesare Pietro Buzzi, wherein judgment of annulment of marriage was entered. From an order vacating judgment of annulment and permitting defendant to file an answer, plaintiff appeals.

Order reversed.

Bauder, Gilbert, Thompson, Kelly & Veatch, of Los Angeles, and Forgy, Reinhaus & Forgy, of Santa Ana, for appellant.

Harvey, Rimel & Johnston, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action for annulment of marriage on the ground of fraud. The complaint was filed on July 23, 1940. Among other things, it alleged that the parties were married on May 9, 1934, in Rome, Italy; that both parties then resided in Cleveland, Ohio; that immediately following the marriage both parties returned to Cleveland, where they made their home; that the plaintiff's consent to the marriage was induced by certain specified false and fraudulent representations made to her by the defendant; and that the plaintiff came to California in January, 1940, with the consent of the defendant, and has resided here since that time.

An order for publication of summons was obtained and summons was duly published, a copy of the summons and complaint being mailed to the defendant at an address in Rome, Italy. The defendant, through counsel, specially appeared and moved to quash summons and the service thereof on the ground that the court had acquired no jurisdiction in the premises or over the person of the defendant, and that jurisdiction to proceed in the action could not be obtained through constructive service on the defendant. A long brief was filed in support of the motion, contending that an action for annulment is one in personam and not one in rem and that, in such an action, jurisdiction over a nonresident cannot be acquired through publication of summons. At the hearing this motion was denied, whereupon the defendant moved for a 10-day stay of proceedings to permit him to answer or to take other proceedings in the premises, which motion was granted. The defendant having failed to make a further appearance the case came on regularly for trial. The court made findings in favor of the plaintiff finding, among other things, that the defendant was duly served with process, and as a conclusion of law that the court had jurisdiction. A judgment of annulment was entered on February 28, 1941. No appeal was taken from that judgment.

More than seven years later, on May 21, 1948, the defendant filed notice of a motion to vacate the judgment of annulment, and for an order permitting him to file a proposed answer, to defend the action on its merits, and to file a cross complaint or other pleading. Affidavits and briefs were filed. The matter was heard on July 21, 1948, and on November 1, 1948, an order was entered vacating the judgment of annulment and permitting the defendant to file his proposed answer. In a letter to counsel the trial judge stated that he had concluded that actions for the purpose of procuring annulments of marriage are personal in their nature, that the court did not acquire jurisdiction over the defendant, and that the judgment of annulment was void. The plaintiff has appealed from the order vacating the judgment.

The main question presented is whether the court acquired jurisdiction to enter the judgment for annulment in 1941, through service by publication. No claim is made that the proceedings for publication of summons were not regularly taken. The question raised is solely as to whether jurisdiction can be acquired in an annulment action through such constructive or substituted service. This question was considered and discussed by this court in a recent case. Bing Gee v. Chan Lai Yung Gee, 89 Cal.App.2d 877, 202 P.2d 360. After further study, we adhere to the conclusion there reached.

The respondent here concedes, in effect in his brief and directly in his oral argument, that an annulment action should be considered as being one in rem, for the purposes of the question before us, if such an action can rightfully be said to involve the status of the parties. It is argued, however, that such an action is one purely in personam and that "the very purpose of such an action is to have the court declare that no valid res or status ever existed or came into being, or at least to determine whether it did or not." It is further argued that section 86 of the Civil Code indicates that a judgment of annulment of marriage is one in personam and not one in rem since it makes such a judgment conclusive only as against the parties and those claiming under them, whereas such a judgment, if it was in rem and affected status, would be binding on the whole world under the provisions of section 1908 of the Code of Civil Procedure.

Section 82 of the Civil Code provides that a marriage may be annulled for any one of six causes, if existing at the time of the marriage. In four of the six causes named, including the one for fraud, the right to an annulment is lost by free cohabitation under designated circumstances. In such a case the very purpose of the action is to end an existing status which would otherwise continue, rather than to declare that no such status ever existed. Despite the legal fiction that a judgment in such a case relates back to the inception of the marriage, for some purposes, such a judgment involves and vitally affects the status of the parties from a logical, legal and practical standpoint. Otherwise, the parties would be free to marry again without taking the trouble to secure such a judgment. Whether or not section 86 of this code limits some of the effect which would otherwise follow from subdivision 1 of section 1908 of the Code of Civil Procedure, it in no way changes the fact that such a judgment involves and affects the status of the parties. The very fact that this section makes the judgment conclusive only as to the parties and those claiming under them strongly implies a continuing recognition of that status for some purposes, rather than the absence of any effect upon the status of the parties.

In Delanoy v. Delanoy, 216 Cal. 27, 13 P.2d 719, 720, 86 A.L.R. 1321, it is said: "It is universally conceded that a divorce proceeding, in so far as it affects the status of the parties, is an action in rem." That an annulment action also involves the marriage status of the parties has been frequently recognized in this state. Linebaugh v. Linebaugh, 137 Cal. 26, 69 P. 616; In re Estate of Eichhoff, 101 Cal. 600, 36 P. 11; Marshall v. Marshall, 212 Cal. 736, 300 P. 816, 75 A.L.R. 661; McDonald v. McDonald, 6 Cal.2d 457, 58 P.2d 163, 104 A.L.R. 1290.

As an actual and practical matter of fact an annulment action involves and affects the status of the parties, as does a divorce action, and in the absence of direct statutory provision in either case the same rule should be applied with respect to constructive service. No good reason appears for resorting to hair-splitting technicalities in deciding this question, or for throwing doubt on marital and property rights by upsetting the practice which has long been followed by many, if not most, of the trial courts in this state. The fact that this question has not been finally decided here leaves the door open for, and emphasizes the necessity of, a construction of our statutes which is in keeping with their purpose and intent.

Under the views above expressed, it is unnecessary to consider the further point raised by the appellant that the respondent may not now attack the jurisdiction of the court to enter the judgment, having previously done so upon the same ground, with a resulting order which would have been reviewable on an appeal from the judgment.

The order appealed from is reversed.

GRIFFIN and MUSSELL, JJ., concur.

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91 Cal.App.2d 832

CALIFORNIA TRUST CO. v. ANDERSON et al.

Civ. 16882.

District Court of Appeal, Second District, Division 1, California.

May 16, 1949.

Rehearing Denied June 2, 1949.

Hearing Denied July 14, 1949.

1. Joint tenancy 🔑5
Tenancy in common 🔑3

A contract between brother and sister that all of their mother's estate, if she predeceased both of them, should be divided between them share and share alike, destroyed right of survivorship between them in corporate stock certificates standing in names of themselves and their mother as joint tenants, so that brother and sister became owners thereof in equal shares as tenants in common on mother's death.

2. Joint tenancy 🔑5
Tenancy in common 🔑3

Joint tenants may, by agreement, change nature of their estate from that of joint tenancy with rights of survivorship, to tenancy in common carrying no such rights.

3. Joint tenancy 🔑10

In suit to quiet title to and impress trust on undivided half interest in corporate stocks, standing in names of brother, sister, and their mother as joint tenants, with rights of survivorship, complaint sufficiently identified stocks to justify trial court's finding that they were those mentioned in contract between brother and sister for division of mother's estate between contracting parties share and share alike, if mother predeceased them.

4. Joint tenancy 🔑5

The term "estate", in contract between brother and sister for division of their mother's entire estate between them equally if she predeceased them, was not employed in technical legal sense of probate estate left by mother on her death, but was used in general sense to designate capital stock certificates held by her and contracting parties in joint tenancy, as referred to in contract, in view of such parties' deceased father's will, devising only life estate to mother, with remainder to brother and sister share and share alike.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Estate".

5. Estates 🔑1

The word "estate" may mean property or the degree, quality, nature, and extent of one's interest in or ownership of property, real or personal.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by the California Trust Company, as special administrator with general powers of the estate of Jessie P. Lockert, deceased, against Robert S. Anderson and another to quiet title to and impress a trust on an undivided half interest in certain corporate stocks. Judgment for plaintiff, and from an order granting a new trial, plaintiff appeals.

Reversed.

Byron O. Smith and Stephens, Jones & La Fever, Los Angeles, for appellant.

Werner O. Graf, Los Angeles, for respondent Robert S. Anderson.

DORAN, Justice.

Plaintiff Trust Company, representing the Estate of Jessie P. Lockert, deceased, instituted the within action against decedent's brother, Robert S. Anderson, and one Quincy Cass, for the purpose of quieting title to and impressing a trust upon an undivided one-half interest in certain corporate stocks. As set forth in the complaint, the stock certificates in question stood "in the combined names of Minnie A. Anderson (mother of Jessie P. Lockert and Robert S. Anderson), Jessie P. Lockert (now deceased) and Robert S. Anderson (defendant herein) as joint tenants with rights of survivorship, and not as tenants in common."

On February 3, 1946, a written instrument, referred to in the briefs as the "Brother-Sister Contract," was executed by Jessie P. Lockert and Robert S. Anderson, brother and sister, reading as follows:

"This is a Memorandum of Understanding and Agreement by and between the undersigned Robert S. Anderson and Jessie P. Lockert, brother and sister, in relation to the personal estate of their mother, Mrs. Minnie A. Anderson, widow, all residents of the City of Los Angeles, State of California.

"Said estate consists of shares of capital stock in sundry corporations and money deposits in bank.

"The estate originated in the bequest by will of Charles H. Anderson, our father, deceased in October, 1932, whose will provided, as follows:

"'I give, devise and bequeath to my beloved wife, Minnie A. Anderson, all of the estate of which I may die possessed both real and personal wheresoever situated for her use and benefit during her life, and at the death of my said wife all the remainder of said estate shall be divided equally between my dauthter, Jessie P. Anderson, and my son, Robert S. Anderson, share and share alike.'

"In accordance with the terms, letter and spirit of said bequest, and notwithstanding the estate is now partly in monies in bank, but mainly represented by certificates of capital stocks issued in joint tenancy in the names of Minnie A. Anderson, Jessie P. Lockert, and Robert S. Anderson; and that said certificates are in the possession and custody of said Robert S. Anderson solely as representative and agent of his mother's estate; and that likewise he has authority jointly with her to receive, deposit in bank, and disburse therefrom for her account, in her name, all monies derived from her estate:

"It is hereby agreed that in the event our mother shall predecease both of us, all her estate left at such time shall be, as soon as legally possible, divided, share and share alike between us."

It appears from the pleadings as summarized in appellant's brief, that the mother, Minnie A. Anderson "died on March 10, 1947, slightly over a year subsequent to the date of the Brother-Sister Contract. * * * Jessie P. Lockert died on May 27, 1947, two months and 24 days after the death of the mother. * * * At the time of the mother's death * * * there was, and ever since said date there have been, standing in the names of Minnie A. Anderson, Jessie P. Lockert and Robert S. Anderson, as joint tenants with right of survivorship, the stocks (here in question). * * * Robert S. Anderson has had possession of the certificates representing said stocks, either in person or through his agent, Quincy Cass, ever since the death of the mother." The said Quincy Cass, made a defendant because in actual possession of the stock certificates, filed a disclaimer, alleging that said stocks were held solely as agent for the other defendant, Robert S. Anderson. It appears that Anderson had been adjudged incompetent and the answer was filed by a guardian.

The parties stipulated that the action might be set for trial on the short cause calendar, and "That at the trial of the said action no testimony will be taken, but the action will be submitted on the pleadings and argument of counsel." Pursuant thereto, after argument the cause was submitted for decision without any evidence having been offered. The trial court found in favor of plaintiff (appellant herein). Thereafter, defendant's (respondent's) motion for a new trial on the stated grounds of "Insufficiency of evidence to justify the decision," and "That the decision of the Court is against law," was granted. The plaintiff has appealed from the order granting a new trial.

Appellant's brief presents "two alternate theories concerning the purposes and effect of the Brother-Sister Contract." The first theory is "that the record title to the corporate shares was taken in the names of the three persons not with any intent to create a joint tenancy tenure with all its incidents, but solely as a measure deemed convenient * * * and (b) that the Brother-Sister Contract was drawn and executed to evidence the true status." The second theory is that "even though the corporate shares had been taken in the name of the three persons with the intent to create therein a joint tenancy with all its legal incidents, the contract operated as a mutual waiver by the brother and sister of their respective rights of survivorship—a waiver, under the authorities hereinafter cited, effective to break up the joint tenancy between them and establish a tenancy in common."

The respondent's position is that the trial court was justified in granting a new trial and nullifying the original judgment in plaintiff's favor, for the reason that there is no evidence showing that the stocks in question were at any time a part of the mother's estate or a part of the Estate of Jessie P. Lockert; that the Brother and Sister Contract in no way affected the legal status of the stocks held in joint tenancy, which, upon the deaths of the mother and daughter, became the sole property of the surviving joint tenant, Robert S. Anderson, defendant herein.

[1] The original conclusion of the trial court "That the brother-sister agreement * * * destroyed the right of survivorship between said parties, and that from and after the death of Minnie A. Anderson (the mother) on March 10, 1947, Jessie P. Lockert and Robert S. Anderson were the owners in equal shares, as tenants in common and not as joint tenants, of the stocks listed," finds justification both in law and under the undisputed facts of the instant case. Therefore the subsequent granting of a new trial from which order the present appeal is taken, was improper.

[2] That joint tenants may by agreement change the nature of the estate from that of joint tenancy with rights of survivorship to a tenancy in common carrying no survivorship rights, cannot be doubted. "It has been held," says the court in Hammond v. McArthur, 30 Cal.2d 512, 515, 183 P.2d 1, 3, "that an agreement between two joint tenants whereby they agree to a different disposition of the property than that of survivorship terminates the relationship," citing McDonald v. Morley, 15 Cal.2d 409, 412, 101 P.2d 690, 692, 129 A.L.R. 810. In the McDonald case, it was said: "At the time when Mr. and Mrs. McDonald made their agreement, they held title to the property 'as joint tenants'. Such an estate requires unity of interest, unity of title, unity of time, and unity of possession. * * * A distinguishing incident of it is the right of survivorship. * * * But by their contract the parties specifically provided that if either one of them died, the interest of that one should not go to the survivor but to the daughter. This is entirely inconsistent with an estate in joint tenancy, which was thereby terminated. * * * Thereafter, Mr. and Mrs. McDonald were tenants in common with separate descendible interests." The applicability of the above mentioned decisions is questioned in the respondent's brief, which points out the factual differences from the instant controversy. "In the case at bar," respondent avers, "there is no provision contained in the brother-sister contract that if either or one of them should die, the interest of that one should not go to the survivor."

It is doubtless true that the brother-sister agreement could have been couched in more definite and appropriate terms. The purpose which the signatory parties had in mind, however, appears to be clear enough, and is definitely stated in the agreement. By its own terms, the document is "a Memorandum of Understanding and Agreement" between brother and sister, concerning what is described as "the personal estate of their mother," consisting of "shares of capital stock," etc. The agreement further identifies the so-called "estate" as having "originated in the bequest by will of Charles H. Anderson, our father," which will left all property to Minnie A. Anderson (the mother) "for her use and benefit during her life, and at the death of my said wife all the remainder of said estate shall be divided equally between (the brother and sister) * * * share and share alike."

The exact purpose of the brother-sister agreement is none other than that of insuring that the "estate" originating in the father's will, described as "mainly represented by certificates of capital stocks issued in joint tenancy in the names of Minnie A. Anderson, Jessie P. Lockert, and Robert S. Anderson; * * * in the possession and custody of Robert S. Anderson solely as the representative and agent of his mother's estate," should be handled "In accordance with the terms, letter and spirit of said bequest." Notwithstanding the fact that nominally such stocks were standing in the joint names of the three parties interested with rights of survivorship, the brother and sister specifically "agreed that in the event our mother shall predecease both of us, all her estate left at such time shall be, as soon as legally possible, divided *share and share alike between us.*" (Italics added.) In other words, since the father's will had not provided for a joint tenancy between the two children with right of survivorship, but directed that the estate should, at the mother's death, be divided "share and share alike," it was the intention of the brother and sister that this "share and share alike" arrangement should prevail regardless of the nominal joint tenancy aspect of the stock certificates. The mother did predecease the two children about one year after execution of the brother-sister contract; some two months later the sister, Jessie P. Lockert died. The brother-sister agreement had not been revoked or modified in any way.

[3] Respondent's contention that the stocks here in question are not sufficiently identified with those mentioned in the brother-sister agreement, is without substantial merit. The stocks held in joint tenancy, their derivation and the facts connected therewith, were specifically described in the complaint. In the answer "this defendant admits that he has been in possession of *said stock certificates,* either personally or through his agent, since the death of Minnie A. Anderson and that no change was made in the registered ownership of said stock certificates prior to the death of Jessie P. Lockert, nor has any change in the registered ownership of said stock certificates been made to the date of filing this answer." (Italics added.) The trial court's finding that "said stocks are part of the property which is the subject matter of the agreement" cannot be said to have been an unreasonable deduction.

[4] It is further insisted by the respondent that it does not appear that the mother, Minnie A. Anderson, left any "estate" to which the brother-sister agreement could apply. It is to be noted, however, that this agreement was executed during the mother's lifetime; that under the father's will the mother had but a life estate, the remainder going to the brother and sister, "share and share alike." Obviously, all these facts were known to the parties when the brother-sister agreement was signed. Under the circumstances, therefore, it is but a reasonable inference that the term "estate" was not employed in the technical, legal sense contended for by respondent, as meaning a probate "estate" left by the mother, but was rather used in a general sense to designate the "certificates of capital stock held in joint tenancy," referred to in the agreement.

[5] According to Webster's New International Dictionary, the word "estate" may mean "property," or "The degree, quality, nature and extent of one's interest in, or ownership" of property, real or personal. The very purpose of the brother-sister agreement, as therein expressed, was to determine and set at rest "the degree, quality, nature and extent" of the children's interests in the stocks which, for convenience or other reason, had been nominally issued in joint tenancy. The respondent's contentions are all untenable; the trial court's original decision properly effectuates the obvious intent expressed in the brother-sister agreement. The motion for a new trial was therefore improperly granted.

The order appealed from is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

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SECOND SERIES

91 Cal.App.2d 805

KUHN v. FERRY & HENSLER et al.

Civ. 16638.

District Court of Appeal, Second District, Division 2, California.

May 13, 1949.

Rehearing Denied May 27, 1949.

Hearing Denied July 7, 1949.

1. Automobiles 🔑121

Hauling of dirt over military access road not open to public and not public highway, and over private graded dirt roads within army air base, was not over "public highway" of state, and hence was not subject to State Highway Carriers Act and rates prescribed in schedules adopted pursuant thereto. Gen.Laws, Act 5129a, §§ 1(f), 12(a).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Public Highway".

2. Appeal and error 🔑1010(1)

A judgment must be affirmed if the findings, supported by the evidence, are sufficient to warrant the relief granted on any legal theory.

MOORE, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action for trucking services by B. W. Kuhn, doing business as Dragline Rentals Company, against Ferry & Hensler, a joint venture, and others. From the judgment, the plaintiff appeals.

Affirmed.

See also 197 P.2d 792.

Charles M. Stark and Paul W. McComish, both of San Francisco, for appellant.

Herbert Cameron, of Los Angeles, for respondents.

McCOMB, Justice.

After trial before the court without a jury, plaintiff appeals from the portion of the judgment which denies him recovery for trucking services rendered to defendants in accordance with the minimum rates for dump truck hauling services as defined and prescribed by the Public Utilities Commission of the State of California and Highway Carriers Tariff No. 7.

Facts

Plaintiff's assignors, a copartnership, engaged in the dump truck hauling business and operated under permits issued by the Public Utilities Commission and the State Board of Equalization as private highway carriers. On or about August 28, 1945, they entered into a contract with defendants Ferry and Hensler by the terms of which they agreed to haul for defendants rock, concrete aggregates and granular material in dump trucks furnished by them in and about work defendants were doing for the United States Government at Muroc Army Air Base, County of Kern. The present action, so far as the question before this court is concerned, involved the recovery for hauling by plaintiff's assignors of dirt from a borrow pit located without the boundaries of the Muroc Army Air Base to the site of defendants' work within the boundaries of said base, the compensation for which was fixed by Schedule 2 attached to the written agreement of the parties and which fixed a rate for the hauling less than the minimum rates for dump trucks hauling over a public state highway as provided in Highway Carriers Tariff No. 7, adopted pursuant to the provisions of the Highway Carriers Act, Statutes of 1935, Chapter 223. The trial court gave judgment in accordance with the schedule of rates agreed upon by the parties in their contract and not in conformity with the minimum rate fixed in the Highway Carriers Tariff No. 7.

Findings

The trial court found:

(a) "It is true that the granular haul (dirt) of material hereinabove referred to, as made by plaintiff's assignor, was made over a State highway of the State of California, which highway was under the jurisdiction of the Public Utilities Commission of the State of California and, therefore, subject to the provisions of the State Highway Carriers Act, and in particular, Highway Carriers Tariff No. 7."

(b) "It is not true that plaintiff's assignor and defendant, Ferry and Hensler, a joint venture, and R. R. Hensler and James L. Ferry, individually, were at the time of making of said contract bound by, nor were they circumscribed by, the provisions of the Public Utilities Commission of the State of California tariffs applicable to the 'Northern Territory', and in particular, Highway Carriers Tariff No. 7, for the reason that defendants, Ferry and Hensler, a joint venture, and R. R. Hensler and James L. Ferry, individually, were not shippers; and that the material moved under said contract by plaintiff's assignor was merchandise to be used only by defendants, Ferry and Hensler, a joint venture, and R. R. Hensler and James L. Ferry, individually, and not by a shipper; and for the reason that if plaintiff's assignor, not being a common carrier, decided to perform transportation or accessorial service at a lower rate than the minimum rate established by the Public Utilities Commission of the State of California, and, in particular, Highway Carriers Tariff No. 7, as aforesaid, they might have applied to the Public Utilities Commission of the State of California for a reduction of said minimum rate, and the said Public Utilities Commission of the State of California, upon a finding that such reduced proposed rate was reasonable, might have authorized such rates less than the minimum rates."

Question

Was the contract between the parties so far as the hauling here involved subject to the State Highway Carriers Act, supra?

This question must be answered in the negative. The preamble to the Highway Carriers Act, Act 5129a, Vol. II, page 1612, Deering's California General Laws, 1944, reads:

"The use of the public highways for the transportation of property for compensation is a business affected with a public interest and it is hereby declared that the purpose of this act is to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways; to secure to the people just and reasonable rates for transportation by carriers operating upon such highways; to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable public demands by providing for the regulation of rates of all transportation agencies so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public."

Section 1(f) of the Highway Carriers Act, page 1612, reads:

"The term 'highway carrier' when used in this act means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever engaged in transportation of property for compensation or hire as a business over any public highway in this State by means of a motor vehicle or motor vehicles. However, it does not include the following:

"(1) Carriers operating exclusively within the limits of a single incorporated city or city and county;

"(2) Any farmer who occasionally transports from the place of production to a warehouse, regular market, place of storage, or place of shipment the farm products of neighboring farmers in exchange for like services or for a cash consideration;

"(3) Persons or corporations hauling their own property;

"(4) Any farmer operating a motor vehicle or vehicles used exclusively in the transportation of his live stock and agricultural commodities or in the transportation of supplies to his farm;

"(5) Any nonprofit agricultural cooperative association organized and acting within the scope of its powers under Chapter 4, Division VI of the Agricultural Code to the extent only that it may be engaged in transporting its own property or the property of its members."

Section 12(a) of said act, page 1616, reads:

"No highway carrier, other than a highway common carrier, shall charge, demand, collect or receive for the transportation of property, or for any service in connection therewith, rates or charges less than the minimum rates and charges or greater than the maximum rates and charges applicable to such transportation established or approved by the Railroad Commission; nor shall any such carrier directly or indirectly pay any commission or refund or remit in any manner or by any devise any portion of the rates, or charges so specified, except upon authority of the commission."

It is to be noted that the Act is applicable only to a highway carrier who transports property for compensation over a *"public highway"* in the state of California. The trial court did not make any finding that the hauling here involved was over a *"public highway"* in the state of California. Therefore, it is necessary for us to search the record for any evidence that would have supported a finding that the hauling was done over a "public highway" in this state. The record fails to disclose such evidence but, on the contrary, the uncontradicted evidence would have supported a finding that the hauling was not over a "public highway" of this state. From evidence introduced in the trial court, it appears without contradiction that the hauling here in question was done over (1) a military access road, not open to the public and not a public highway, and (2) private graded dirt roads within the Army Air Base. In this state of the record, we must assume that had the trial court made a finding upon this issue, which was material, it would have found in conformity with the uncontradicted evidence that the hauling was not over a public highway but was over private roadways.

[1] In view of the fact that the hauling was not over a public highway of the state of California, the Highway Carriers Act and schedules adopted pursuant thereto were not applicable to the present situation and the compensation to be paid was a matter for agreement between the parties and governed by the contract into which they had entered. Hence the trial court's judgment was correct.

[2] It is immaterial that the trial court reached its conclusion through an erroneous process of reasoning. A reviewing court is not interested in the trial court's reasoning or the method by which it reaches its judgment. Its only concern is whether or not from the record the trial court has arrived at a correct judgment. This rule is well stated by Mr. Chief Justice Gibson in Sears v. Rule, 27 Cal.2d 131, 140, 163 P.2d 443, 448: "It is, of course, immaterial that the theory upon which the judgment may be affirmed is not identical with that relied upon by plaintiffs or by the trial court, since plaintiffs are required only to plead and prove facts sufficient to justify relief, and the trial court's judgment must be affirmed if the findings, supported by the evidence, are sufficient to warrant the relief granted on any legal theory." (See also cases cited in 2 Cal.Jur. (1921), p. 809, Appeal and Error, note 12.)

Plaintiff's Citations

Butler v. Bell Oil & Refining Co., 70 Cal.App.2d 728, 161 P.2d 559; Entremont et al., v. Whitsell et al., 13 Cal.2d 290, 89 P.2d 392; Gardner v. Rich Mfg. Co., Ltd., et al., 68 Cal.App.2d 725, 158 P.2d 23, and Johnston v. L. B. Hartz Stores (1938), 202 Minn. 132, 277 N.W. 414, relied upon by plaintiff, are not applicable to the facts in the present case for the reason that in each of the cited cases it was conceded that the transportation involved was over a public highway of the state, while in the present case, as pointed out above, the transportation was not over a public highway of the state but over private roads.

Affirmed.

WILSON, J., concurs.

MOORE, P. J., dissents.

Rehearing denied; MOORE, P. J., dissenting.

91 Cal.App.2d 854

PEOPLE v. CHAPMAN.

Cr. 2092.

District Court of Appeal
Third District, California.

May 16, 1949.

Hearing Denied June 13, 1949.

1. Criminal law 🔑1119(4)

Conviction would not be reversed on ground that district attorney gave information to newspaper that defendant had suffered prior convictions and that jury received such information from one of their members, thereby denying defendant due process of law, where newspaper article did not appear in record and evidence failed to disclose that district attorney gave out such information. Pen.Code, § 1025; U.S.C.A.Const. Amend. 14.

2. Criminal law 🔑369(1)

Statute relating to reading or alluding to charge of previous convictions after a plea of not guilty does not prohibit disclosure of a defendant's previous convictions, except that they must not be read to jury nor alluded to on trial. Pen.Code, § 1025.

3. Criminal law 🔑925½(3), 957(3)

Failure of trial court to call jurors before him for examination as to what occurred in jury room and refusal to grant a new trial on ground that during deliberation of jury they were advised by one of their own members that defendant had suffered prior convictions was not error, since affidavits, testimony and depositions of jurors are inadmissible to impeach their own verdict except in case of verdicts reached by chance. Pen.Code, § 1025; U.S.C.A.Const. Amend. 14.

4. Criminal law 🔑1174(2)

Statute relating to reading or alluding to charge of previous convictions after plea of not guilty does not guarantee a defendant against knowledge by jurors of previous convictions, and conviction would not be reversed on ground that defendant's election not to take witness stand in his own behalf was due to his fear that prior convictions would be brought out on cross-examination, where defendant was given full latitude on voir dire to question all jurors accepted by him. Pen.Code, § 1025; U.S.C.A.Const. Amend. 14.

5. Assault and battery 🔑92
Robbery 🔑24(1)

Evidence sustained conviction of robbery while armed with a deadly weapon and assault by means of force likely to produce great bodily harm.

6. Criminal law 🔑42

Discharge of one of two defendants charged with felony so that he might be a witness for state was not error, in view of statute authorizing such procedure. Pen.Code, § 1099; U.S.C.A.Const. Amend. 14.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Jack Chapman was convicted of robbery while armed with a deadly weapon and assault by means of force likely to produce great bodily harm, and he appeals.

Affirmed.

Richard O. Graw, Berkeley, for appellant.

Fred N. Howser, Atty. Gen., Gail A. Strader, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Defendant Jack Chapman and his seventeen year old son-in-law, Donald Larios, were charged, in an information filed in Tuolumne County, with three felonies, to wit: robbery while armed with a deadly weapon, assault with a deadly weapon, and assault by means of force likely to produce great bodily harm. During the course of the trial, and before the defendants had gone into their defense, the district attorney applied for a discharge of defendant Larios that he might be a witness for the prosecution. The application was granted, the trial proceeded against Chapman alone, and resulted in a verdict of guilty of the first and third charges, and of not guilty of the second.

On this appeal from the judgment which followed, Chapman asserts that his conviction was unfairly obtained in violation of the 14th Amendment of the Constitution of the United States; that the dismissal of defendant Larios was made in violation of section 1099 of the Penal Code, and in violation of due process of law, and that the district attorney violated his duties under section 1099, supra.

Appellant states that his main contention is that his conviction "was obtained under circumstances involving 'a failure to observe that fundamental fairness essential to the very concept of justice' * * * which cannot be denied a defendant in a criminal case without violating his right to due process." This contention is based upon an assumption that the jury was aware of the fact that Chapman had suffered two prior convictions. The record shows that two such priors were charged in the information, and that Chapman, on arraignment, admitted them. It is not contended that the charge of the previous convictions was read to the jury or alluded to on the trial, Pen.Code, sec. 1025; but appellant in his brief urges that the district attorney, before the trial, gave information to the "Stockton Record" that defendant had suffered such prior convictions, which statement was published in that newspaper about ten days prior to the trial, and that during the deliberations of the jury they received information from one of their members that defendant had suffered such prior convictions, and that for those reasons the defendant was denied due process of law.

In his brief appellant sets forth what purports to be the article in the Stockton Record, which contains the statement: "According to District Attorney, Ted Vilas, Chapman has two prior convictions." Accordingly, appellant, on his motion for a new trial, charged the district attorney with misconduct in giving out such information which, he claims, must have been so generally known by the public as to create a prejudice against appellant and to render the securing of an impartial jury impossible.

[1,2] A complete answer to this argument of appellant, as far as this court is concerned, is that the aforesaid article does not appear anywhere in the record before us, nor is there any evidence that the district attorney gave any such information to the Stockton Record or to anyone else. The information contained an allegation concerning such priors; it was a public record accessible to all, including newspaper reporters. And, we might add, there is nothing in section 1025 of the Penal Code which prohibits disclosure of a defendant's previous convictions, except, as stated therein, that such an allegation in an information or indictment, when admitted by a defendant, "must not be read to the jury, nor alluded to on the trial." It was not so read or alluded to on the trial.

Appellant, in his brief, says that "a district attorney violates a fundamental procedural right of the defendant if he disseminates such information by giving it to a newspaper reporter and permits the reporter to publish the information as being obtained from the prosecuting attorney." But there is nothing in this record to show that the district attorney did disseminate such information; and obviously it was not within his province to prohibit a reporter from publishing it "as being obtained from the prosecuting attorney," or at all.

Appellant also contends that he was denied a fair trial because the jurors, during their deliberations, were advised by one of them that defendant had suffered prior convictions. This point was raised on defendant's motion for a new trial, in an affidavit made by his attorney, Ross A. Carkeet, in which it was averred that affiant had been informed by several members of the jury that at least one member of the jury mentioned on more than one occasion during the deliberations that defendant was "an ex-convict" or "a two-time loser" or "had served time," or words to that effect; and affiant alleged that at least one member of said jury based his verdict of guity upon evidence not before the jury, to wit: that he took into consideration prior convictions of felony when the same were not properly before the jury; that he had requested affidavits from said jurors, but each had refused to sign same, but had stated that he or she would so testify if called into court and questioned by the court as to such statement by one of the jurors. On this showing the failure of the trial court to call the jurors before him for examination as to what occurred in the jury room, and its refusal to grant a new trial, are urged as reversible error.

[3] In view of the well established rule in this state that affidavits, testimony, and depositions of jurors are inadmissible to impeach their own verdict except in the case of verdicts reached by chance, we find no error in this connection. See People v. Reid, 195 Cal. 249, 261, 232 P. 457, 36 A.L.R. 1435; Maffeo v. Holmes, 47 Cal.App.2d 292, 295, 117 P.2d 948; De Garmo v. Luther T. Mayo, Inc., 4 Cal. App.2d 604, 607, 41 P.2d 366; People v. Fong Sing, 38 Cal.App. 253, 264–265, 175 P. 911; People v. Feld, 149 Cal. 464, 478, 86 P. 1100; People v. Odza, 134 Cal.App. 290, 292, 25 P.2d 264; Kent v. Los Angeles Ry. Corp., 29 Cal.App.2d 435, 437–438, 84 P.2d 1057; 20 Cal.Jur., sec. 41, p. 61; Tyson v. State, 146 Tex.Cr.R. 128, 171 S.W.2d 496; Glass v. State, 143 Tex.Cr. R. 88, 157 S.W.2d 399.

[4, 5] Appellant argues that defendant's election not to take the stand in his defense was due to his fear that if he did so it would be brought out on cross-examination that he had suffered prior convictions, and that, after he made such an election, it was unfair to him that the jury should have been made aware of that fact. Defendant, of course, had the right to refrain from testifying in his own behalf, on constitutional grounds; but this court cannot know what impelled him to remain silent. Plainly section 1025, supra, goes no further than its language implies, and does not guarantee a defendant against knowledge by the jurors of prior convictions; nor does it follow that jurors, even with such knowledge, could not, or did not in this case, give defendant a fair trial. He was given full latitude on voir dire, to question all of the jurors, and they were accepted by him; and we cannot say that they stultified themselves, and found defendant guilty, merely because they may have been told of rumors that he had been previously convicted. The testimony was ample to sustain the verdict.

[6] Appellant's second ground for reversal is based upon the dismissal of the defendant Larios, it being asserted that the district attorney's request for such dismissal was misconduct, and the court's granting of the motion was error, which denied defendant due process of law. There is no merit in this contention. The code section, 1099, supra, especially authorizes what was done; and such action has been approved in numerous decisions. See People v. Frahm, 107 Cal.App. 253, 262, 290 P. 678; People v. Dillon, 68 Cal.App. 457, 474, 229 P. 974; People v. Bocchio, 80 Cal.App. 138, 141, 251 P. 672.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

91 Cal.App.2d 827

GIRVETZ v. BOYS' MARKET, Inc.

Civ. 16845.

District Court of Appeal, Second District,
Division 1, California.
May 16, 1949.

Rehearing Denied June 2, 1949.
Hearing Denied July 14, 1949.

1. Negligence 🔑32(1)

Operator of a food market was not an insurer of the safety of people shopping in his market, but owed them the duty to exercise reasonable care.

2. Negligence 🔑48

To impose liability for injuries suffered by invitee due to defective condition of premises, owner or occupier must have either actual or constructive knowledge of dangerous condition, or have been able by ordinary care to discover condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises.

3. Negligence 🔑121(2), 136(16)

In action by invitee against owner or occupier of premises for injuries resulting from existence of a dangerous condition on premises, whether dangerous condition had existed long enough so that reasonable man exercising reasonable care would have discovered the condition, is ordinarily a fact question for jury, and fact alone that dangerous condition existed at time of accident causing injury, will not warrant an inference that owner or occupier was negligent.

4. Evidence ⚷77(5)

In action against operator of food market for injuries sustained when plaintiff shopper slipped on a banana which was in aisle of market, no inference unfavorable to defendant could be drawn from failure of any employees of defendant who were charged with duty of sweeping and keeping aisles clear, to testify, in absence of evidence warranting an inference of defendant's negligence.

5. Appeal and error ⚷934(1)

On plaintiff's appeal from judgment for defendant notwithstanding verdict for plaintiff, evidence would be viewed in light most favorable to plaintiff.

6. Negligence ⚷134(7)

In action against operator of food market for injuries sustained when plaintiff shopper slipped on a banana which was in aisle of market, evidence that banana was in the aisle for a minute and a half was insufficient to justify charging operator with knowledge of its presence on floor and consequently with negligence in failing to remove banana from aisle, notwithstanding the presence of many employees of defendant in immediate vicinity of banana.

◆

Appeal from Superior Court, Los Angeles County; John J. Ford, Judge.

Action by Freda Girvetz against the Boys' Market, Inc., a California corporation, for injuries sustained when plaintiff slipped on a banana while shopping in food market operated by defendant. From judgment for defendant notwithstanding verdict for plaintiff, plaintiff appeals.

Judgment affirmed.

George C. Bliss, Beverly Hills, for appellant.

Cushman & Wetherbee, Robert A. Cushman, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal from a judgment for defendant, The Boys' Market, Inc., entered notwithstanding the verdict of a jury in favor of plaintiff. Plaintiff sought to recover for injuries sustained when she slipped on a banana or banana peel while shopping in the market operated by defendant. Judgment notwithstanding the verdict was granted on the theory that there was no substantial evidence to support a finding that the defendant was negligent.

Plaintiff had left the vegetable department located at the front of defendant's store and had passed through one of the vegetable department check-stands on her way to the grocery department located at the rear of the store. She fell in an area, described as an aisle, between the vegetable check-stands and the grocery department, which was flanked on one side by the liquor department and on the other by the candy department. The location of her fall, therefore, was such as to afford no ground for an inference that the dangerous condition was created by the defendant proprietor, it being as reasonable to infer that the banana was dropped by a customer after leaving the vegetable check-stand as to infer that it got there in any other manner.

The only evidence as to how long the dangerous condition had existed prior to plaintiff's fall was the testimony of a customer that she saw the banana on the floor "a good minute and a half" before the happening of the accident.

On behalf of the defendant, the store manager testified that there was a janitor on duty at all times who was instructed to sweep the floors; that there was a "box boy" who was instructed to keep the place swept between the check-stands and the candy department; that there was at all times a porter on duty whose primary duty was to sweep the floor, and also a boy designated to sweep whenever he saw the necessity therefor; that employees in each department were required to keep their immediate vicinity "as clean as possible". Other facts surrounding the accident are that the store was fully lighted; that the floor was of concrete, colored green; that there were five cashiers or checkers on duty at the vegetable check-stands; that plaintiff after her fall was found by the manager approximately five feet from the nearest checker.

[1-3] The defendant market owner was not an insurer of the safety of his patrons, but owed them the duty to exercise reasonable care in keeping the premises safe for his invitees. Louie v. Hagstrom's Food Stores, 81 Cal.App.2d 601, 606, 184 P.2d 708; Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128; Owen v. Beauchamp, 66 Cal.App.2d 750, 152 P.2d 756; McKellar v. Pendergast, 68 Cal.App.2d 485, 156 P.2d 950. To impose liability for injuries suffered by an invitee due to the defective condition of the premises, the owner or occupier "must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it." Louie v. Hagstrom's Food Stores, supra, 81 Cal.App.2d at page 606, 184 P.2d at page 711; Hatfield v. Levy Brothers, 18 Cal.2d 798, 806, 117 P.2d 841. Whether, under all the circumstances, the defective condition had existed long enough so that a reasonable man exercising reasonable care would have discovered it, is ordinarily a question of fact to be decided by the jury. Louie v. Hagstrom's Food Stores, supra, 81 Cal.App.2d at page 607, 184 P.2d 708; Rothschild v. Fourth & Market St. R. Co., 139 Cal.App. 625, 627, 34 P.2d 734; Tuttle v. Crawford, supra, 8 Cal.2d at page 130, 63 P.2d 1128; Hatfield v. Levy Brothers, supra, 18 Cal.2d at page 807, 117 P.2d 841.

The fact alone that a dangerous condition existed at the time the accident occurred will not warrant an inference that the defendant was negligent. There must be some evidence, direct or circumstantial, to support the conclusion that the condition had existed long enough for the proprietor, in the exercise of reasonable care, to have discovered and remedied it. Louie v. Hagstrom's Food Stores, supra, 81 Cal.App.2d at page 607, 184 P.2d 708; Owen v. Beauchamp, supra, 66 Cal.App.2d at page 754, 152 P.2d 756; McKellar v. Pendergast, supra, 68 Cal.App.2d at page 489, 156 P.2d 950.

This being the state of the law, the determination of this appeal is narrowed to the question of whether there is any evidence, direct or circumstantial, from which it could be inferred that the dangerous or defective condition, that is, the presence of the banana on the floor of the aisle, had existed for a sufficient length of time to justify charging the proprietor with knowledge of its existence and consequently with negligence in failing to remedy the condition.

[4] Appellant contends that in the circumstances presented it was a question of fact for the jury whether defendant was negligent in permitting the banana to be lying on the floor where customers were required to walk. It is pointed out that a person operating a vegetable market, in the exercise of ordinary care, should maintain a more vigilant outlook than the operator of some other type of business where the danger of things falling on the floor is not so obvious. Quoting from Tuttle v. Crawford, 8 Cal.2d 126, 130, 63 P.2d 1128, 1130, where the court held that "The fact that the attention of persons who visit public markets is attracted by the display of the wares offered for sale and more or less absorbed by the transactions which they have in mind would seem to increase the necessity of exercising care to the end that the floor spaces and aisles allotted to the use of customers should be made safe and kept fit for such purpose", appellant contends that because the only evidence of due care offered by defendant was the testimony of the manager as to the duties of the porters, box boys and clerks to sweep and keep the aisles clear, the jury would be justified in drawing an inference unfavorable to defendant for failure on the part of any employee charged with

such duty to testify. This argument is unsound, since the burden rested upon the plaintiff to present evidence warranting an inference of negligence before any unfavorable inference could be drawn from the failure of the defendant to present evidence in rebuttal.

In support of the contention that although the evidence showed only that the banana had been on the floor for a minute and a half, the question of constructive knowledge was one of fact for the jury, appellant cites Tuttle v. Crawford, supra; Hamilton v. Pacific Electric Ry. Co., 12 Cal.2d 598, 86 P.2d 829; Williamson v. Hardy, 47 Cal.App. 377, 190 P. 646; McClurken v. Ralph's Grocery, 130 Cal.App. 529, 20 P.2d 66; Clampett v. Shopping Bag Mkt., Inc., 29 Cal.App.2d 410, 84 P.2d 543; and Louie v. Hagstrom's Food Stores, supra. Tuttle v. Crawford and Clampett v. Shopping Bag Mkt., Inc., involved wet floors which could have been attributed to no other agency than the proprietor. In Williamson v. Hardy and McClurken v. Ralph's Grocery the question of the lapse of time apparently was not raised or considered. Louie v. Hagstrom's Food Stores, hereinbefore referred to, does not support appellant's position. To the contrary, the decision turned on the point that there was sufficient circumstantial evidence to justify an inference that the dangerous condition (a broken jar of syrup on the floor) had existed for "a substantial period of time." So also, in Hamilton v. Pacific Electric Ry. Co. there was evidence from which it could be inferred that the defendant had not inspected its waiting room for a period of twenty to thirty minutes. In general, all the authorities cited by appellant are distinguishable, in that they involve either conditions created by the proprietor or circumstances from which it could be inferred that the condition had existed for an appreciable length of time, thus presenting a question for the jury.

[5, 6] Viewing the case, as we must, in the light most favorable to plaintiff, it appears that her fall was the result of a dangerous condition existing on the floor of defendant's market with approximately fifteen employees within a radius of fifteen feet from the scene of the accident, but that the circumstances are such as to afford no basis for an inference that the condition was created by the proprietor or his employees. The question is whether, in the circumstances, it can be inferred that the dangerous condition had existed for such a length of time as to justify charging the defendant with lack of ordinary care in failing to discover and remedy it before the plaintiff was injured. As stated in Louie v. Hagstrom's Food Stores, supra, 81 Cal.App.2d at page 608, 184 P.2d 708, the exact time the condition must exist before it should, in the exercise of reasonable care, have been discovered and remedied, cannot be fixed, but varies according to the circumstances. It may be conceded that ordinary care in the case of a public market involves a more vigilant outlook than in the case of an apartment house lobby. It might also be conceded that the presence of a condition such as was shown in the circumstances of this case for as long as ten or fifteen minutes would in all probability be held to justify submitting the cause to the jury. But where the only evidence is that the foreign object has been on the floor of the market for "a minute and a half", it must be held that it is insufficient to support an inference that the defendant proprietor failed to exercise the care required of him.

It is, of course, entirely possible that the banana had been on the floor for a half hour or more, but to uphold a verdict based on that possibility would be to fix liability not upon evidence, but upon surmise and conjecture. The same possibility would exist were there no evidence at all as to the length of time the condition had continued. Obviously, the exact time that a dangerous condition must exist in order to charge the proprietor cannot be stated as a matter of law. It can only be held that, in the circumstances of the case now before the court, one and one-half minutes is too short a period. True, there were many employees in the immediate vicinity of where the plaintiff fell. If their duty required that they perceive the presence of the object on the floor within a minute and a half after it fell there, then their duty was not that of "ordinary", but of "utmost" care. The conclusion is inescapable that the evidence cannot, as a matter of law, be held sufficient without, in effect, applying the doctrine of res ipsa loquitur and casting upon the market proprietor a burden which, in the present state of the law, he is not required to assume.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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91 Cal.App.2d 845

KEATING v. ZUMWALT et al.

Civ. 7533.

District Court of Appeal
Third District, California.
May 16, 1949.

1. Automobiles 🔑245(6, 46)

Negligence of defendant motorist in passing automobile in the nighttime on a public highway at 50 miles per hour, and striking pedestrian walking on the left side of the highway was properly submitted to the jury.

2. Automobiles 🔑218

The statute providing that no pedestrian shall walk upon any roadway otherwise than close to his left hand edge of the roadway did not establish contributory negligence of pedestrian who was struck by automobile while pedestrian was walking on the paved portion of the left side of the highway approximately one to three feet from the edge thereof. Vehicle Code, § 564.

3. Trial 🔑336

In personal injury action, where forms of verdict supplied to jury were general in nature, and jury of its own volition wrote into form preceding general verdict for defendant, the language "unavoidable accident for both plaintiff and defendant-unanimous" verdict was the general verdict for defendant on all issues tendered, and was not in conflict with implied finding that defendant was free from negligence and quoted phrase was surplusage which could be disregarded.

4. Negligence 🔑63

An "unavoidable accident" is one which occurs without fault or negligence upon part of any of the parties thereto.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Unavoidable Accident".

5. Negligence 🔑116, 119(3)

Defense of unavoidable accident may be raised by special defense, or under a general denial of negligence without a special plea to that effect.

6. Trial 🔑336

Language voluntarily included by a jury in a general verdict, which is not in conflict with a valid general verdict may be disregarded as surplusage.

Appeal from Superior Court, Colusa County; C. C. McDonald, Judge.

Action for personal injuries by George A. Keating against Lionel R. Zumwalt and others. Judgment for Lionel R. Zumwalt, and plaintiff appeals.

Affirmed.

Brown, Ford & Cooney, Colusa, for appellant.

Rich, Weis, Carlin & Fuidge, Marysville, for respondents.

THOMPSON, Justice.

In a suit for damages for personal injuries sustained by a pedestrian while he was walking along the outer edge of a public highway in the nighttime, as the result of having been struck by an automobile approaching from behind him, the jury returned a verdict in favor of the defendant Lionel R. Zumwalt. A judgment for defendant was rendered accordingly. From that judgment plaintiff has appealed.

The complaint alleges that the accident resulted from the negligent operation of defendant's machine. The answer denies the material allegations of the complaint and affirmatively alleges that the defendant was free from negligence and that the plaintiff's injuries were the result of his contributory negligence and also that his injuries were sustained as the result of an unavoidable accident.

Two forms of verdict were given to the jury. The first read, "We the jury find our verdict for the plaintiff, and assess the damages as blank dollars." The second form was, "We, the Jury, find our verdict for the Defendant Lionel R. Zumwalt." The jury adopted the last-mentioned form, except that the jury wrote with pen and ink above the typewritten form the following language, "unavoidable accident for both plaintiff and defendant—unanimous." That verdict was signed by the foreman, and duly declared and recorded in open court without objection of either party. The instructions are not before this court. The jury was not requested to make any special finding of fact.

The appellant contends there is no evidence supporting the verdict to show unavoidable accident, contributory negligence of the plaintiff, or a lack of negligence on the part of the defendant. On the contrary, it is asserted the undisputed evidence proves the negligence of the defendant as a matter of law.

The evidence shows that the defendant was driving his automobile on the public highway in Colusa County westerly from Marysville at 5:30 A.M. on December 30, 1946. It was then dark. He was traveling at the rate of about fifty miles per hour. He overtook another car going in the same direction. He turned to his left to pass that car, and then observed the plaintiff walking in the same direction about 85 feet ahead of his machine, on the paved portion of the left side of the highway, approximately three feet from the southern edge thereof. Defendant immediately applied his brakes. The plaintiff testified that he was walking westerly about one foot from the southerly edge on the paved portion of the highway when he was suddenly hit by the machine of the defendant. Defendant's front bumper or left front wheel struck the plaintiff and broke his ankle. He was thrown to the left shoulder of the highway. A traffic officer testified that he found skid marks on the pavement for a distance of about 85 feet to the place where the plaintiff was struck. Defendant's car ran about 60 feet beyond the point where the accident occurred before it was stopped on the left-hand side of the highway. Defendant said that his machine was running about thirty-five miles per hour when he struck the plaintiff.

[1] We may not hold as a matter of law that the defendant was guilty of negligence in passing a machine in the nighttime on the public highway, under the circumstances of this case, at the rate of fifty miles per hour, or that, as a reasonable person he should have anticipated that a pedestrian would then be walking along the southern portion of the paved highway. We conclude that the defendant was not guilty of negligence as a matter of law. The question of defendant's negligence was one of fact to be determined by the jury.

[2] We may also assume there is no satisfactory evidence in this case to show that plaintiff was guilty of contributory negligence. All that Section 564 of the Vehicle Code provides is that: "No pedestrian shall walk upon any roadway outside of a business or residence district otherwise than close to his left hand edge of the roadway."

The problem to be determined on this appeal is, Did the jury return a general verdict in favor of the defendant, thereby implying that it found him to be free from negligence? We think it did.

[3] The jury was not requested to make any special findings of fact. We may assume it was instructed upon an issue of unavoidable accident. The forms of verdicts which were supplied to the jury by the court were merely general in nature. The jury, of its own volition, wrote into the form preceding the general verdict for defendant, the language, "unavoidable accident for both plaintiff and defendant—unanimous." We may reasonably construe that to mean that in addition to the general verdict returned for the defendant, the jury also unanimously found that it was an "unavoidable accident", and that the general verdict for defendant on the other

issues presented was not unanimous. At least, the finding that it was an "unavoidable accident" is not in conflict with the implied finding of the jury in the general verdict that defendant was not guilty of negligence. The text in 53 American Jurisprudence, at page 752, section 1083, supported by numerous authorities from other jurisdictions, states that:

> " * * * Accordingly, special findings, if reasonably open to such a construction, should be given an interpretation which will support the general verdict, rather than overturn and destroy it."

[4-6] An unavoidable accident is defined as "One which occurs without fault or negligence upon the part of any of the parties thereto." Sitkei v. Ralphs Grocery Company, 25 Cal.App.2d 294, 296, 77 P.2d 311, 312. The defense of unavoidable accident may be raised by special defense, or under a general denial of negligence without a special plea to that effect. Sitkei v. Ralphs Grocery Company, supra; Lotta v. City of Oakland, 67 Cal.App.2d 411, 415, 154 P.2d 25; Smith v. Harger, 84 Cal.App.2d 361, 373, 191 P.2d 25. See, also, Eigner v. Race, 54 Cal.App.2d 506, 513, 129 P.2d 444; Barber v. Gordon, 111 Cal.App. 279, 295 P. 377; 65 C.J. 1195. Moreover, while there is no California case directly in point, it has been held in other jurisdictions that language voluntarily included by a jury in a general verdict, which is not in conflict with a valid general verdict, may be disregarded as surplusage. Rowe v. Safeway Stores, Inc., 14 Wash.2d 363, 128 P.2d 293; Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406, 147 A.L.R. 945.

In the Rowe case, supra, which was a suit for damages resulting from an automobile collision similar to the present action, the jury returned a verdict as follows [14 Wash.2d 363, 128 P.2d 296]: "We, the jury * * * do find for defendants. By reason of contributory negligence." In holding that the voluntary statement of the jury "by reason of contributory negligence" written by the jury on the form of a general verdict supplied by the court should be disregarded as surplusage, the court said:

> "* * * Treating gratuitous, explanatory remarks which a jury may append to its general verdict as a special finding of fact, or as a guide in determining how the jury may have resolved the factual issues, would invite surmise and conjecture and lead to uncertainty and confusion. * *
>
> "We think that, under the circumstances here presented, the informal language of the verdict should be disregarded as surplusage."

In the foregoing case an order granting a new trial was affirmed on the ground that the court erroneously instructed the jury regarding essential issues. In the dissenting opinion, Mr. Justice Beals said:

> "* * * While I am in accord with the majority in holding that the words, 'by reason of contributory negligence,' which the jury wrote in its verdict, were mere surplusage, and are not entitled to consideration, I am of the view that the order granting a new trial should be reversed, with instructions to enter judgment upon the general verdict in favor of the defendants."

Likewise, in the Christensen case, supra [215 Minn. 394, 10 N.W.2d 410], in which a general verdict for the defendant contained the language added thereto by the jury that "by reason of the fact that both the defendant and plaintiff were negligent," was held by the Minnesota court to be surplusage.

We conclude that the verdict which was returned in the present case was a general verdict in favor of the defendant on all the issues tendered, and that the memorandum added thereto by the jury of its own volition is surplusage which should be disregarded. It is not in conflict with the implied finding that defendant was free from negligence which contributed to the accident, and does not invalidate the binding effect of the general verdict for defendant.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

91 Cal.App.2d 849

YOST et ux. v. JOHNSON et al.

Civ. 7603.

District Court of Appeal,
Third District, California.
May 16, 1949.

1. Appeal and error 🔑1015(3)

In passing on a motion for new trial based on insufficiency of evidence, it is exclusive province of trial court to judge credibility of witnesses, determine probative force of testimony, and weigh evidence.

2. New trial 🔑71

In considering sufficiency of evidence on motion for new trial, court may draw inferences opposed to those drawn at the trial, and, where the only conflicts consist of inferences deduced from uncontradicted probative facts, court may resolve such conflicts in determining whether case should be retried.

3. Appeal and error 🔑1015(3)

Only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment will an appellate court reverse trial court's order granting a new trial on ground of insufficiency of evidence.

4. Appeal and error 🔑979(2)

An order granting a new trial on ground of insufficiency of evidence to sustain judgment will not be disturbed on appeal, unless there is a clear showing of abuse of discretion.

5. Appeal and error 🔑854(6), 933(1)

All presumptions are in favor of an order granting a new trial on ground of insufficiency of the evidence, and the order will be affirmed on appeal if sustainable on any ground.

6. New trial 🔑71

The trial court, in considering a motion for new trial on ground of insufficiency of evidence, is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party.

7. Appeal and error 🔑1015(3)
New trial 🔑71

Even if evidence is uncontradicted, trial judge may draw inferences from it contrary to inferences made by jury, and it is his duty to resolve such conflicts in determining, on motion for new trial on ground of insufficiency of evidence, whether issues should be retried, and only when, as a matter of law, there is no substantial evidence to support a contrary judgment, may an appellate court reverse order granting new trial.

8. New trial 🔑68

Where driver of truck and trailer, who was proceeding near center of street in town, slowed down and gradually turned to right for purpose of parking, and bicycle of nine-year-old boy who was riding behind truck began to wobble when boy reached point between truck and parked automobile, whereon he fell to street and he was crushed by wheels of trailer, granting of new trial to parents of boy in death action after jury returned verdict for defendants was not an abuse of discretion.

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Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by Roger C. Yost and Margorie E. Yost, husband and wife, against F. O. Johnson and Katherine C. Johnson, individually and as partners doing business under the firm name of Johnson Trucking Company, and James L. Tull to recover damages for the death of the plaintiffs' son. From an order granting plaintiffs' motion for a new trial, after jury returned a verdict for defendants, defendants appeal.

Order affirmed.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, and Goldstein, Barceloux & Goldstein, Chico, for appellants.

Pugh & Pugh, Red Bluff, L. C. Smith, Redding, for respondents.

ADAMS, Presiding Justice.

Defendants have appealed from an order granting plaintiffs' motion for new trial after a jury returned a verdict in favor of defendants in an action by plaintiffs to recover damages for the death of their nine-year-old son who was run over and killed by a trailer attached to a truck belonging to F. O. and Katherine C. Johnson and driven by their employee, James L. Tull. The order of the court granting a new trial asserted that it was based upon the ground of "insufficiency of the evidence to justify the verdict, and that the verdict of the jury was contrary to the weight of the evidence."

The accident happened in the town of Corning, about noon on September 12, 1947. At that time the truck and trailer, both loaded with lumber, were proceeding west on Solano Street. They had been running near the center white line of the street—which was 60 feet wide—until, as they approached an intersecting street (Sixth Street, which was 56 feet wide), Tull decided to park on the north side of Solano Street after crossing Sixth Street, for the purpose of having lunch. He therefore turned gradually toward the right while slowing down to park. The decedent, who was riding a bicycle, had been following the truck, and when it slowed down and gradually pulled to the right the boy also turned slightly to the right and gained a little on the trailer. Just across Sixth Street on Solano a car was parked, and as the boy reached the point between the truck and the parked car his bicycle began to wabble, whereupon he fell to the street and his head was crushed by the wheels of the trailer. The truck driver testified that while slowing down he looked in both his left and right hand mirrors but did not at any time see the boy on the bicycle.

Respondents took the position that the truck driver should not have pulled to the right to park while the boy was riding his bicycle to the right of the trailer, and that by reason of the truck's movement the boy was "sandwiched" in between the car parked at the curb and the trailer; and that the driver of the truck should not have pulled toward the curb unless he could do so with safety to traffic coming up on his right hand as the boy on the bicycle was doing. On the other hand appellants argue that since the driver at no time saw the boy, and had gradually pulled over, as he had a right to do, the boy, having had ample time and distance to observe the movements of the truck and trailer, was guilty of contributory negligence in not doing something to avoid being caught between the trailer and the parked car.

The question before us, then, is whether the trial court, in granting plaintiffs' motion for a new trial, committed reversible error.

[1-3] Our Supreme Court, in comparable cases, has frequently enunciated the rule governing appellate courts in passing upon such questions. For instance, it said in Brooks v. Metropolitan Life Insurance Co., 27 Cal.2d 305, 307, 163 P.2d 689, 690: "In passing upon a motion for a new trial based upon the insufficiency of the evidence, it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence. People v. Sarazzawski, 27 Cal.2d 7, 161 P.2d 934; Green v. Soule, 145 Cal. 96, 102, 78 P. 337. In considering the sufficiency of the evidence upon such motion the court may draw inferences opposed to those drawn at the trial, Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 451, 456, 168 P. 1033, and where the only conflicts consist of inferences deduced from uncontradicted probative facts, the court may resolve such conflicts in determining whether the case should be retried. Cauhape v. Security Savings Bank, 118 Cal. 82, 84, 50 P. 310. It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court. See Dempsey v. Market Street R. Co., 23 Cal.2d 110 [113], 142 P.2d 929."

[4-7] It also stated, in Williams v. Field Transportation Co., 28 Cal.2d 696, 698, 171 P.2d 722, 723: "An order granting a new trial upon the ground of the insufficiency of the evidence to sustain the judgment will not be disturbed upon appeal, unless there be a clear showing of abuse of discretion. 'All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. Mazzotta

v. Los Angeles Ry. Corporation, 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party.' Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465, 467. Even if the evidence is uncontradicted, the trial judge may draw inferences from it contrary to those made by the jury, and it is his duty to resolve such conflicts in determining whether the issues should be retried. Only when, as a matter of law, there is no substantial evidence to support a contrary judgment, may an appellate court reverse an order granting a new trial. Brooks v. Metropolitan Life Insurance Co., 27 Cal.2d 305, 163 P.2d 689; Mazzotta v. Los Angeles Ry. Corporation, supra."

In Hames v. Rust, 14 Cal.2d 119, at page 124, 92 P.2d 1010, at page 1012, the Supreme Court also asserted: "When the motion is granted, as here, for insufficiency of the evidence, it is only in rare cases showing abuse of discretion that an appellate court will interfere because the trial judge must weigh all the evidence and determine the just conclusion to be drawn therefrom. Hanlon Drydock & Shipbuilding Co. v. Southern Pac. Co., 92 Cal.App. 230, 232, 268 P. 385. It cannot be held that a trial court has abused its discretion where there is a conflict in the evidence or where there is any evidence which would support a judgment in favor of the moving party."

This court, in the case of Kehlor v. Satterlee, 37 Cal.App.2d 116, 117, 98 P.2d 759, 760, where plaintiff's motion for a new trial was granted, said that an order granting a new trial, when it is predicated upon the insufficiency of the evidence, will not be disturbed upon appeal, except upon a showing of clear and manifest abuse of discretion on the part of the trial court in respect to the granting of the same; that the rule is simple in its application when there is a substantial conflict in the evidence upon the issues to be decided, but that even "If there be no conflict, the discretionary power of the trial court still remains, as stated by this court in the case of Otten v. Spreckels, 24 Cal. App. 251–257, 141 P. 224, 226," quoting from the Otten case as follows: "Moreover, even in cases where there may not appear to be a conflict in the evidence, and where all the proofs seem to be favorable to the one or the other of the parties litigant, the question as to the probative force or evidentiary value of the testimony, in a proceeding on a motion for a new trial based upon the ground that the evidence is insufficient to justify the verdict, is one whose determination is with the trial court."

In Efinoff v. Shephard, 77 Cal.App.2d 818, 176 P.2d 407, where plaintiff's motion for a new trial after verdict for defendant was granted and affirmed, the court said that it is a well settled rule of law that a trial court has a wide discretion in granting a new trial on the ground of insufficiency of the evidence; that the trial judge is said to be in the position of a "thirteenth juror," with full power to weigh the evidence and to reach his own conclusion as to the probative value thereof. It quoted from Ogando v. Carquinez Grammar School District, 24 Cal.App.2d 567, 569, 75 P.2d 641, that it is only in rare instances and on very strong grounds that a reviewing court will set aside an order granting a new trial. Also it said that in considering such a motion it is not only the trial court's province but its duty to scrutinize and weigh the evidence, and if in its opinion the facts upon which the decision of the jury is based are insufficient to justify that decision, or if it believes that the weight of the evidence is against the decision, a new trial should be granted, even though the inferences it may draw are opposed to those drawn by the jury; and if, therefore, on appeal the case shows a reasonable or fairly debatable justification for the trial court's order, or the evidence presents a situation where reasonable minds might differ in their deductions, said order will not be set aside, even though the court of appellate jurisdiction might take a view different from that of the trial court, or believe the evidence would be sufficient to support a judgment in the event a new trial had been denied.

[8] In the instant case we are not prepared to say as matter of law that there is not substantial evidence to support a judgment for plaintiffs, or that there was a clear or manifest abuse of discretion on the part of the trial court in granting the motion for a new trial. It saw and heard the witnesses and it was its province, as well as its duty, to weigh the evidence and reach its own conclusion as to the probative value thereof.

The order is affirmed.

PEEK and THOMPSON, JJ., concur.

91 Cal.App.2d 865

CLARK v. CAPITAL NAT. BANK OF SACRAMENTO et al.

Civ. 7559.

Sac. 5955.

District Court of Appeal
Third District, California.
May 17, 1949.

As Modified on Denial of Rehearing
June 14, 1949.

Hearing Denied July 14, 1949.

1. Executors and administrators 🔑315(6)

A final decree of distribution of property is ordinarily conclusive upon the heirs, devisees and legatees, and the terms of will may not be used to impeach unambiguous terms of decree of distribution.

2. Executors and administrators 🔑315(6)

Where decree of distribution specifically referred to the will, the will might be used to clarify the distributive terms of the decree.

3. Trial 🔑393(4)

In action to determine title to and possession of a conditional legacy which was distributed in trust pursuant to terms of will, trial court properly incorporated in its findings paragraph of will dealing with such legacy in view of fact that decree of distribution expressly referred to such paragraph of will and construed will as language of decree authorized.

4. Wills 🔑470

Paragraph of will granting a conditional legacy must be construed as a whole.

5. Wills 🔑665

Where testator bequeathed $25,000 in trust for benefit of grandson who was to be paid the interest, and provided that principal should be paid over when grandson reached 25 years of age unless he had sooner been graduated from college, that in event of death before 25, grandson's heirs should take and that if grandson should reach 25 without having been so graduated, fund should be otherwise disposed of, bequest was conditional and where grandson had not been so graduated, he ceased to have any interest in such fund. Probate Code, § 142.

◆

Appeal from Superior Court, Sacramento County; B. F. Van Dyke, Judge.

Action by George Harvey Clark against the Capital National Bank of Sacramento and others to determine the title to and possession of a conditional legacy of $25,000 which was distributed in trust pursuant to the terms of a will. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Archibald D. McDougall, Daniel Dennis, Sacramento, for appellant.

Downey, Brand, Seymour & Rohwer, J. Q. Brown, Dist. Atty., Everett M. Glenn, Sacramento, for respondents.

THOMPSON, Justice.

This is an equitable suit to determine the title to and possession of a conditional legacy of $25,000, which was distributed in trust, pursuant to the terms of a will. The will bequeathed the legacy to the executor of the last will and testament in trust nevertheless to be by him delivered into the possession of an established, recognized and responsible trust corporation, for the benefit of plaintiff provided he graduated from a university before he reached the age of twenty-five years. If he failed to graduate from a named college within that time, the legacy was bequeathed in trust for the benefit of a scholarship fund to be distributed by the trustees to the students selected by the officers of the City of Sacramento in a designated manner. The plaintiff became twenty-five years of age without graduating from the university, and the conditional bequest to him therefore failed. The court adopted findings to that effect and rendered judgment against the plaintiff, determining that he had no title or interest in the corpus of said fund. From that judgment this appeal was perfected.

The appellant contends that the court erred in adopting, in its findings, paragraph nine of the will, and in construing it to mean that the conditional legacy of $25,000, contained therein, failed with respect to him because he reached the age of twenty-five years without graduating from a university. The appellant also asserts that, even though the trust failed as to him, he was, nevertheless, entitled to said $25,000 legacy "as sole heir of the testator and as successor to the rights of the residuary distributees named in the decree."

George Harvey Clark, Sr., a resident of Alameda County, formerly a resident and officer of the City of Sacramento, executed his will, on September 23, 1921, the ninth paragraph of which is involved in this litigation. He died November 7, 1923, possessed of real and personal property, and leaving surviving him as heirs his wife, Emma Clark, a married son, Jerome Frank Clark, and the plaintiff, George Harvey Clark, Jr., a grandson of the testator. The grandson was born August 29, 1921, and was little more than two years of age at the time of the death of his grandfather. The grandson became twenty-five years of age on August 29, 1946. It is conceded he did not graduate from any university or college. The will was admitted to probate in Alameda County, December 4, 1923, and Victor L. Hatfield, the testator's attorney, was appointed and qualified as executor. The will bequeathed the $25,000 legacy to the named executor, in trust, to be by him "delivered into the possession of an established, recognized and responsible Trust corporation * * * for the benefit of my grandson * * *" under specified conditions. After the executor had qualified and on September 19, 1933, the probate court of Alameda County appointed a Sacramento bank as trustee of that fund, and the $25,000 legacy was paid to it. The bank paid all semiannual accumulations of interest thereon to the plaintiff until he reached the age of twenty-five years as provided by paragraph nine of the will. On September 18, 1925, after due process of administration, the final account was settled and distribution of the estate was made in accordance with the provisions of the will. With respect to the $25,000 legacy, which is involved in this litigation, the decree provides that:

"And it appearing that said Executor has delivered into the possession of the California Trust and Savings Bank, a corporation, [of Sacramento] an established, recognized and responsible trust corporation, of the State of California, the sum of $25,000.00, in accordance and subject to the terms of paragraph 'Ninth' of the Will of said deceased, *to which reference is hereby made;*" (Italics added.)

The decree then distributed specified properties to named individuals, and then provided:

"And that the residue of said estate hereinafter particularly described, together with all the other property not now known or discovered in or to which the decedent, at the time of his death, or in or to which his estate by operation of law or otherwise, has acquired any right, title or interest, be, and the same is hereby distributed as follows:

"To Emma Clark, an undivided one-half thereof.

"To Jerome Frank Clark, an undivided one-half thereof."

The ninth paragraph of the will, which is the chief source of controversy in this case, provides as follows:

"*Ninth*: I give and bequeath to the executor of this my Last Will and Testament after he qualifies and acts as such, the sum of Twenty-five Thousand ($25,000.00) Dollars, in trust nevertheless to be by him delivered into the possession of an established, recognized and responsible Trust corporation to be invested to the best advantage by said Trust corporation for the benefit of my grandson, George Harvey Clark, Jr. The interest earned by, and which accrues from, said Twenty-five

Thousand Dollars to become due and payable to said George Harvey Clark, Jr. each six months after said sum of Twenty-five Thousand Dollars has been delivered into the possession of said Trust corporation. Said sum of Twenty-five Thousand Dollars is to be held and retained by said Trust corporation until said George Harvey Clark, Jr. shall reach the age of twenty-five (25) years, unless he shall have before such age, graduated and been awarded a degree by either of the colleges mentioned. In such event the Trust corporation is hereby authorized and instructed to deliver to my grandson, George Harvey Clark, Jr. said sum of Twenty-five Thousand Dollars and all interest which may have accrued thereon. In the event of the death of said George Harvey Clark, Jr. before reaching the age of twenty-five years, said sum of Twenty-five Thousand Dollars is hereby devised and bequeathed to his surviving heirs. In the event my grandson, George Harvey Clark, Jr. shall live to be twenty-five years of age, and shall not have graduated from and been awarded a degree by either of the universities named, said sum of Twenty-five Thousand Dollars is hereby bequeathed and devised to the Mayor or the City Manager of the City of Sacramento, California, the Principal of the high school of the City of Sacramento in which institution is enrolled the greatest number of students, and the City Superintendent of Schools of the City of Sacramento, in trust nevertheless to be by said three officials or a majority thereof, invested to the best advantage, and the interest accruing thereon shall be paid out from time to time under the supervision of said three officials, or a majority thereof, to defray the expenses incidental to providing a college education for the boy or girl who shall in open competition attain the highest degree of success in whatever examination or test may be prescribed, fixed and determined upon by said three officials. Said Trust fund of Twenty-five Thousand Dollars shall be known as The George H. Clark Memorial Fund."

We are of the opinion the findings and judgment are adequately supported by the evidence. The above-quoted paragraph of the decree of distribution is a sufficient finding that the $25,000 fund was deposited with the California Trust and Savings Bank (superseded as trustee by The Capital National Bank), an "established, recognized and responsible trust corporation, * * * in accordance and subject to the terms of paragraph 'Ninth' of the Will." In determining the terms and conditions of the will upon which the trust fund was to be held and dispersed, that paragraph of the decree specifically authorized the incorporation and construction of the language of the "ninth" paragraph of the will by adding thereto the language "to which reference is hereby made."

[1, 2] It is ordinarily true that a final decree of distribution of property is final and conclusive upon the heirs, devisees and legatees, and that the terms of the will may not be used to impeach the clear and unambiguous terms of the decree of distribution. But certainly when the decree specifically refers to the will, as it does in the present case, it may be used to clarify and explain the distributive terms of the decree. In re Ewer, 177 Cal. 660, 171 P. 683; Horton v. Winbigler, 175 Cal. 149, 165 P. 423; Buttram v. Finley, 37 Cal.App.2d 459, 465, 99 P.2d 1093. In the Ewer case, supra, it is said, 177 Cal. at page 662, 171 P. at page 684:

> "* * * But while the will cannot be used to impeach the decree, it can be used to explain it where the decree taken alone is uncertain, vague, or ambiguous."

Likewise, in the Buttram case, supra, it is said 37 Cal.App.2d at page 465, 99 P.2d at page 1095:

> "It is true that *unambiguous* language of a decree of distribution is controlling upon the heirs and devisees of a will with respect to the interests acquired thereby. [In re] Estate of Scrimger, 188 Cal. 158, 206 P. 65; [In re] Estate of Lockhart, 21 Cal.App.2d 574, 69 P.2d 1001; 11B Cal.Jur. 787, secs. 1290, 1296. However, there are well-recognized exceptions to the rule that ordinarily a decree of distribution is final and conclusive. When the language of the decree is uncertain, vague or ambiguous, the will may be resorted to for the purpose of determining the intention of the testator with respect to the subject in controversy.

[In re] Estate of Lockhart, supra; Fraser v. Carman-Ryles, 8 Cal.2d 143, 64 P.2d 397; [In re] Estate of Goldberg, 10 Cal.2d 709, 713, 76 P.2d 508; 11B Cal.Jur. 804, sec. 1299."

In the present case the will was properly admitted in evidence and marked Plaintiff's Exhibit No. 1. It was referred to and paragraph nine was adopted by the findings of the trial court. The court thereupon construed that paragraph to clarify the decree in accordance with the intention of the testator.

In Re Estate of Lockhart, 21 Cal.App.2d 574, 69 P.2d 1001, 1002, the Appellate Court held that the will to which reference was made in the decree which distributed a trust fund to a trustee bank, "in pursuance of and according to the provisions of the last will of said decedent," thereby authorized reference to the will to determine the distributive terms of the decree. It is there said:

"* * * The court may, by express terms or by apt reference thereto, incorporate the will in the decree so as to constitute it a portion of its distributive terms and make it a part of the decree as effectually as though set forth in it. When necessity arises thereafter to construe the decree, it is the duty of the court to look to the will to ascertain the terms of distribution. Horton v. Winbigler, 175 Cal. 149, 165 P. 423. If the will, by apt reference, is made part of the decree, it supplies matters which it contains but the decree omits. In re Estate of Blake, 157 Cal. 448, 108 P. 287. While the will cannot be used to impeach the decree, it can be used to explain it where the decree taken alone is uncertain, vague and ambiguous. This rule has been applied both where the decree referred to the will (In re Ewer's Will, 177 Cal. 660, 171 P. 683; Fraser v. Carman-Ryles [8 Cal.2d 143], 64 P.2d 397), and where it did not. McCloud v. Hewlett, 135 Cal. 361, 67 P. 333."

[3] In this case the decree of distribution was uncertain and ambiguous with respect to the terms and conditions of paragraph nine of the will under which the conditional trust fund was distributed to the trust corporation. The trial court in this case therefore properly incorporated in its findings said paragraph nine of the will, and accurately construed its terms, as the language of the decree specifically authorized it to do. The decree actually distributed the fund to the named trustee, to be administered "in accordance and subject to the terms of paragraph 'Ninth' of the Will of said deceased, *to which reference is hereby made.*" (Italics added.)

[4, 5] Paragraph nine of the will must necessarily be read as a whole, for it deals only with the conditional bequest of that particular legacy of $25,000. It gave that sum to the executor to be by him delivered to a responsible trust corporation, for the purpose of administration in accordance with the terms and conditions therein mentioned. It definitely provided, without condition, that the *interest* on that sum should be paid semi-annually to the grandson until he reached the age of twenty-five years, which was done. The second sentence of the ninth paragraph of the will then provides that the corpus of the trust fund shall be retained by the trustee until the grandson becomes twenty-five years of age, "unless he shall have, before such age, graduated and been awarded a degree" by either Stanford University or the University of California. The court found, and the evidence supports that finding, that the grandson reached the age of twenty-five years and that he had not graduated from any university. The next sentence of paragraph nine of the will provides that if the grandson should die before he became twenty-five years of age, the corpus of that fund should go to his surviving heirs. But that provision became ineffectual because the grandson is still living. The last sentence of paragraph nine of the will then provides that if the grandson "shall not have graduated from" either of said named universities, then the corpus of that fund "is hereby bequeathed and devised to" the Mayor or Manager of the City of Sacramento, to the Principal of the high school of that city having the largest enrollment and to the City Superintendent of Schools, *in trust,* "to defray the expenses incidental to providing a college educa-

tion for the boy or girl who shall in open competition attain the highest degree of success in whatever examination or test may be prescribed, fixed and determined upon by said three officials."

The first sentence of the ninth paragraph which states that the fund is given to the trustee "in trust * * * for the benefit of my grandson" is not inconsistent with the subsequent provisions of that paragraph. The grandson did benefit by the payments of semi-annual installments of interest thereon until he reached the age of twenty-five years. That paragraph must be read as a whole to ascertain the intention of the testator. The bequest of the corpus of that trust fund was conditional. We think that paragraph nine provides, the court found, that the vesting of the corpus of the trust fund in the plaintiff is dependent upon the designated condition precedent that he should first graduate from a named university before he reached the age of twenty-five years. The vesting in plaintiff of the corpus of that fund failed because the condition was not fulfilled. Probate Code, § 142. The trust, however, did not terminate or fail in its entirety so as to entitle plaintiff to inherit the fund as a residuary legatee or assignee of his grandfather's estate, for an alternative trust in that fund was expressly created by the will, in the event of the failure of the grandson to graduate from a named university before he became twenty-five years of age. Or, if we assume the trust in the corpus *for the benefit of the grandson* failed for lack of fulfillment of the condition precedent, then a new trust was created therein for the benefit of the designated scholarships to be awarded by the trustees.

It follows that plaintiff is not entitled to the corpus of the fund as a definite, controlling, irrevocable and consummated bequest under the will, nor as an heir, residuary legatee or successor by assignment, or otherwise, of the residue of the testator's estate.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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91 Cal.App.2d 905

DE MIRJIAN et al. v. IDEAL HEATING CORPORATION et al.

IDEAL HEATING CORPORATION v. DE MIRJIAN et al.

Civ. 16888.

District Court of Appeal, Second District,
Division 3, California.

May 19, 1949.

Rehearing Denied June 8, 1949.

Hearing Denied July 14, 1949.

1. Action 🔑27(2)
Attachment 🔑7

Lessors' action against lessee for damages from fire starting on leased premises and spreading to lessor's adjoining premises was in tort, not contract, notwithstanding lease provision that lessee would hold lessors harmless from any damage resulting from use, misuse, or neglect, and would not support an attachment against lessee. Code Civ.Proc. § 537; Civ.Code, §§ 1708, 1714, 1929.

2. Attachment 🔑4

Fundamental basis of cause of action, rather than form or phraseology of pleadings, determines right to attachment. Code Civ.Proc. § 537.

3. Attachment 🔑5
Election of remedies 🔑4

Plaintiff may elect in certain situations to sue upon contract theory rather than tort theory, and may be entitled to attachment if he does so. Code Civ.Proc. § 537.

4. Attachment 🔑247

Complaint is to be considered as an affidavit for purpose of motion to discharge attachment.

5. Attachment 🔑7

If complaint reveals gravamen of action to be ex delicto rather than ex contractu, attachment will not lie. Code Civ. Proc. § 537.

6. Action 🔑27(1)

If complaint states a cause of action for breach of promise set forth in contract, action is ex contractu, but is ex delicto if it seeks damages arising out of breach of a duty growing out of contract.

7. Attachment ⚿5

Under lease providing that lessee would hold lessors harmless from damage resulting from use, misuse, or neglect, and would pay all reasonable costs including attorney's fees in any action "necessary to enforce lessors' rights hereunder", the attorney's fee provision did not apply to actions to enforce liability existing independently of the lessor-lessee relationship, such as lessors' action for damages from fire starting on leased premises and spreading to lessors' adjoining premises, and hence claim for attorney's fees was not ground for attachment. Code Civ.Proc. § 537.

8. Contracts ⚿206

A conventional provision for attorney's fees does not create an obligation to pay fees in action arising solely out of promisor's negligence unless, by clearly expressed agreement of parties, rather than mere interpretation of vague, general language.

9. Attachment ⚿102

Allegation that defendants were indebted to plaintiffs in specified sum upon written contract for direct payment of money, to-wit, payment for damage to and destruction of described property and loss of profits, together with reasonable attorney's fees as prayed for in complaint, was insufficient to support an attachment upon the claim for attorney's fees. Code Civ.Proc. § 537.

10. Attachment ⚿107

In action ex delicto for $302,474.28, including $75,000 demanded in complaint for attorney's fees, affidavit for attachment relying on contractual claim of "reasonable attorney's fees" in specified amount would not support a writ for $200,000.

◆

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Action by Albert De Mirjian and others against Ideal Heating Corporation and another, for damages from fire allegedly caused by defendant's negligence, wherein the named defendant filed a cross-complaint against plaintiffs, individually, and as copartners doing business under the fictitious name and style of California Art Company. From an order denying defendant's motion to discharge an attachment, defendant appeals.

Reversed with directions.

John W. Preston, John W. Preston, Jr., and Morris Bordon, Los Angeles, for appellant.

McBain & Morgan, Irving E. Tarson, and Lane & McGinnis, Los Angeles, for respondents.

SHINN, Presiding Justice.

This is an appeal from an order denying motion of defendant and appellant to discharge an attachment issued and levied upon its bank account. The appeal is presented upon a clerk's transcript. The action is based upon a fire allegedly caused by defendant's negligence. Plaintiffs are seeking to recover damages for the destruction of and injury to their real and personal property, for loss of profits, and for attorney's fees incurred in enforcing plaintiffs' rights.

At the time of the fire, plaintiffs were the owners of two adjoining parcels of real property both of which were improved with business buildings, and which were located respectively at 807 East Gage Street and 817 East Gage Street in the city of Los Angeles. On August 21, 1940, defendant had leased the premises at No. 807 from plaintiffs' predecessors in interest. Plaintiffs occupied and carried on an art and lamp business in their building at No. 817. The fire, out of which the action arose, commenced upon the premises leased by defendant and spread to the adjoining premises occupied by plaintiffs, causing extensive destruction and damage to both. The complaint sets forth five causes of action, the first three of which purportedly state a basis for liability under the terms of the written lease. Counts four and five are concededly grounded solely upon negligence. The issue which we are called upon to determine is whether plaintiffs' complaint states, or purports to state, a cause of action which is based "upon a contract, express or implied, for the direct payment of money," Code Civ.Proc., sec. 537, and which will therefore support an attachment.

Plaintiffs' first three causes alleged are predicated upon a provision appearing in paragraph 8 of the lease which reads: "Lessee agrees to hold Lessors and said premises free and harmless from any damage resulting from the use, misuse or neglect thereof and all appurtenances thereto." The nature of plaintiffs' action is sufficiently indicated by the allegations which appear in the first cause of action. They may be summarized as follows: By the terms of the lease, the lessee expressly and impliedly agreed to reimburse plaintiffs for all damage resulting both to plaintiffs and to said leased premises from said defendants' use, misuse or neglect of said premises; defendants so used, misused and neglected said premises and their appurtenances as to render them in a highly inflammable and dangerous condition in that they maintained thereon, unguarded and exposed, large stocks of paint, lacquer thinner and other liquids, substances and properties of a highly volatile, inflammable and explosive nature; these materials were left exposed to numerous employees and many other persons having access to the premises and to lighted matches, cigarettes, fires, etc., without notice or warning of any kind or nature as to the dangerous and noxious properties thereof, and as a direct and proximate result of defendants' use, misuse and neglect of the premises as aforesaid, the fire occurred for which recovery is sought.

[1] Despite plaintiffs' artfully contrived attempt to state causes of action within the scope of section 537 of the Code of Civil Procedure, we think they have failed to do so and that the court below was in error in refusing to discharge the attachment.

[2] When a party seeks the remedy of attachment it is the fundamental basis of his cause of action, rather than the form or phraseology of his pleadings which determines his right to the writ. Hallidie v. Enginger, 175 Cal. 505, 166 P. 1; San Francisco Iron Etc. Co. v. Abraham, 211 Cal. 552, 554, 296 P. 82; Powers v. Freeland, 114 Cal.App. 146, 149, 299 P. 736; Bullard v. Rosenberg, 130 Cal.App. 542, 20 P.2d 104; Rosenberg v. Bullard, 127 Cal.App. 315, 15 P.2d 870. In the Powers case, 114 Cal.App. at page 149, 299 P. at page 737, it was declared to be an "elementary principle" that "it is the substance of the cause of action which is important rather than its form. * * * for, if the cause of action is one that in reality sounds in tort, the remedy of attachment, which is purely statutory, is not available to a complainant under our statutes, and the statutory inhibition may not be overcome by pleading a cause of action, which is really one in tort, as one sounding in contract." See also, 2 R.C.L., sec. 18, p. 815; 4 Am.Jur. Sec. 106, p. 622; 7 C.J.S., Attachment, § 13, p. 201, and cases there cited.

[3-5] It is well established that there are certain situations in which a plaintiff may elect to sue upon a contract theory, rather than a tort theory, and may be entitled to an attachment if he does so. Los Angeles Drug Co. v. Superior Ct., 8 Cal.2d 71, 63 P.2d 1124; McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019; Oil Well Core Drilling Co. v. Barnhart, 20 Cal.App.2d 677, 67 P.2d 696; Yosemite, etc., Ass'n v. Case-Swayne Co., 73 Cal.App.2d 806, 167 P.2d 541. In cases of this nature, however, it invariably appears that the alleged tortious conduct is merely incidental to the contractual liability relied upon, or as pointed out in Oil Well Core Drilling Co. v. Barnhart, supra, that it is unnecessary to prove the commission of a tort in order to make the contract counts good. The controlling principle, which is uniformly recognized by the authorities, is that if the complaint, which is to be considered as an affidavit for the purpose of a motion to discharge an attachment, San Francisco Iron Etc. Co. v. Abraham, supra, 211 Cal. 552, 296 P. 82, reveals the gravamen of the action to be ex delicto rather than ex contractu, the attachment will not lie.

[6] With these rules in mind, we turn to a consideration of the nature of plaintiff's action. Under varying circumstances, it has been repeatedly affirmed that if the

complaint states a cause of action for breach of a promise set forth in the contract the action is to be regarded as ex contractu, but if it seeks damages arising out of the breach of a duty growing out of the contract, the action will be regarded as ex delicto. Jones v. Kelly, 208 Cal. 251, 254, 280 P. 942; Peterson v. Sherman, 68 Cal.App.2d 706, 711, 157 P.2d 863. Accordingly, it has been held that a cause of action against a carrier for personal injuries, although pleaded as a breach of contract for safe conveyance, sounds in tort. Williamson v. Pacific Greyhound Lines, 67 Cal. App.2d 250, 153 P.2d 990; Basler v. Sacramento Etc. Ry. Co., 166 Cal. 33, 134 P. 993; Rushing v. Pickwick Stages System, 113 Cal.App. 240, 298 P. 150. Similar conclusions have been reached in actions for injury to persons or property caused by defective or impure products, pleaded in terms of breach of warranty, Singley v. Bigelow, 108 Cal.App. 436, 291 P. 899; Gosling v. Nichols, 59 Cal.App.2d 442, 139 P.2d 86; Automobile Ins. Co. v. Union Oil Co., 85 Cal.App.2d 302, 193 P.2d 48, and in actions for malpractice based upon alleged breach of contract to provide competent medical care. Harding v. Liberty Hospital Corp., 177 Cal. 520, 171 P. 98; Marty v. Somers, 35 Cal.App. 182, 169 P. 411; Speer v. Brown, 26 Cal.App.2d 283, 79 P.2d 179. "In such cases the tort which is the basis of the claim for damages lies in the breach of the duty imposed by law, and the allegations of the contract relations between the parties are merely for the purpose of showing that the plaintiff was not a trespasser or that he was lawfully in the position or situation at the time the defendant's breach occurred." Nathan v. Locke, 108 Cal.App. 158, 162, 287 P. 550, 551, 291 P. 286.

Applying the foregoing principles to the present case, it is manifest that plaintiffs' complaint sounds in tort and not in contract. The relationship between plaintiffs and defendant was created by the lease contract, but defendant's duty to exercise reasonable care, and to respond in damages for a failure to do so, were imposed by force of law, independent of any contract or the terms thereof. Civ.Code, secs. 1708, 1714, 1929; see Berning v. Colodny & Colodny, 103 Cal.App. 188, 191, 284 P. 496. Plaintiffs' claim for relief stems from alleged tortious negligence on the part of defendant in storing dangerous inflammables in an exposed condition without warning or safeguard. With the exception of the count for attorney's fees, there are no allegations tending to indicate any basis of liability arising solely out of the contract or out of any source other than the law of torts. The clause obligating defendant to save plaintiffs harmless for "use, misuse or neglect" must be read in conjunction with a further provision expressly exempting defendant from liability for damage due to "ordinary use." As so construed it is clear that any liability on the part of defendant which might obtain under this provision of the lease would depend entirely on proof directly establishing liability in tort. The only breach of the provision alleged consists of the alleged negligence; the liability sought to be enforced is one that existed independently of the lessor-lessee relationship or the terms of the lease. We conclude that although plaintiffs' action for damages resulting from the fire may have been technically pleaded in terms of contract, its gravamen is tort, and accordingly it will not support an attachment.

Plaintiffs' third cause of action contains a count for attorney's fees in the sum of $75,000 which is based upon a clause in section 12 of the lease reading as follows: "In any action at law or equity necessary to enforce Lessors' rights hereunder, Lessee agrees to pay all reasonable costs including attorney's fees, incurred by Lessors herein."

[7] It is contended that the cause of action for attorney's fees furnishes ground for an attachment, in the amount of the demand. We entertain a contrary view. It would require a strained construction of the attorney's fee provision to extend its coverage to actions to enforce a liability such as the one pleaded, which exists independently of the lessor-lessee relationship.

[8] Provisions imposing an obligation to pay for attorney's fees incurred in the enforcement of rights arising out of con-

tracts are commonly found in leases and many other types of contracts. It may not be questioned that it would be permissible to frame such provisions so as to extend the liability to actions for damages arising out of torts directly or indirectly connected with the subject matter of the contract, but we have been unable to discover any reported case in which a court has had occasion to consider a contract in which such broad liability has been so expressed. Nor to our knowledge has any court passed upon the contention that a conventional provision for attorney's fees creates an obligation of the promisor to pay such fees in an action brought to recover damages arising solely out of the promisor's negligence. If such unusual and extensive liability is to be created, it must be by clearly expressed agreement of the parties and not by means of a mere interpretation of vague, general language, such as the parties here employed. We therefore hold that the provision for attorney's fees was not an undertaking upon the part of defendant for which a recovery may be had in the present action and that the attachment should have been discharged for this reason.

There are several other reasons for our conclusion that the demand for attorney's fees does not furnish support for the attachment.

[9, 10] The prayer of the complaint is for $302,474.28, including $75,000 demanded for attorney's fees. It is averred in the amended affidavit for attachment that the defendants are indebted to plaintiffs in the sum of $200,000 upon a written contract for the direct payment of money, to wit: "Payment for damage to and destruction of premises leased to defendants and for damage to and destruction of personal property located in said adjoining premises and loss of profits resulting from destruction of plaintiff's business conducted therein, together with reasonable attorney's fees as prayed for in the complaint as amended on file herein." This affidavit is insufficient to support an attachment upon the claim for attorney's fees. Exclusive of that claim, the amount sued for as damages for destruction of property and loss of profits exceeds the amount for which the attachment was sought and issued. It is impossible to determine from the affidavit whether the attachment was sought in the amount of $75,000 or any other sum on the basis of the claim for attorney's fees as distinguished from the alleged damage to the buildings, the destruction of personal property and the loss of profits. It follows from our first holding that considerably more than $200,000 was sought upon demands for which an attachment will not lie. The affidavit therefore does not state the amount claimed to be due for attachment purposes upon contract for the payment of attorney's fees, nor does it furnish evidence that the attachment was sought upon that claim as distinguished from the others. For this reason alone the attachment should be dissolved. Doud v. Jackson, 102 Cal.App. 213, 219, 283 P. 107. But even if it should be assumed that the reference to "reasonable attorney's fees as prayed for in the complaint" was intended as an application for attachment to the amount of $75,000, it is obvious that the affidavit would not support a writ for the amount of $200,000. Finch v. McVean, 6 Cal.App. 272, 91 P. 1019; Murillo v. Toole, 47 Cal.App.2d 725, 729, 118 P.2d 895.

The order is reversed with instructions to dissolve the attachment.

WOOD and VALLÉE, JJ., concur.

91 Cal.App.2d 890

FRENCH ART CLEANERS v. STATE BOARD OF DRY CLEANERS.

Civ. 13913.

District Court of Appeal, First District, Division 2, California.
May 19, 1949.

Hearing Denied July 14, 1949.

1. Appeal and error ⚷920(3)

The issuance of a preliminary injunction restraining proceedings under new legislation without reciting court's reasons does not indicate for purposes of review that trial court entertained conviction that legislation was unconstitutional, but requires assumption that injunction was issued merely to maintain status quo until final determination of case.

2. Appeal and error ⚷863
Injunction ⚷158

The issuance or refusal of a preliminary injunction merely determines that court, balancing respective equities of parties, concludes that, pending a trial on the merits, defendant should or should not be restrained from exercising rights claimed by him, hence, an appellate court, in passing upon propriety of issuance or dissolution of a preliminary injunction will not determine merits of case in advance of trial.

3. Injunction ⚷136(3)

Where State Board of Dry Cleaners would suffer no serious detriment by permitting prices to continue as they were in communities in which plaintiff, who specialized in low priced dry cleaning, operated and plaintiff might suffer serious detriment if it were compelled to obey price fixing orders until their validity was determined, issuance of a preliminary injunction restraining board from enforcing price orders as against plaintiff was not error. Business and Professions Code, §§ 9563–9567, 9590, 9591.

4. Injunction ⚷85(1, 2)

Statute prohibiting issuance of injunction to prevent execution of public statute by officers prohibits restraining public officers from enforcing valid law, but does not prevent issuance at instance of one specially interested to enjoin attempted execution of an unconstitutional statute. Civ.Code, § 3423.

5. Appeal and error ⚷1152

Preliminary injunction restraining State Board of Dry Cleaners from enforcing price orders as against plaintiff pending determination of validity of statutes under which orders were issued would be modified on appeal by deleting therefrom provisions enjoining actions by board which would not interfere with plaintiff's business. Civ.Code, § 3423; Business and Professions Code, §§ 9563–9566.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by French Art Cleaners against State Board of Dry Cleaners to enjoin the enforcement as against plaintiff of certain price orders and for other relief. From an order granting a preliminary injunction, defendant appeals.

Affirmed as modified.

See also 198 P.2d 91.

Fred N. Howser, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., for appellant.

George M. Naus, San Francisco, Nathan Kessler, Oakland, for respondent.

Geo. E. Cryer, R. Alston Jones, Los Angeles, amici curiae.

GOODELL, Justice.

This is an appeal from an order granting a preliminary injunction. The court enjoined the Board from "enforcing [as to plaintiff] or seeking to enforce any of the price orders and price lists of which copies are annexed to the complaint * * * as Appendices A, B and C, and * * * from establishing any minimum price schedules pursuant to the provisions of Sections 9563 through 9566 of the Business and Professions Code * * *" until the further order of the court.

At the 1945 session the legislature enacted chapter 1517 which codified 61 sections dealing with cleaning and dyeing, including said four, into the Business and

Professions Code. Sections 9563, 9564 and 9566 were amended in 1947 (chapter 1163). The four sections in question now read:

Sec. 9563. "The board may establish minimum price schedules for the various items of cleaning, dyeing and pressing services for any city or county or other area as may be determined by the board upon the filing of a petition with it, requesting a minimum price schedule for that city or county or other area signed by seventy-five per cent (75%) or more of the persons in that city or county or other area who are licensed under this chapter."

Sec. 9564. "Upon receipt of a petition under this article the board shall investigate and ascertain those minimum prices which will enable cleaners, dyers, or pressers in that city or county or other area to furnish modern, proper, healthful and sanitary services, using such appliances and equipment as will minimize the danger to public health and safety incident to such services.

"In establishing minimum price schedules, the board shall consider all conditions affecting the business of cleaning, dyeing and pressing in that city, county or other area and the relation of those conditions to the public health, welfare and safety."

Sec. 9565. "Before the board shall establish minimum price schedules pursuant hereto in any city, county or other area, the board shall cause to be conducted in such city, county, or other area a cost survey * * * to determine the cost of the various items of cleaning, dyeing and pressing service for which minimum price schedules shall be established, and in establishing such minimum price schedules the board shall not fix a price for any service at a sum less than that which is shown to be the cost price of such service in the cost survey which shall be conducted in the city, county or other area for which such price is established. * * *"

Sec. 9566. "At the conclusion of an investigation therefor, the board may establish a reasonable and just minimum price schedule conforming to the requirements of this article. If the board, after investigations made either upon its own initiative or upon the complaint of fifty-one percent (51%) or more of the persons licensed under this chapter in the city or county or other area for which the minimum price schedule is established determine that the minimum price so established or any of them are insufficient properly to provide healthful and proper services to the public and to maintain a clean, healthful, safe and sanitary cleaning, dyeing or pressing establishment, or that any minimum price set creates an undue hardship on any licensee under this act, the board may vary or fix anew a minimum price for any cleaning, dyeing or pressing service in that city, county or other area."

On January 14, 1948 the Board promulgated retail and wholesale minimum price schedules for 17 areas in Alameda County, namely, Oakland, Piedmont, Berkeley, Alameda, 12 other cities, and Castro Valley. Appendix A to the complaint contains the general order, B sets forth the retail, and C the wholesale minimum prices fixed by the schedules.

Respondent took no part in the Board's proceedings leading up to these orders although it had the right to do so.

The application for a preliminary injunction was heard on the verified complaint alone. Its allegations, in so far as they are pertinent to the questions now involved, are summarized as follows:

Under the code the Board is composed of seven members, consisting of "one public member and the owners of two retail plants, two wholesale plants, and two shops"; each of the six who are plant and shop owners has "a personal, private, direct, pecuniary and selfish interest, in common to the six, in (1) preventing price competition in the service industry and business of dry cleaning and pressing of garments worn by members of the general public, and in (2) making and maintaining as high as possible the prices paid by the members of the general public for cleaning and pressing garments worn by the latter, without regard to the interest of the general public in any lower price, even though a lower price be a fair and adequate one reached through fair and open competition for the business of cleaning and pressing garments."

Plaintiff for about 15 years by itself and its predecessor had conducted in Oakland a clothes cleaning establishment and since 1945 has been licensed to operate a dry cleaning plant.

Plaintiff is a "wholesale plant owner", i. e., more than 51% of its gross sales are to retailers who deal exclusively with the public, and in addition to its wholesale plant it is the owner of two retail stores, one in Oakland and one in Berkeley, operated under the name "Pay Less Cleaners", where cleaning and pressing is retailed to the public. As to those two stores it is a "retail plant owner."

The cleaning and pressing retailed at the two retail stores is done at plaintiff's wholesale plant, but comprises less than 25% of the total production of the wholesale plant. The remainder of more than 75% of plaintiff's wholesale production is wholesaled to independent retail stores, i. e., "retail plants" and "shops".

Union shop conditions prevail in the cleaning and pressing industry in Alameda County and plaintiff's employees are unionized; plaintiff pays not less than the union scale of wages to its employees and maintains union hours and working conditions in its plants.

In August, 1947, more than 75% of the Board's licensees in Alameda County, acting under section 9563, petitioned the Board to "establish minimum price schedules for various items of cleaning, dyeing and pressing service in said Alameda County for both wholesale and retail" in which plaintiff did not join or acquiesce.

Thereupon the Board conducted a cost survey and investigation, and at its conclusion issued the orders in question.

Notwithstanding the petition requested the Board to establish minimum prices for the items of cleaning, dyeing and pressing, the orders fix prices for cleaning alone, without any mention of pressing, excepting only that in the fair trade practice rules appearing in Exhibits B and C it is forbidden that pressing be done as "free work" in connection with any minimum price charged for the cleaning of a garment.

"The prices * * * established by said Board * * * are exorbitant, unreasonable and unfair to the members of the general public."

There are in Alameda County not more than 76 cleaning plants licensed "to perform the service of dry-cleaning by immersion and agitation, or immersion only, in a volatile, commercially moisture-free solvent", within the meaning of sections 9501 and 9507 and that those 76 plants dry-clean the hundreds of thousands of outer garments worn by the persons comprising the population of the county.

(Here follow allegations describing the several processes and procedures of wet-cleaning and dry-cleaning, not necessary to be set forth. The process of plain and fancy "spotting" is likewise described elsewhere in the complaint.)

After these descriptions the complaint alleges that "dry solvent has identical chemical and physical effects in all dry-cleaning plants. Its action on soil in garments in any one plant is uniform with its action on soil in any other plant. It is as safe and healthful in any one plant as in any other. It is * * * a safety solvent, and has completely superseded the use of gasoline two decades ago. Its safety in use is under the sole jurisdiction of the State Fire Marshal * * * Plaintiff's dry-cleaning operations are conducted thereunder in a safe and healthful manner."

Plaintiff does not (as some plants do) supplement power pressing with handiron pressing, nor does it (as some plants do) enclose finished garments in packages or containers for delivery to customers, nor does it (as some plants do) "finish" cleaned and pressed garments by mending, sewing on buttons, and other small repairs.

The following allegations are quoted verbatim:

"VII. (a) The members of the general public who do not clean and press their own garments but have the service performed by another divide broadly into two classes: (1) Those who, regardless of the higher cost and price, desire the fullest possible extent of cleaning, spotting and pressing; (2) Those who desire to keep their cost of living down by disregarding the ultimate in the esthetics of garment beauty and therefore voluntarily and knowingly desire, seek and choose the lower cost and price attainable in a cleaning and pressing service, such as that given by plaintiff, from which wet-cleaning, fancy spotting, hand pressing, and finishing and packaging frills are excluded.

"(b) The minimum price for a man's suit or woman's dress under Exhibit B is $1.22, which covers the service for the higher cost and price class, aforesaid. Plaintiff's price is 69 cents for the lower cost and price class, aforesaid.

"(c) The cleaning, spotting and pressing service rendered by plaintiff is proper, healthful and sanitary; it is satisfactory to plaintiff's customers; and the plaintiff's lower prices yield it a fair and reasonable profit. Those members of the public in Alameda County who are able and willing to pay $1.22 for cleaning and pressing a man's suit or woman's dress will not give their business to plaintiff. Those who are unable or unwilling to pay more than 69 cents per garment will give their business to plaintiff * * *

"IX. There is a controversy between plaintiff and defendant over the validity of the orders of said Board annexed as Exhibits A, B and C. Defendant asserts that each of them is valid. Plaintiff asserts that each is invalid, upon the following grounds;

"1. Said orders, and the statutory provisions upon which they are based, are not a valid and reasonable exercise of the police power for the public benefit, but are arbitrary prohibitions in violation of due process and equal protection of the laws, under the Fourteenth Amendment, in that they result and will result only in private benefit of a small, private group of competitive cleaners and pressers. They do not benefit, but they injure by greatly higher prices, the members of the public who desire to purchase cleaning and pressing service.

"2. The delegation of price-fixing to a board of seven members of whom six are interested members of the competitive business of dry-cleaning is a vicious and unlawful delegation of legislative power.

"3. The price-fixing provisions of said orders and the statutory provisions on which they are based are invalid because of delegation of legislative power to private persons to initiate the imposition of, and to impose, a minimum price upon dissenting competitors.

"4. The statutory provisions on which said orders are based deny equal protection of the laws, under the Fourteenth Amendment, to the minority group of a non-assenting 25% under section 9563 of said Code, and the 49% group under section 9566 of said Code.

"5. The price-fixing orders * * * and the statutory provisions upon which they are based unconstitutionally deny to plaintiff the liberty of contracting with those men and women in Alameda County who are perfectly content to pay 69 cents for dry-cleaning a suit or dress and machine pressing it but do not care to have fancy wet-cleaning and hand ironing and other frills added to the service with resulting higher cost and price.

"6. The price orders * * * are invalid because they alter and enlarge the statute, upon which they purport to be based, by exceeding the powers granted under the statute to said Board."

The prayer is that the orders be declared invalid, and that preliminary and final injunctions be granted, restraining the Board from enforcing or attempting to enforce the orders, or the statutory provisions on which they are based, and for general relief.

Appellant says "The trial Court entertained the conviction that any minimum price statute applicable to the dry cleaning industry would be necessarily unconstitutional and enjoined the enforcement of the minimum price provisions of said Code upon that broad ground. *The single question presented by the appeal is, therefore, the abstract constitutionality of the said minimum price provisions.*" (Emphasis appellant's.)

[1] It does not necessarily follow, simply because the injunction issued, that the court entertained the conviction that the legislation was unconstitutional. It is to be assumed, in the absence of any record of the court's reasons, that it was issued, as preliminary injunctions usually are, merely to maintain the status quo until the final determination of the case. Stewart v. Superior Ct., 100 Cal. 543, 545, 35 P. 156, 563; Tulare Irr.Dist. v. Superior Ct., 197 Cal. 649, 671, 242 P. 725; People v. Black's Food Store, 16 Cal.2d 59, 62, 105 P.2d 361.

[2] The effect of a preliminary injunction is explained in 14 Cal.Jur. pp. 184-5 as follows: "The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or should not be restrained from exercising the rights claimed by him. Indeed, when the cause is finally tried it may be found that the facts require a decision against the party prevailing on the preliminary application. *It therefore follows that an appellate court in passing upon the propriety of the issuance or dissolution of a preliminary injunction will not determine the merits of the case in advance of the trial,* and its decision as to the propriety of granting the writ is no intimation of what the judgment of the lower court should be at the final hearing; nor is it the law of the case in a subsequent appeal from the final judgment on the merits." (Emphasis added.)

In "balancing the respective equities of the parties" the trial court in the exercise of its discretion had to give careful consideration to the consequences of whatever action it took. On the one hand was the Board. The granting of the injunction would (as it did) restrain temporarily the enforcement of its orders in 17 locations. On the other hand was the respondent. If no injunction issued the orders would be immediately enforceable and if respondent defied them *it* would be subject to injunction on the petition of the Board under section 9567, and to fines of from $25 to $200 for each day's violation under secs. 9590, 9591, Business & Professions Code. Hence under threat of injunction and heavy fines respondent would be forced to quit its 69 cent business and adopt the $1.22 minimum (using those figures as typical and illustrative.)

Respondent alleged that "The price-fixing orders * * * and the statutory provisions upon which they are based unconstitutionally deny to plaintiff the liberty of contracting with those men and women in Alameda County who are perfectly content to pay 69 cents for dry-cleaning a suit or dress and machine pressing it but do not care to have fancy wet-cleaning and hand ironing and other frills added to the service with resulting higher cost and price." This is but another way of saying that if the minimum price schedules were enforced respondent would lose this lower-bracket group of its customers. While awaiting trial it is conceivable that it might lose them *for all time,* even though it eventually won the case.

[3] It may be assumed that the court concluded, after weighing such possibilities and the consequences to both sides, that appellant would suffer no unusual or serious detriment by permitting prices to "ride" as they were in these 17 communities, and that less harm all around would come by granting the injunction pendente lite than by denying it.

The injunction was issued on the verified complaint alone see Porters Bar Dredging Co. v. Beaudry, 15 Cal.App. 751, 759, 115 P. 951, as section 527, Code Civ.Proc. permits. Appellant could have filed a verified answer or affidavits but it elected to do neither. In its briefs, however, it "joins issue" on several allegations of the complaint. It states that this allegation, or that, is not true. It states that the incomplete and inferior service which respondent gives its customers is not known to the customers to be incomplete or inferior, and that therefore they are deceived into thinking they are getting $1.22 worth of service for their 69 cents. It appears to us that this treatment of the case by appellant bears out respondent's contention that the facts relating to the actual conduct, practices and usages of the trade, of which courts have no judicial knowledge, must, of necessity, be brought out at a trial, before any court can decide the ultimate question of constitutionality.

In Kresge Co. v. Couzens, Mayor, et al., 290 Mich. 185, 287 N.W. 427, 428, 124 A.L.R. 543 (cited by respondent), it was held that an ordinance of the City of Detroit, while ostensibly enacted in the public interest, was in fact an "unreasonable interference with the rights of citizens to carry on a legitimate business" and "an attempt to stifle competition rather than to enforce reasonable and necessary regulations". Respondent claims that such is the effect of the challenged legislation and it has alleged that the orders and the legislation on which they are based "will result only in private benefit of a small, private group of competitive cleaners and pressers" to the detriment, not the benefit, of the public.

The case of Brock, as State Director of Agriculture, et al. v. Superior Court, 12 Cal.2d 605, 86 P.2d 805 settles the question now presented. The Director, acting under the 1935 Agricultural Adjustment Act sought by a system of licensing and other means to limit the production of grape fruit to the end that the artificial scarcity thus resulting would elevate prices. In the main litigation certain growers obtained a temporary injunction to prevent the Director from putting the plan into operation as to themselves on the ground that the measures were unconstitutional. By prohibition the Director sought to compel the Superior Court to dissolve the temporary injunction issued in the main litigation, but the Supreme Court in an opinion which comprehensively deals with the problem—in all essentials the same as that now presented—denied the writ. The court points out that in a suit to enjoin the enforcement of legislation where the complaint tenders issues of fact touching the question of constitutionality "The plaintiffs are entitled to the findings of a trial court upon those issues." In denying the writ the court held the temporary injunction to have been properly issued. At page 614 of 12 Cal.2d, at page 808 of 86 P.2d it cites numerous cases, including Polk Co. v. Glover, 305 U.S. 5, 59 S.Ct. 15, 83 L.Ed. 6, and from the latter it quotes the following:

"We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity. The allegations of the bill as to trade conditions and practices, and as to the effect of the required embossing of cans, raise particular questions which can hardly be said to lie within the range of judicial notice. The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable. See Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 211-213, 55 S.Ct. 187, 192, 193, 79 L.Ed. 281, and cases cited. And that determination requires a hearing in due course upon the issues raised by the pleadings."

See, also, Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 511, 78 L.Ed. 940, 89 A.L.R. 1469, where the court said: "* * * a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because *the reasonableness of each regulation depends upon the relevant facts.*" (Emphasis added.)

[4] In the instant case appellant relies on section 3423 of the Civil Code. In the Brock case, the petitioners did likewise, but the court 12 Cal.2d at page 609, 86 P.2d at page 807, said: "The petitioners place their principal reliance upon section 3423 of the Civil Code which provides that 'an injunction cannot be granted * * * to prevent the execution of a public statute, by officers of the law, for the public benefit'. This section has been construed as a limitation upon the power of a court to restrain public officers from enforcing a valid law (Reclamation District v. Superior Court, 171 Cal. 672, 154 P. 845), but it has uniformly been held that one specially interested may enjoin the attempted execution of an unconstitutional statute."

From what has been said it is clear that any discussion on this appeal, of the constitutionality of the legislation would be unnecessary as well as inconsistent with the reasons which we have already given.

[5] The injunction, in addition to halting the enforcement of the orders contained in appendices A, B and C in the 17 communities, enjoined, as to the plaintiff, the establishing of *any* minimum price schedules under sections 9563 through 9566. The injunction includes by its terms action which may not interfere in the least with plaintiff's business. As far as the present

case is concerned, plaintiff can complain only of orders already made which affect its business.

Accordingly, the trial court is directed to modify the injunction by striking therefrom the words:

"and are further restrained and enjoined from establishing any minimum price schedules pursuant to the provisions of Sections 9563 through 9566 of the Business and Professions Code of the State of California."

As so modified the order appealed from is affirmed, each party to pay its own costs on appeal.

NOURSE, P. J., and DOOLING, J., concur.

91 Cal.App.2d 872

CONNORS et al. v. SOUTHERN PAC. CO. et al.

Civ. 7600.

District Court of Appeal, Third District, California.

May 17, 1949.

Hearing Denied July 14, 1949.

1. Railroads 🔑350(5)

In action against railroad for death of decedent resulting when truck decedent was driving collided with train which was crossing highway on a spur track, negligence of defendant in failing to provide suitable lighting for crossing or to give adequate warning of presence of train was for jury.

2. Railroads 🔑346(5)

In action against railroad for death of decedent resulting when truck decedent was driving on public highway at night collided with freight train which was crossing highway on a spur track, defendant had burden of proving that decedent was contributorily negligent.

3. Trial 🔑165

On defendant's motion for a nonsuit, made upon termination of plaintiff's evidence, plaintiff is entitled to full credit for all favorable evidence together with reasonable inferences which may be drawn therefrom, and trial court may not weigh evidence or discredit witnesses, and, if evidence is conflicting, trial court must accept testimony which is most favorable to plaintiff.

4. Railroads 🔑309

Owners and operators of trains must exercise ordinary care in crossing public highways commensurate with conditions existing and hazards to be encountered.

5. Railroads 🔑350(6)

Where there is substantial evidence of a lack of ordinary care of railroad or its trainmen in crossing a public highway, question of negligence of railroad should ordinarily be presented to jury, and a nonsuit should not be granted.

6. Trial 🔑139(1)

In action for death of decedent resulting when truck decedent was driving at night collided with freight train crossing highway on a spur track, issue of whether whistle or bell of train had been sounded while train was crossing highway was for jury under testimony of witness, who would have heard whistle and bell if they had been sounded, that they heard no whistle or bell, notwithstanding trainmen testified that whistle and bell had been sounded.

7. Railroads 🔑346(5)

In action for death of decedent resulting when truck decedent was driving at night collided with train which was crossing highway on a spur track, plaintiffs were entitled to rely on statutory presumption that deceased took due care of his own safety in operating the truck at time of collision, to be weighed by the jury. Code Civ.Proc. § 1963, subd. 4.

8. Railroads 🔑350(26)

In action for death of decedent resulting when truck decedent was driving at night collided with freight train which was crossing highway on a spur track, plaintiffs' evidence did not as a matter of law dispel statutory presumption that deceased took due care of his own safety in operating truck at time of accident, so as to justify granting motion of railroad for nonsuit at close of plaintiffs' negligence on ground that decedent was contributorily negligent. Code Civ.Proc. § 1963, subd. 4.

◆

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Rae Connors, and Donna Connors and Evart Connors, minors, appearing by their guardian ad litem, Rae Connors, against Southern Pacific Company, a corporation, and others, for death of Charles E. Connors, deceased, resulting when truck decedent was driving collided with train at crossing. From a judgment of nonsuit, plaintiffs appeal.

Judgment reversed.

Miller & Kroloff, Stockton, McAllister & Johnson, Sacramento, for appellant.

Gilbert L. Jones, R. B. Daley, Daniel Lane, Roy A. Weaver, Stockton, for respondent.

THOMPSON, Justice.

The plaintiffs, who are the surviving widow and minor children of Charles E. Connors, have appealed from a judgment of nonsuit which was granted at the close of their evidence. Mr. Connors, who was driving a truck loaded with fruit on the public highway in the nighttime, was instantly killed as the result of colliding with a Southern Pacific railway train which was crossing the highway on a spur track near Tracy. The appellants assert that the crossing is hazardous and inadequately lighted and that no adequate warning of the passing of the train was given.

We are convinced the court erred in granting the motion for nonsuit at the close of plaintiffs' evidence. There appears to be sufficient evidence, with the reasonable inferences to be drawn therefrom, of the negligence of the defendants in failing to provide suitable lighting for the crossing or to give adequate warning of the presence of the train to require a denial of the motion for nonsuit, and to entitle the cause to be submitted to the jury. The burden was on the defendants to prove the asserted contributory negligence of the deceased. We think contributory negligence does not appear as a matter of law. The motion should have been denied.

Charles E. Connors was thirty-four years of age. He was married to the plaintiff Rae Connors in 1930. There are two children, aged 15 and 13 years, respecively, as the issue of their marriage. They lived in Sacramento. He had been employed for about two years by Earl M. Fletcher, an orchardist of the Sacramento Valley, to drive a truck and to haul fruit to the market in that vicinity. He usually hauled fruit to the Libby, McNeil and Libby cannery in Sacramento. He was an industrious and capable truck driver. On the occasion of the accident he was driving a diesel truck and a trailer loaded with peaches, from Woodland by way of Sacramento and Stockton to Sunnyvale. The vehicles and load of fruit weighed over twenty-two tons. The machine was equipped with good headlights, spotlights, Westinghouse air brakes, and twelve gears. Frank Wardlow, another employee of Mr. Fletcher, accompanied him on that trip with another similar truck and trailer. At the time of the accident, which occurred at 2:30 o'clock in the morning, Wardlow followed immediately behind the truck driven by Mr. Connors. They procured their loads of fruit and reached Sacramento at six o'clock P.M. on August 19, 1947, where they ate their dinner and then slept for about four hours. They left Sacramento at midnight and arrived at Stockton about an hour later, where each ate a sandwich and drank some coffee. There is no evidence or contention that either of them drank any intoxicating liquor. They traveled about thirty-five or forty miles per hour. It took them thirty minutes to drive from Stockton to the point of the collision, near Tracy, which is twenty-one miles distant.

At the place where the accident occurred, highway number 50 extends easterly and westerly. About one-half mile east of Tracy the Southern Pacific main line track crosses the highway at a right angle in a northerly and southerly direction. The highway crosses the main railroad track at that point by means of an overpass. Beyond that point, and about a quarter of a mile to the west of the overpass, a spur track, which is seldom used, parallels the main line, passing near or into the Heinz plant. From the apex of the overpass to the spur track the highway grade descends sharply. There is no light in the immediate vicinity of the spur track crossing. There is one city light on a twenty or thirty foot pole about a quarter of a block to the west of the spur track near the outskirts of the City of Tracy. There is also another light at the entrance to the Heinz plant, which is 300 or 400 feet from that crossing. Several witnesses testified that the spur track crossing was poorly lighted. A traffic officer testified that "visibility and lighting" at that point were "very poor." A witness, William Iam, testified "that is the dark spot there at night." John Borges, speaking of the city light to the west of the spur track, said, "I believe there is one, a *dim light.*" Regarding the spur track crossing he said, "Well, it is always dark" there. There is absolutely no evidence that the deceased knew that was a hazardous crossing at night, or even that the spur track existed at the foot of the grade beyond the overpass of the main line track.

We may reasonably infer that when the deceased had traversed the overpass he thought he was beyond the hazard of the railroad crossing, and that he was not aware of the spur track at the foot of the grade. As he approached the overpass he threw the clutch into lower gear to climb the grade. When he passed the apex, he switched the clutch back into higher gear. William Iam, a truck driver for the Dairymaid Creamery, who chanced to be standing near a building about 150 feet from the crossing, testified that he distinctly heard the deceased "as he shifted into gears" at that point. That evidence of hearing the shifting of gears on the down grade, just before the collision occurred, refutes the respondents' theory that Mr. Connors was then asleep. It also furnishes some evidence that the deceased was not aware of the spur track hazard at the foot of the grade. As the deceased descended the grade, his headlights and spotlights were burning "in perfect condition all the way through." His companion, Mr. Wardlow, testified as follows: "Q. Did Mr. Connors have on his truck lights?" to which he replied, "Yes. * * * two spotlights, two headlights." This furnishes some evidence of due care on the part of the deceased.

It appears from the testimony of trainmen, which was taken under Section 2055 of the Code of Civil Procedure, that just before Mr. Connors reached the overpass, defendants' train, consisting of fifteen low gondola and beet-rack cars, was traveling slowly in a southerly direction on the spur track. The gondola cars were over forty feet in length. The train was over five hundred feet in length. The switch engine was hauling the train toward or past the Heinz plant. The crew consisted of an engineer, fireman, and three trainmen. Robert McArthur was riding on the front footboard of the engine. Each of the trainmen had a lantern. Before crossing the state highway the train stopped at the highway so the trainmen might look for traffic and place fusees on the highway to warn motorists of the passing of the train. McArthur had a lantern and two fusees. We may infer that one fusee was intended to be placed on either side of the passing train. All other trainmen remained in the cab of the engine. McArthur said that he placed one fusee on the northern shoulder of the road west of and about three feet from the track. None was placed on the east side of the spur track. He put the other fusee in his pocket, boarded the engine and signaled to the engineer to proceed. The gondola cars were painted either black or dark red. They were difficult to see in the nighttime. The cars were equipped with no lights or reflectors. No trainmen, with or without lanterns, were stationed on or beside the moving cars. They all remained in the cab. It is obvious that while the cars were passing the crossing the burning fusee on the west side of the intervening train would furnish no warning whatever to a motorist approaching on the highway from the east. There was an ordinary, unlighted cross-arm sign near the crossing and white lines with the usual "R.R." letters were painted on the pavement near the spur track, which afforded little warning to a highway motorist traveling in the dark of the night.

The engineer testified that before crossing the highway he blew the whistle and rang the bell. Several witnesses, standing near by, said that they heard no whistle or bell. After the engine had passed the crossing a considerable distance, it is apparent that the headlight would furnish little or no warning of the presence of the train to motorists approaching on the highway. The train proceeded slowly, at a speed of not more than five or six miles per hour. We may assume that, for the purpose of this appeal, while Connors was coming down the grade his headlights would undershoot, for some distance, the passing cars. If he could see the highway over the tops of the low gondola cars, and did not observe the cars because of their dark color and the lack of crossing lights, he would be led to believe the highway was open and unobstructed, if indeed he knew the spur track was there.

The engine had passed the crossing some 200 feet or more when the truck crashed into the side of the fifth or sixth gondola car behind the engine. It struck with such force that the gondola car was derailed. The truck was damaged, and Mr. Connors was instantly killed.

[1, 2] We are convinced the foregoing evidence furnishes adequate proof of defendants' negligence to entitle the cause to be submitted to the jury, and that the motion for nonsuit should therefore have been denied. The burden was on the defendants to prove contributory negligence. Certainly the evidence does not show contributory negligence as a matter of law. We are of the opinion the evidence, uncontradicted by further testimony, would support a verdict for plaintiffs, if the cause had been submitted to the jury and a favorable verdict had been returned for them.

[3] The rule with respect to the granting or denial of a motion for non-suit upon the termination of plaintiff's evidence is well established. The plaintiff is entitled to full credit for all favorable evidence together with the reasonable inferences which may be drawn therefrom. The trial court may not weigh the evidence upon that motion, nor discredit witnesses. If the evidence which has been adduced is conflicting the trial court must accept that testimony which is most favorable to the plaintiff. Williamson v. Pacific Greyhound Lines, 78 Cal.App.2d 482, 485, 177 P.2d 977; Seaford v. Smith, 86 Cal.App.2d 339, 343, 194 P.2d 792; Mastro v. Kennedy, 57 Cal.App.2d 499, 134 P.2d 865; Mastrangelo v. West Side Union High School Dist., 2 Cal.2d 540, 544, 42 P.2d 634; Nichols v. Southern Pac. Co., 58 Cal.App.2d 91, 98, 136 P.2d 332; Estate of Rabinowitz, 58 Cal.App.2d 106, 135 P.2d 579; 9 Cal.Jur., Sec. 35, p. 551; 5 Cal.Jur. 10-Yr. Supp., Sec. 35, p. 267.

[4, 5] In railroad crossing cases, the owners and operators of trains are bound to exercise ordinary care in crossing public highways commensurate with the conditions existing and the hazards to be encountered. Peri v. Los Angeles Junction Ry., 22 Cal.2d 111, 120, 137 P.2d 441; Harper v. Northwestern Pac. R.R. Co., 34 Cal.App.2d 451, 93 P.2d 821; Mallett v. Southern Pac. Co., 20 Cal.App.2d 500, 68 P.2d 281. When there is substantial evidence of a lack of ordinary care of the railroad company or its trainmen in crossing a public highway, that question should ordinarily be presented to the jury for its determination, and a nonsuit should not be granted. In the Peri case, supra, the court said, 22 Cal.2d at page 122, 137 P.2d at page 447:

> "* * * Likewise, it is only reasonable to say that the necessity, nature, character and extent of the warnings such as flagmen, flares, lights and signals, shifts with the circumstances of the particular case, and is a question of fact in each case. See Cooper v. Southern Pacific Co., 43 Cal.App.2d 693, 111 P.2d 689; Alloggi v. Southern Pacific Co., 37 Cal.App. 72, 173 P. 1117; California Rendering Co. v. Pacific Elec. Ry. Co., 205 Cal. 73, 269 P. 922."

In the Mallett case, supra, a judgment for plaintiff was affirmed on appeal. In that case the driver of an automobile, who was familiar with the crossing in question consisting of a main track and two parallel side tracks, which were provided with a wig-wag signal not then swinging and a light situated on a pole 160 feet from the crossing, ran in the nighttime into a low gravel gondola car attached to an engine and several other cars, which blocked the crossing in the town of Corning. She was seriously injured. It was contended she was guilty of contributory negligence because the presence of the train across the highway was itself a sufficient warning since her headlights should have disclosed the obstructing gondola car. Regarding that subject, this court said, 20 Cal.App. 2d at page 505, 68 P.2d at page 284:

> "* * * It is common knowledge that a black stationary object [the gondola car] against the dark background of a highway is difficult to see on a dark night, even with the aid of standard headlights. Obviously, the color of an object on the highway on a dark night, and the presence of other objects which may deepen the shadows in that vicinity, must be considered in determining how clearly it may be seen by means of standard automobile headlights. For the reason that standard headlights of an automobile do not clearly illuminate the dark surface of a highway, the motor vehicle department paints a white stripe in the center thereof. [Citing an authority.]"

In the Harper case, supra, a nonsuit was reversed on appeal. A hearing by the Supreme Court was denied. The facts of that case were somewhat similar in many respects to those of the present suit. In that action the driver of an automobile who was not familiar with the locality, and did not know of the presence of a train across the highway on a spur track, on a dark night ran into a freight car which then blocked the highway in the City of Petaluma. The engine had crossed the highway and its headlight therefore afforded no warning. Several cars were attached to the engine. They were painted a dark red color, and were not easily distinguishable in the darkness. Two brakemen with their lanterns were riding on the ladders attached to the cars. The conductor, with his lantern, stood on the highway on the side opposite that upon which the deceased was approaching. There was one 60 candle-power electric lamp on a pole 300 feet from the crossing. A row of trees on Wilson Street helped to render the crossing obscure. There was also an ordinary cross-arm sign at that crossing. There was a conflict of evidence regarding the blowing of a whistle and the ringing of a bell. This court said [34 Cal.App.2d 451, 93 P.2d 824]: "We believe it was error to grant a nonsuit under the conditions here existing, and the order and judgment must be reversed."

[6] In spite of the fact that the engineer and a trainman in this case testified that the whistle was blown and the bell rung while the train was crossing the highway, the evidence of other witnesses, who stood near by and were in a position to have heard the whistle and bell if they had been sounded, that they heard no whistle or bell furnishes some evidence of negligence in that respect, entitling that issue to be presented to the jury. Peri v. Los Angeles Junction Ry., supra; Jones v. Southern Pacific Co., 74 Cal.App. 10, 26, 239 P. 429; White v. Los Angeles Ry. Corp., 73 Cal.App.2d 720, 727, 167 P.2d 530.

[7, 8] We are of the opinion the plaintiffs were entitled to rely upon the presumption created by Section 1963, subdivision 4, of the Code of Civil Procedure, that the deceased took due care of his own safety in operating the truck at the time of the accident, to be weighed by the jury under the circumstances of this case. Smellie v. Southern Pacific Co., 212 Cal. 540, 552, 299 P. 529; Westberg v. Willde, 14 Cal.2d 360, 365, 94 P.2d 590. We may not say that the presumption was dispelled by the evidence which was adduced by plaintiffs, as a matter of law. There is evidence in this case that the deceased was traveling downgrade with a heavy load; that he was in control of his brakes which were in good condition, and that his headlights and spotlights were burning brightly. The inference is that he had no knowledge of the presence of the freight train, or even that there was a spur track at the bottom of the grade. We find no evidence which would dispel the presumption or render him guilty of contributory negligence as a matter of law.

The judgment of nonsuit is reversed.

ADAMS, P. J., and PEEK, J., concur.

91 Cal.App.2d 912

PEOPLE v. INGRAM.

Cr. 4296.

District Court of Appeal, Second District, Division 3, California.

May 19, 1949.

1. **Assault and battery** ⚷56

In order to complete offense of assault with a deadly weapon, intended victim need not be actually injured.

2. **Criminal law** ⚷260(11)

In prosecution for assault with a deadly weapon tried to the court, intent with which shots were fired was for trial court.

3. **Assault and battery** ⚷56

If a rifle is deliberately and unlawfully fired toward another person in a manner likely to produce great bodily harm, an assault with a deadly weapon may be accomplished even though defendant does not really intend to hit the victim.

4. **Assault and battery** ⚷56

An assault with a deadly weapon does not involve necessity of proof of any specific intent to commit it.

5. **Assault and battery** ⚷92

Evidence sustained wife's conviction of assault with a deadly weapon on husband. Pen.Code, §§ 240, 245.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Lillian B. Ingram was convicted of assault with a deadly weapon, and she appeals.

Affirmed.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Fred N. Howser, Attorney General, and Kent C. Rogers, Deputy Attorney General, for respondent.

VALLEE, Justice.

Appellant was charged with assault with a deadly weapon upon her husband, George W. Ingram, with intent to commit murder. She was convicted of assault with a deadly weapon by the court, sitting without a jury, and sentenced to the county jail. She appeals from the judgment.

Appellant claims that the evidence is insufficient to support the judgment. The claim is without merit. The facts are these:

On May 7, 1948, about 8:30 p.m., appellant, her husband and a Mrs. Cloud were present in appellant's home. An argument took place between appellant and her husband. She asked him to take down a curtain rod. He said, "No," there was no hurry. She said, "I'll go in there and get that gun and blow your brains out. Maybe you think I won't do it." She obtained her ".38 revolver," waved it around, and again said she would blow his brains out—that he was "just a no-good so and so." About a minute later she fired a shot which went through the refrigerator door. Her husband was sitting in a chair about 3 feet from the refrigerator. In less than a minute, with the gun pointed directly at her husband, she fired a second shot which lodged in the floor about 6 inches from his left toe. Appellant's husband did not threaten or strike her. He was not armed nor did he have his hands on the gun. The night of the shooting the parties had "tea for supper." Appellant admitted she fired one shot at her husband.

[1-4] Penal Code, section 240, defines assault as: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." And Penal Code, section 245, provides that "Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is" guilty of a public offense. It is not necessary, in order to complete the offense of assault with a deadly weapon, that the intended victim be actually injured. The intent with which the shots were fired was a matter for the determination of the trial court. In People v. Corlett, 67 Cal.App.2d 33 at page 55, 153 P.2d 595, 605, 964 the court stated: "If a rifle is deliberately and unlawfully fired toward another person in a manner 'likely to produce great bodily injury,' an assault

with a deadly weapon may be accomplished even if the defendant does not really intend to hit the victim. It has been held that an assault with a deadly weapon does not 'involve the necessity of proof of any specific intent to commit it.' People v. Marseiler, 70 Cal. 98, 100, 11 P. 503, 504; People v. Gordan, 103 Cal. 568, 37 P. 534; People v. Lopez, 81 Cal.App. 199, 202, 253 P. 169; People v. Lim Dum Dong, 26 Cal.App.2d 135, 140, 78 P.2d 1026."

[5] The evidence abundantly supports the judgment. Any decision, other than one of guilty of assault with a deadly weapon, would have been a miscarriage of justice.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

92 Cal.App.2d 53

GARCIA et al. v. CITY OF SANTA MONICA et al. (two cases).

Civ. 16832.

District Court of Appeal, Second District, Division 1, California.

May 25, 1949.

1. Automobiles 🔑245(26)

In action against city and police officers for injuries sustained when police officers attempted to start a stalled automobile in which plaintiff was riding by pushing it, where the evidence was conflicting as to whether the officers were acting within the scope of their employment court properly submitted question to jury.

2. Automobiles 🔑244(1)

In action for injuries sustained when police officers attempted to start a stalled automobile in which plaintiff was riding, by pushing it, verdict for defendant city and officers was sustained by the evidence.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Personal injury action by Lauretta M. Garcia, formerly Lauretta M. Wingate, and J. A. Wingate against City of Santa Monica and others and by Lauretta M. Garcia, formerly Lauretta M. Wingate, against City of Santa Monica and another. From a judgment for defendants, Lauretta M. Garcia, formerly Lauretta M. Wingate, appeals.

Judgment affirmed.

A. W. Brunton, Los Angeles, for appellant.

Tripp & Callaway, Los Angeles, for respondents.

DORAN, Justice.

This is an appeal by plaintiff from the judgment following a jury verdict for defendants.

According to appellant, "Plaintiff, Lauretta M. Garcia, seeks to recover damages for personal injuries and moneys expended as a result thereof, caused by the negligence of defendant, police officer, John Twiford, while engaged in the due course of his employment, at which time he used an automobile owned by the defendant, City of Santa Monica to push an automobile in which plaintiff was riding as a passenger. The car in which plaintiff was riding was pushed in such a manner as to cause it to jump the curb and collide with a power pole. As a result of the officer's negligence plaintiff sustained serious injuries and substantial damage."

It appears from the record that the accident occurred about two o'clock a. m. in the City of Santa Monica. Plaintiff's car was "stalled" and defendant Twiford and another officer in a police car undertook to start the motor by shoving the car. Officer Twiford testified:

"A. We stopped pushing the car at 15th, and it appeared to be started, just showed on the crosswalk, what would be the crosswalk on this side of 15th.

* * * * * *

"Q. You say you started to turn down 15th? A. Yes.

"Q. And the other car had gone on across 15th? A. Yes; it was apparently operating under its own power at that time. We were going back down to start our patrol."

Following the accident plaintiff signed the following statement relating to the accident:

"January 25, 2:12 a. m. I, Eleanor Rivas with Lauretta Wingate, was sitting in our car which was stalled in the middle of the intersection at 14th and Montana, headed east on Montana. When Officer Twiford and Cook passed in a squad car we asked for assistance and were told that they were on a detail and would be back to help us if we were still there when they finished their detail. The officers came back and said they would push us out of the intersection and see if our car would start. They pushed us up 15th and Montana where they released us. Our car went out of control near the alley between 15th and 16th Street when the steering gear locked. We jumped the curb and struck a telephone pole head-on."

It is contended on appeal that the evidence is "insufficient to sustain the verdict" and that certain instructions as given, as well as the failure to give others, amounted to error. It is argued in connection with the latter contention that, "The refused instructions were to have been given in the event there was no conflict in the testimony on these questions of fact. The trial court, however, rejected the instructions which were applicable, according to the evidence, and gave the inapplicable instructions. Since appellant was required to submit her instructions in advance and could not be certain as to what facts would be established by the respondent Twiford, she had a right to expect that the inapplicable instructions would not be given and that the rejected instructions would be given.

[1] The instructions referred to related to the issue as to whether, "the officers were acting within the scope of their employment". It is contended by appellant that the evidence was not conflicting on this issue. The record does not appear to sustain appellant's contention in this regard. The complaint alleges and the answer denies that the officers were acting, "within the course and scope of their employment". And it cannot be successfully contended, from a review of the record, that the evidence is not in conflict on this issue. The instructions on this issue and other instructions to which appellant excepts relating to the Vehicle Code did not amount to prejudicial error.

[2] The evidence was amply sufficient to sustain the verdict.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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91 Cal.App.2d 858

McNEIL et al. v. GRANER.

Civ. 16659.

District Court of Appeal, Second District, Division 3, California.

May 17, 1949.

Rehearing Denied June 6, 1949.

Hearing Denied July 14, 1949.

1. Mines and minerals 🔑79(1)

Where participating interests in the production from oil wells were assigned in order to finance drilling of wells, apportionment of expense of extracting production, namely drilling and possible deepening of well, installation of pressuring equipment, maintenance and operation and apportionment of mineral taxes and dehydration costs, were proper matters to be arranged by contract.

2. Mines and minerals 🔑79(1)

Parties to written assignment of participating interests in the production from oil wells must be conclusively presumed to have intended exactly what they said in such agreement in absence of anything in agreement or extrinsic evidence tending to prove that they had some understanding which was imperfectly expressed.

3. Contracts 🔑154

The reasonableness of agreement must be judged as of the time when it was made and fact that after it has been in operation for several years it is found to be highly advantageous to one of the parties and detrimental to the other does not furnish ground for disregarding its plain provisions so as to equalize the benefits.

4. Mines and minerals ⚷79(1)

Written assignment of participating interests in production from oil wells, providing that royalty interest assigned was free of drilling expenses but subject to its pro rata share of mineral rights tax and deduction and payment out of proceeds of $8 per month for each one per cent assigned for operating and maintenance charges was unambiguous and authorized deduction of $8 per month for operating and maintenance costs from each one per cent interest in production assigned, though proportionate share of actual cost of operation and maintenance was considerably less.

5. Mines and minerals ⚷79(1)

Written assignment of participating interests in production from oil well, provided that royalty interest assigned should be subject to its pro rata share of mineral rights tax and ⅛0 "of" its pro rata share of operation and maintenance costs, not to exceed $8 per month for each one per cent assigned, plus its proportion of costs of dehydration, evidenced a mistake in use of quoted word for which the word "or" should be substituted in order to effectuate the obvious purpose of such provision of requiring assignees to contribute to cost of operation and maintenance, though no extrinsic evidence was offered to show such mistake.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Or".

6. Contracts ⚷157

Where it is clear that a word or term has been used inadvertently and it is clearly inconsistent with meaning of parties, it will be rejected altogether and, where, by inadvertence, words are plainly omitted from a contract, they may be supplied by construction if contract indicates what they are.

7. Contracts ⚷143

Courts will if possible give effect to all parts of an instrument.

8. Contracts ⚷143

An interpretation which gives a reasonable meaning to all provisions of instrument will be preferred to one which leaves a portion of writing useless or inexplicable, and if that is impossible, an interpretation which gives effect to the main apparent purpose of contract will be favored.

9. Contracts ⚷152, 159

In giving effect to general meaning of a writing, particular words are sometimes wholly disregarded, supplied, or transposed, "or" being given the meaning of "and" or vice versa, if remainder of agreement shows that a reasonable person in position of the parties would so understand it.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "And".

10. Contracts ⚷152, 157, 159
Statutes ⚷188, 197, 200

Clerical or grammatical errors may be corrected, single or plural language may be treated as if it were the other, or the word "and" may be substituted for the word "or" in order to arrive at the true meaning of a statute or contract.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Myrtle G. McNeil and others against George V. Graner, etc., for construction of written assignment of participating interests in the production from specified oil wells and to recover sums due plaintiffs thereunder. From portions of judgment in favor of plaintiffs, defendant appeals.

Judgment reversed in part with directions.

R. G. Akers, Long Beach, for appellant.

John E. Sisson, Edward J. Cotter, John A. Weyl, Los Angeles, for respondents

SHINN, Presiding Justice.

Plaintiffs brought this action alleging themselves to be the owners and holders severally of participating interests in the production from four certain oil wells designated as Wells Nos. 6, 7, 8 and 9 which are and for some years have been operated by defendant George V. Graner. For convenience we shall refer to the several interests in production as "units." It was alleged that plaintiffs are entitled to receive their several percentages of production less stated percentages of taxes and expenses of operating and maintaining the wells, that defendant has made false and excessive deductions on account of taxes and the cost of maintenance and operation and has failed to render true accountings to the plaintiffs and to pay them the full sums due according to their respective interests.

Plaintiffs recovered judgment. A part of the recovery was based upon the commingling of oil from the several wells and the failure to correctly account to plaintiffs for their respective shares. The appeal was not taken from this portion of the judgment. The plaintiffs were given judgment in several amounts which totalled something over $25,000, and which the court found had been deducted by defendant as cost of operation and maintenance of Wells Nos. 7 and 9, in excess of the amounts properly deductible under the terms of the participating agreements. Defendant appeals from these portions of the judgment.

The assignments were issued by defendant's predecessor to finance the drilling of the wells. It was alleged by plaintiffs, and admitted, that a controversy exists with respect to the provisions under which the units are chargeable with portions of the cost of operation and management. The judgment included a declaration as to the meaning of such provisions, as affecting Wells 7 and 9, and the money judgment resulted from the construction which the court placed upon them. Defendant also appeals from these declaratory provisions of the judgment.

The assignments of production from Well No. 9, so far as material, read as follows: "The assignor agrees that he is the owner and holder of said interest hereby conveyed; that the said oil and gas lease is in full force and effect, and that he has not heretofore sold, assigned or conveyed this royalty interest or any portion thereof; that the royalty interest hereby assigned is free and clear of any drilling expense, but shall be subject to its pro rata share of the mineral rights tax, and the deduction and payment (out of the proceeds) of the sum of Eight ($8.00) Dollars per month, for each one (1%) per cent hereby assigned, for operating and maintenance charges, plus its proportion of the cost of dehydration." The court interpreted this assignment to mean that each 1% interest in production was chargeable only with 1/80 of the total cost of operation and maintenance, not to exceed $8.00 per month. This was the construction contended for by plaintiffs. It is conceded that the total cost of operation and maintenance is chargeable against 80% of the production, the remaining 20% bearing no part of the expense. Defendant has been deducting $8 per month from each 1% interest, although the proportionate share (1/80), of such costs, has been considerably less. The judgment in favor of plaintiffs, as to Well No. 9, represents the difference between the sums deducted by defendant and the amounts that would have been deducted if each 1% interest had been charged with only its proportionate, or 1/80, share of the cost. The court's interpretation was reached without the production of extrinsic evidence; each party contended that the provisions for deductions for operating and maintenance were clear and unambiguous. We thing they are.

[1-4] Plaintiffs argue for a construction of the agreement which is clearly untenable. They say that since the deduction of $8 per month was "for operating and maintenance charges," the provision must be interpreted to mean that the unit holder would pay his proportionate share of the operating and maintenance expense but not to exceed $8 per month. There is no provision in the agreement that the unit holder will pay a proportionate share of the operating and maintenance expense and there is no reasonable basis for reading such a provision into it. The designation of the purpose of the contribution by the unit holders may not be construed as a limitation upon the amount to be contributed. Eighty per cent of the production belonged to the unit holders. Apportionment of the expense of extracting the production, namely, the drilling and possible deepening of the well, installation of pressuring equipment, maintenance

and operation and apportionment of mineral taxes and dehydration costs were proper matters to be arranged by contract. By provisions which it is unnecessary to quote the unit holders were relieved of all drilling expense, but were obligated to contribute proportionately, but only out of production, to the expense of deepening the well and the installation of pressuring equipment, and there was to be a proportionate contribution to the payment of taxes and expense of dehydration. In the absence of a specific provision respecting the cost of operation and maintenance, the agreement would have been incomplete. The investors would have been uncertain as to the amount of their liability for such costs. It was necessary, therefore, to specify the item of operation and maintenance in order to fix the obligation of the unit holders at a definite proportion, or in a definite amount. The parties agreed upon, and clearly stated, the basis and the amount of the contributions to be made by the unit holders. They assumed a definite obligation to pay a fixed sum of $8 per unit, or a total of $640 per month, no more and no less. The operator, on the other hand, undertook to maintain and operate the wells for the benefit of the owners of production and it was his duty to give them proper management and reconditioning, at whatever cost to himself. By their agreement the parties resolved an uncertainty into a certainty. The fact that the monthly expense has been less than $8 per unit does not alter the contract. It proves only that the probable expense was miscalculated. The court can no more relieve the unit holders of their obligation, or modify it, than it could relieve the operator from paying the necessary expense above the amount chargeable to the unit holders. In the absence of anything in the agreement, and without extrinsic evidence tending to prove that the parties had some understanding which was imperfectly expressed, it mut be conclusively presumed that they intended exactly what they said in the agreement. Plaintiffs argue that the agreement should be given a construction that would render it reasonable, rather than one which would lead to an absurd result, and they say it is unreasonable and absurd to require them to pay $8 per month when their proportionate share of the expense is considerably less. But the reasonableness of an agreement must be judged as of the time when it is made. The fact that after it has been in operation for a number of years it is found to be highly advantageous to one of the parties and detrimental to the other, does not furnish a ground for disregarding its plain provisions so as to equalize the benefits. There is no uncertainty or ambiguity in the contract and it is not at all unreasonable to give it a literal interpretation. If the sum of $8 in any one month exceeded 1/80 of the actual expense, defendant was entitled to retain the difference, and if the expense in any month exceeded $8 per unit, defendant alone would have to pay the excess. The contention of defendant is therefore correct; the deductions at the rate of $8 per month for each 1% interest were justified under the contracts, and the judgment with respect to this issue was in error.

[5] The assignment relating to production from Well No. 7 reads as follows: "The Assignor agrees that the royalty interest hereby assigned is free and clear of any drilling expense, but shall be subject to its pro-rata share of the mineral rights tax, and One-Eightieth (1/80) of its pro rata share of the costs of operation and maintenance, not to exceed, however, the sum of Eight ($8.00) Dollars per month for each One percent (1%) hereby assigned, plus its proportion of the costs of dehydration." The court gave a literal construction to this clause and declared that it means that each unit holder is required to pay only 1/80 of 1/80 of the monthly expense. Defendant has been deducting from the proceeds from Well No. 7 $8 per month for each unit. Conceding that these deductions were unauthorized and excessive, he contends on the appeal that the court should have interpreted "one-eightieth (1/80) of its pro rata share of the costs of operation and maintenance" to read, "one-eightieth (1/80) or its pro rata share of the costs of operation and maintenance," etc. The word "of," he says, represents a typographical error; the word "or" was intended. There was no extrinsic evidence offered or re-

ceived tending to show that this alleged mistake had been made. It was not sought to reform the instrument in this particular. We are nevertheless compelled to agree with defendant on this point.

The obvious purpose of the provision was to require contributions by the investors to the cost of operation and maintenance and to protect them from liability in excess of a stated amount. The parties anticipated that the share to be borne by the unit holders might amount to or exceed $8 per unit, or $60 per month, and they agreed upon this sum as the maximum of their share of the expense. This limitation shows clearly what the parties had in mind. The operator was to pay all expense in excess of $640 per month. But when we assume, as the parties did when they entered into the contract, that there might be a monthly expense of $640, and then apply the formula of the plaintiffs, adopted by the court, that each unit holder would be obligated to pay only 1/80 of 1/80, or 1/6400, and all of them together only 1/80, of the monthly expense, it is seen that instead of the unit holders paying $640 as the cost of the monthly operation, each one would pay but 10¢ and their total payment would amount to only $8. Before their liability would reach the agreed maximum of $640 the total expense of operation and maintenance of the one well in one month would have to reach the sum of $51,200.

[6-10] It is not possible for us to believe that the parties understood their contract to mean what it says. The writing clearly evidences a mistake of some sort, and the only reasonable explanation is that there was an error in drafting the agreement. The provision that each 1% interest in production would be "subject to its pro rata share of the mineral rights tax * * * plus its proportion of the cost of dehydration," and the use of "1/80" and "pro rata share" relative to operating and maintenance expense, strongly indicate that the parties intended that the unit holders should pay a proportionate share of the expense of production. We should, if possible, give effect to the quetioned provision. Under the interpretation urged by plaintiffs, it would impose such an insignificant obligation upon the unit holders as to practically excuse them from contributing to the expense. Clearly, the parties had no such intention. The general rule which should be applied is stated in 17 Corpus Juris Secundum, Contracts, § 308 page 725, as follows: "Where it is clear that a word or term has been used inadvertently, and it is clearly inconsistent with, and repugnant to, the meaning of the parties, it will be rejected altogether. Conversely, where, by inadvertence, words are plainly omitted from a contract, they may be supplied by construction if the context indicates what they are". Mr. Williston says, Volume 3, Revised Edition, page 1781: "The court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable; and if this is impossible an interpretation which gives effect to the main apparent purpose of the contract will be favored. Indeed, in giving effect to the general meaning of a writing, particular words are sometimes wholly disregarded, or supplied, or transposed. Thus, 'or' may be given the meaning of 'and,' or vice versa, if the remainder of the agreement shows that a reasonable person in the position of the parties would so understand it. Clerical or grammatical errors may be corrected; single or plural language may be treated as if it were the other; and other illustrations might be given of the same principle." The word "and" is often substituted for the word "or" in order to arrive at the true meaning of a statute or contract. Arnold v. Hopkins, 203 Cal. 553, 562, 265 P. 223; H. Laughlin E. Corp. v. J. W. Leavitt & Co., 116 Cal.App. 197, 2 P.2d 511; Universal Sales Corp. v. California etc. Mfg. Co., 20 Cal.2d 751, 775, 128 P.2d 665. If the words and figures, "one-eightieth 1/80," and the words "its pro-rata share" were used advisedly, the mistake must have been in the use of "of" where "or" was intended. Any other interpretation would render the agreement unreasonable and nullify one of its most important provisions.

Defendant should be required to restore to plaintiffs the amount of the excess of his charges for operation and maintenance on Well No. 7 above their proportionate shares.

The judgment is reversed as to those portions which relate to charges and deductions that have been made by defendant for the cost of operation and maintenance of Wells Nos. 7 and 9 and which declare the rights of the parties with respect thereto.

WOOD and VALLÉE, JJ., concur.

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91 Cal.App.2d 922

BAGLEY v. INTERNATIONAL HARVESTER CO.

Civ. 7503.

District Court of Appeal, Third District, California.

May 19, 1949.

1. Appeal and error 🔑1078(1)

Where appellant's contentions pertained only to first two causes of actions and none was made in regard to a third cause of action, the latter was deemed abandoned.

2. Sales 🔑266

Major question involved in determining existence of an implied warranty of fitness for particular purpose in article sold is reliance by buyer upon skill and judgment of seller to select an article suitable for his needs, and whether article is described by its trade-name or trade-mark is not conclusive, if other conditions exist raising an implied warranty of its character.

3. Sales 🔑434

Allegation that truck purchased was represented as suitable for hauling logs in certain county did not establish an implied warranty of fitness of the truck for a particular purpose so as to authorize buyer's recovery for breach thereof where it was not alleged that seller, pursuant to knowledge of purchaser's demand, selected the particular truck for that particular purpose nor that purchaser relied upon the skill and judgment of the seller in such selection, or that the agent making the alleged representation of suitability was acting in the scope of his agency. Civ. Code, § 1735,(1, 4).

4. Contracts 🔑333(9)

Allegation of purchaser of truck that seller represented that if purchaser would use truck, seller would repair it, and that thereafter purchaser continued to use the truck was insufficient allegation of acceptance of purchaser of alleged offer of the seller to continue using the truck after promise of seller to make repairs. Civ. Code, § 1605.

5. Contracts 🔑333(9)

Where an offer is made for a particular act it is not enough to allege that plaintiff merely performed the act, but allegation of performance must show that it was done with intent to accept and in consideration of the offer.

◆

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Action for breach of warranty in sale of a truck by Lester Bagley against International Harvester Company, a corporation. From a judgment dismissing plaintiff's fourth amended complaint after an order sustaining defendant's demurrer to the complaint without leave to amend, plaintiff appeals.

Affirmed.

Whitten Swafford, Yreka, Barr & Hammond, Yreka, for appellant.

Neumiller, Ditz, Beardslee & Sheppard, Stockton, for respondent.

PEEK, Justice.

This is an appeal from a judgment of the trial court dismissing plaintiff's fourth amended complaint after an order of the court sustaining defendant's demurrer to said complaint without leave to amend had been entered.

The first cause of action, which is incorporated in its entirety in the second and third causes, alleged the corporate existence of the defendant; the purchase by plaintiff of an International K-11 truck from the defendant; that at the time of purchase the defendant, through its agent, orally warranted and represented that the truck was suitable for hauling logs in Siskiyou county; that plaintiff purchased the truck because of said representation and for no other reason, and that plaintiff used the truck for said purposes but that it was not suitable therefor—that it broke down and continued to break down when so used.

The second cause of action alleged that plaintiff notified defendant of the break down; that defendant orally represented to plaintiff that if he would continue to use the truck defendant in consideration of such use would repair the same in such a manner that it could be used for the purpose contemplated; that the plaintiff continued to use the truck but that defendant failed to repair it.

The third cause of action alleged that defendant orally represented to plaintiff that if he would continue to use the truck the defendant would repair it in a manner suitable for the hauling of lumber; that at said time defendant intended to perform various experiments upon the truck for its own information and use, and that it did so experiment for a period of five months; that if defendant did not make the foregoing representation plaintiff himself would have repaired the truck but did not in reliance upon said representation of defendant; that defendant wilfully concealed from plaintiff that the purported repairs were in effect experiments; that the defendant at the time of said representation did not intend to repair the truck and that plaintiff was unable to use the truck for the entire 1944 season thereby sustaining certain specified damage.

[1] As appears from plaintiff's opening brief, but two contentions are made, both of which are without merit. (1) That the fourth amended complaint stated a cause of action for breach of an implied warranty of fitness, and (2) that said complaint stated a cause of action for breach of a contract to repair the truck, which contract contained an express warranty of fitness. Such contentions pertain only to the first two causes of action, and since none are made in regard to the third cause of action it is deemed abandoned. Ellerhorst v. Blankman, 102 Cal.App. 133, 282 P. 507.

The three causes of action alleged in said complaint are neither separately discussed nor are specific allegations referred to in support of such contentions other than the general statement that the allegations that representations were made was sufficient to support a cause of action for breach of warranty.

In support of his first contention appellant briefly refers to his prior pleadings but makes no reference to his fourth amended complaint other than to describe it as "a terse brief pleading of basic facts."

From plaintiff's briefs it would appear that he has attempted to bring himself within the provisions of sub-section 1 of section 1735 of the Civil Code, which reads:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

But by virtue of the allegations in his first cause of action that on or about a certain date he "purchased a certain International K-11 truck from the defendant" he also placed himself within the provisions of said section 4 of that same code provision, which provides:

"In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

[2, 3] However, as this court noted in Drumar Mining Co. v. Morris Ravine M. Co., 33 Cal.App.2d 492, 92 P.2d 424, 426, quoting from 59 A.L.R. 1180, said sub-

section 4 is subject to certain qualifications, that is:

> "* * * The major question in determining the existence of an implied warranty of fitness for a particular purpose, is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs, and the question as to whether the article was described by its trade name or trade mark, is not conclusive, if the other conditions exist which would raise an implied warranty of its character."

Applying these rules to the complaint now before us it is readily apparent that the bare allegation that the truck was represented as suitable for hauling logs in Siskiyou county is not such an allegation as would show that the seller was apprised of the specific hauling problems which confronted the plaintiff. In other words the truck may well have been suitable generally for hauling logs in that county and not for plaintiff's particular purpose, if any. Also, neither is it alleged that the seller pursuant to knowledge of the purchaser's demands selected the particular truck for that particular purpose. Furthermore it is not alleged that the buyer relied upon the skill and judgment of the seller in such selection nor is it averred that the agent making the alleged representation of suitability was acting in the course and scope of his agency in making such statement.

[4, 5] The basis for appellant's argument in support of his second cause of action is that "he agreed to continue to use his truck" and that such an allegation was sufficient under section 1605 of the Civil Code. However, it is readily apparent from an examination of the second cause of action that the plaintiff did not allege an agreement or promise by him with respect to the use of the truck pursuant to the alleged offer of the defendant. All that plaintiff alleges is simply that the seller represented to plaintiff that if he would use the truck defendant would repair it and that thereafter "plaintiff continued to use said truck" but otherwise there is no allegation whatsoever of any acceptance of that offer on the part of the plaintiff. Where an offer is made for a particular act it is not enough to allege, as has the plaintiff, that he merely performed the act. An allegation of performance by him would necessarily have to show that it was done with intent to accept and in consideration of the offer. In other words that plaintiff's act in continuing the use of the truck was bargained for and given in exchange for the promise of defendant to repair it if he would continue to use the truck. Rest. Contr. sec. 75.

Inasmuch as appellant has chosen to stand solely upon the sufficiency of his fourth amended complaint, and has raised no question as to whether the trial court abused its discretion in sustaining defendant's demurrer thereto without leave to amend, the order and judgment herein attacked must be sustained for the reasons hereinabove set forth.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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91 Cal.App.2d 887

SCOTT v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 13897.

District Court of Appeal, First District, Division 2, California.

May 19, 1949.

1. Trial 🔑139(1)

Testimony of roofing workman, struck by municipal streetcar while tending tar kettle in street, that he heard no signal, and testimony of workmen on roof that car did not slacken speed until workman was struck and was stopped 120 feet from point of collision, were sufficient to take action for injuries sustained by workman to jury on issue of whether streetcar was negligently operated, though workmen on roof admitted on cross-examination they could not testify positively that no warning was sounded, but only that they heard none.

2. Evidence ⚷586(3)

Testimony of witness who was in position to hear warning signal, if sounded, that he heard no bell or warning signal, is sufficient to support a finding that none was sounded.

3. Street railroads ⚷117(19)

Where roofing workman tending tar kettle in street within three feet of overhang of streetcars operated on northbound track looked to the south and saw nothing approaching from that direction before walking between kettle and track with back to approaching traffic from the south, whether workman was contributorily negligent so as to preclude recovery for injuries sustained when struck by overhang of northbound streetcar was a question for jury.

4. Municipal corporations ⚷705(10)

One whose duties require him to work in a public street, regardless of whether his work has a direct relation to streets, is not held to the same quantum of care for his own safety as a pedestrian.

5. Municipal corporations ⚷706(7)

Evidence that pedestrian looked in direction from which danger might be expected and saw nothing ordinarily raises a jury question as to his contributory negligence.

6. Appeal and error ⚷927(3)

On appeal from judgment of nonsuit, plaintiff's evidence must be given its most favorable construction.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Thomas Scott against City and County of San Francisco, a municipal corporation, and others for injuries sustained by plaintiff when struck by a streetcar of San Francisco Municipal Railway. From a judgment of nonsuit, plaintiff appeals.

Judgment reversed.

P. H. McCarthy, Jr., F. Nason O'Hara, Herbert S. Johnson, San Francisco, for appellant.

Jno. J. O'Toole, City Atty., Sylvain D. Leipsic, Deputy City Atty., William F. Bourne, Deputy City Atty., San Francisco, for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment of nonsuit. On October 7, 1946 between 4 and 4:30 p. m. plaintiff was struck by a north-bound street car of the San Francisco Municipal Railway operated over San Bruno Avenue. Plaintiff was employed by a roofing contractor as a member of a crew engaged in installing a roof on a building under construction. His particular duty was to tend the tar kettle in which tar was heated for use in the construction of the roof. There was a pile of debris in front of the building and workmen of defendant had dug a trench in the street leading to the building for the installation of a water or sewer pipe. By reason of the trench and the debris the tar kettle had been placed within three feet of the overhang of street cars operated on the north-bound track. Just before the casualty to plaintiff occurred the tar had caught on fire and he had gone between the north-bound track and the kettle to the south end of the kettle to trip the lid and thus extinguish the fire. From that point, taking the testimony most favorable to plaintiff, the following occurred:

Plaintiff looked south along the car track and saw nothing approaching from that direction. He then turned and walked between the kettle and the north-bound track with his back to approaching traffic from the south. He heard no street car bell or other warning and he was struck from the rear by the overhang of the front of the north-bound municipal car. Two workmen on the roof of the building under construction testified for plaintiff. They saw the plaintiff walking between the kettle and the track with his back to the oncoming street car when, according to one witness, the street car was 150 feet from plaintiff. The car was travelling from 20 to 25 miles per hour and did not slacken its speed until after striking the plaintiff. These witnesses heard no bell or other warning.

[1, 2] That the jury could find that the street car was negligently operated is

clear. Testimony that no bell or warning signal was heard by witnesses in a position to hear is sufficient to support a finding that none was sounded. Ostertag v. Bethlehem etc. Corp., 65 Cal.App.2d 795, 800,151 P.2d 647; White v. Los Angeles Ry. Corp., 73 Cal.App.2d 720, 727, 167 P.2d 530. That the witnesses on the roof on cross-examination stated that they could not testify positively that no warning was sounded but only that they heard none goes only to the weight of their testimony and the plaintiff's own testimony that he heard no warning signal was not qualified in any way. The plaintiff if advised of the approach of the car could have avoided being struck by moving toward the kettle and away from the track a distance of a foot or less. The evidence that the car was 150 feet from plaintiff when first seen by one witness, that it did not slacken speed until plaintiff was struck and that it was stopped in 120 feet from that point also presented a question of fact on defendants' negligence.

[3-5] Plaintiff's contributory negligence in our judgment was also not established as a matter of law. One whose duties require him to work in a public street is not held to the same quantum of care as a pedestrian. Mecham v. Crump, 137 Cal. App. 200, 203–204, 30 P.2d 568; State, etc., Ins. Fund v. Scamell, 73 Cal.App. 285, 290, 238 P. 780 et seq.; 23 Cal.Jur. 891; 2 Cal. Jur. 10 Yr.Supp. 427–429. Plaintiff testified that he looked to the south and saw nothing. The laborer in the street is required to use a lesser quantum of care than a pedestrian and even in the case of a pedestrian evidence that he looked in the direction from which danger might be expected and saw nothing ordinarily raises a jury question as to his contributory negligence. In White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086, 1091, the court said:

> "There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury."

This case has been followed on this point in Rapp v. Southern Service Co., 116 Cal. App. 699, 703–704, 4 P.2d 195; Reichle v. Hazie, 22 Cal.App.2d 543, 545–546, 71 P.2d 849; Lowell v. Harris, 24 Cal.App.2d 70, 84, 74 P.2d 551; Hart v. Irvine, 46 Cal. App.2d 805, 808, 117 P.2d 11; Young v. Tassop, 47 Cal.App.2d 557, 562–563, 118 P. 2d 371; and Connolly v. Zaft, 55 Cal.App. 2d 383, 385, 130 P.2d 752.

Respondents suggest that the rule with regard to the quantum of care required of workmen in public streets should be limited to those whose work has a direct relation to the streets, i. e. to street sweepers, trackmen, etc. The rule has not been so limited. In Zumwalt v. E. H. Tryon, Inc., 126 Cal.App. 583, 14 P.2d 912, the rule was applied to a sheepherder driving his band of sheep along a public road, and in Ostertag v. Bethlehem, etc., Corp., supra, 65 Cal. App.2d 795, at page 801, 151 P.2d at page 650 the rule was applied to one working in the interior of a building under construction, the court saying:

> "The courts have often recognized that where a person must work in a position of possible danger the amount of care which he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case."

[6] Giving plaintiff's evidence its most favorable construction as we must on appeal from a nonsuit it is clear that the case should not have been taken from the jury.

Judgment reversed.

NOURSE, P. J., and GOODELL, J., concur.

91 Cal.App.2d 901

TURNER et al. v. ELLIOTT et al.

Civ. 16720.

District Court of Appeal, Second District,
Division 3, California.
May 19, 1949.

1. False imprisonment ⚿31

Substantial evidence supported finding that member of partnership participated in arrest of plaintiffs for burglary of the partnership so as to justify recovery for false imprisonment where the charge was false.

2. False imprisonment ⚿36

Awards of $1,000, $1,000 and $1,200, respectively, to young men for false imprisonment on a charge of robbery were not excessive or the result of passion or prejudice.

3. Appeal and error ⚿1004(3)

Denial of motion for new trial upon the ground of excessive damages must be deemed a decision by the trial court that the amounts of verdicts for false imprisonment were reasonable and in accord with the preponderance of evidence.

◆

Appeal from Superior Court, Los Angeles County; Thomas J. Cunningham, Judge.

Action for damages for false imprisonment by Morley B. Turner and others against Sidney N. Elliott and Frank Riga, Jr., individually and as partners associated in business under the name and style of Buffalo Liquors, and Buffalo Liqeuors, a partnership. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Spray, Davis & Gould, Los Angeles, for appellants.

Edison J. Demler, Long Beach, for respondents.

SHINN, Presiding Justice.

Sidney N. Elliott and Frank Riga, Jr. appeal from judgments on verdicts which awarded plaintiffs damages for false imprisonment, namely, to Bob L. Butcher $1,000, to George Moore $1,000, and to Morley B. Turner $1,200. Two grounds of appeal are urged by appellants, namely, that the evidence was insufficient to prove that either of the appellants was responsible for the arrests of plaintiffs, and that the amounts of the verdicts were excessive.

There was evidence which the jury could reasonably have deemed sufficient to establish the following facts: On January 21, 1947, at about 7:00 o'clock p. m., two men committed a robbery in the liquor store of the defendants. At the point of guns they took from defendant Elliott, who was alone in the store, liquor of the value of about $97. The three plaintiffs, who were all 21 years of age at the time of trial, were residents of Long Beach; during the evening they had attended a meeting of an ex-serviceman's club and had been in the company of numerous friends until about 10:00 o'clock p. m., when they went to a bowling alley where Turner expected to meet some one to disone to discuss a matter of business. Defendant Elliott also was at the bowling alley, observed Butcher and Moore for a time and then spoke with one Murphy, pointing out Butcher and Moore, stating they looked like the men who committed the robbery. At Elliott's suggestion Murphy called the police who arrived in six police cars, armed with revolvers and sawed-off shotguns. Elliott met the officers, conversed with them, and pointed out Butcher and Moore by walking to where they were sitting and standing directly behind them, saying: "These are the boys" or "these are the men." The two plaintiffs were ordered to stand up and raise their hands; their clothing was searched and they were handcuffed with their hands behind their backs. As they were being taken to the police cars plaintiff Turner approached the officers and stated that he knew Butcher and Moore and had been with them during the evening, whereupon Elliott directed the officers to take Turner along, saying: "He may be one of them." Turner was then handcuffed in like manner and the three plaintiffs were shoved into the police cars. In the meantime, a crowd of some 200 persons had gathered, and when some one asked what the arrest was for one of the officers replied that they were a couple of robbers who had just stuck up a place. Butcher then asked one of the officers: "What in the world we done anyhow, what's it all about?" and the officer told him to shut his g— d—— mouth or he would shut it for him. Newspaper photographers were in the crowd in front of the bowling alley and took flashlight pictures of the boys as they were led to the cars by the officers. Elliott accompanied them to the police station where the boys were questioned. One of the officers stated in the presence of Elliott that he (Elliott) was positive in his identification of Butcher and Moore and Elliott remained silent. The police detained the boys in separate rooms until about 1:30 o'clock a. m. when they were released. Other newspaper photographers were allowed to take their pictures. When one of the boys hung his head to avoid being photographed, one of the officers threatened to hit him in the mouth unless he straightened his head up, and the boy complied. During the interrogation the boys gave the officers the names of 10 or 15 of their friends with whom they had spent the evening. The officers telephoned the homes of these young people, many of whom had gone to bed, and questioned them until they became satisfied that the boys had had nothing to do with the robbery. The affair caused a great deal of comment among the friends and acquaintances of the boys and their families, and they were besieged with inquiries as to the occasion for their arrest. There was ample evidence to prove that they were frightened and humiliated by the sawed-off shotguns which were leveled at them, by the accusations of the officers, the presence of the curious crowd and the activities of the newspaper photographers. They were also greatly embarrassed by the notoriety into which they had been thrust.

[1] The jury was instructed, in part, as follows: "If you find the defendant Elliott requested, directed, commanded or participated in the arrest of the plaintiffs, then your verdict shall be for the plaintiffs. You are instructed that it is not enough that plaintiffs merely prove that a defendant or the defendants stated to police officers that plaintiffs looked like the men who robbed the liquor store in question here or resembled them. Plaintiffs must go further and prove either the defendants, in addition, authorized, encouraged or assisted the officers to do any unlawful act, or that said defendant or defendants procured an unlawful arrest without process, or participated in the unlawful arrest or imprisonment, or that the defendant or the defendants wilfully identified the wrong man or men as being the person or persons who robbed said liquor store, and that said defendant or defendants did so for the purpose of having the plaintiffs, or either of them, arrested and prosecuted." The question propounded by these instructions was answered by the jury in favor of plaintiffs. It is re-argued on the appeal upon the theory that there was no substantial evidence that defendant Elliott participated in the arrests of plaintiffs. There was ample evidence to support the implied finding that he did so participate. He was a victim of the robbery, caused the police to be summoned, pointed out Butcher and Moore, stated that they were the men who had robbed, him, and when Turner interceded he directed the officers to arrest Turner also. Without his activities there would have been no identification of the plaintiffs and no arrests. The question whether defendant Elliott was acting on behalf of the partnership, consisting of himself and Riga, was submitted to the jury under an appropriate instruction, and no point is made on the appeal that the evidence was insufficient to support the implied finding of the jury that Elliott was acting as a representative of the partnership and defendant Riga.

Upon the trial defendants disclaimed any intention to justify the arrests, stating that they would not attempt to justify an arrest they were not responsible for. Their position is the same on the appeal.

Defendants rely on Miller v. Fano, 134 Cal. 103, 66 P. 183, and Van Fleet v. West American Insurance Company, 5 Cal.App. 2d 125, 42 P.2d 378, 43 P.2d 557, in support of their claim that the arrests here were made by the police officers without any direction or assistance from the defendants. As a rule a decision as to the sufficiency of evidence in one case is found to be of no value in another. The cited cases are no exception. The facts which the courts were considering bear no resemblance to the circumstances of the arrests of plaintiffs herein.

[2] Enough of the evidence has been stated to answer the claim that the verdicts were excessive. Certainly, it does not appear that they were the result of passion or prejudice. Defendants argue that the damages were merely nominal, citing Maher v. Wilson, 139 Cal. 514, 73 P. 418, a case in which no actual damage was shown. A case closer in point is Gomez v. Scanlan, 155 Cal. 528, 102 P. 12, where a judgment for $2,000 was upheld. The amounts awarded the several plaintiffs indicate to us that the jury made a fair and dispassionate appraisal of the damages they had suffered.

[3] Defendants made a motion for a new trial upon the ground, among others, of excessive damages. Since trial judges should under such circumstances make an independent determination as to the reasonableness of the verdicts, the denial of the motion must be deemed a decision by the court that the amounts of the verdicts were reasonable and in accord with a preponderance of the evidence.

The judgments are affirmed.

WOOD and VALLÉE, JJ., concur.

92 Cal.App.2d 1

SOLOMON v. PHILLIPS et al.

Civ. 3777.

District Court of Appeal
Fourth District, California.
May 20, 1949.

1. Appeal and error 🔑882(3)

Where case was tried on theory that issue was whether property was actually joint tenancy property or whether it was community property, it could not be contended for first time on appeal that trial court erred in finding on that issue on ground that it was admitted in plaintiff's pleadings that property was community property.

2. Husband and wife 🔑264

Evidence of undisclosed intention of one party to deed by which property was conveyed to plaintiff and her former husband was not controlling on issue as to whether property was held by plaintiff and her former husband as community property or as joint tenants.

3. Witnesses 🔑311, 315, 370(1)

The manner in which witness testified, character of his testimony and such things as his bias and motives were matters to be considered by trial court in weighing his testimony.

4. Husband and wife 🔑14(3)

Clear and satisfactory evidence is required to upset legal effect of deed purporting to convey property to husband and wife as joint tenants.

5. Husband and wife 🔑264, 269

Evidence failed to overcome presumption that plaintiff and former husband took title to realty as joint tenants under deed which described them as joint tenants and established that property was community property, and, hence, judgment lien which had been obtained against former husband before parties were divorced did not attach to plaintiff's interest in the property.

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action by La Verne J. Solomon against Robert M. Phillips, G. H. Reiff and another to quiet plaintiff's title as to real property and for partition thereof. From judgment for plaintiff, the defendant Reiff, alone, appeals.

Affirmed.

Docker & Docker, and Fred W. Docker, Fresno, for appellant.

Ralph Robinson, Fresno, for respondents.

BARNARD, Presiding Justice.

The plaintiff and the defendant Phillips were married in 1941. In October, 1944, they contracted for the purchase of a house and lot in Fresno which they occupied as a home. On February 19, 1945, this property was deeded to them as "Robert M. and LaVerne J. Phillips, husband and wife, as joint tenants." This deed was recorded on May 18, 1945. In December, 1945, these parties separated and the property was leased to the defendant McCluskey.

In February, 1946, the defendant Reiff obtained a judgment for $3041.32 in an action against defendant Robert M. Phillips in the superior court of Los Angeles County. An abstract of this judgment was recorded in Fresno County on March 6, 1946. An execution sale was held under this judgment and a sheriff's certificate of sale was issued on December 9, 1947, and recorded on December 10, 1947, showing the sale to defendant Reiff of the interest of Robert M. Phillips and the community interest, if any, of LaVerne Phillips, also known as LaVerne J. Solomon, in this real property.

On April 12, 1946, the plaintiff obtained a divorce from the defendant Phillips in Nevada. Having remarried, she commenced this action on August 25, 1947. In the first three causes of action she sought a partition of this real property and other relief as against the defendant Phillips. In the fourth and fifth causes of action she sought to quiet her title to this real property as against the defendants Reiff and McCluskey, respectively. At the trial the issues raised by the first three and the fifth causes of action were amicably disposed of, and the trial proceeded on the issues raised by the fourth cause of action. With respect thereto, the court found that during the married life of the plaintiff and the defendant Phillips they acquired this real property by their joint efforts; that the property was acquired by said parties and held by them as joint tenants from February 19, 1945, until December 10, 1947, when the interests of the defendant Phillips were terminated by an execution sale and the issuance of a sheriff's certificate of sale in favor of the defendant Reiff; that from said date the property has been held as tenants in common by the plaintiff and the defendant Reiff; and that the defendant Phillips has no further interest in said real property. As a conclusion of law, it was found that the plaintiff is entitled to a judgment declaring that she is the owner of a half interest in the property as a tenant in common with the defendant Reiff, and that Reiff is the owner of a half interest as a tenant in common with her. Judgment was entered accordingly, and the defendant Reiff has appealed from those portions thereof which award the plaintiff a one-half interest in the property as a tenant in common with him.

The appellant contends that this property was the community property of the respondent and Robert M. Phillips, that as such the entire property was liable for the husband's debts, and that his judgment lien, having been obtained before the parties were divorced, attached to the entire property.

[1] It is first contended that it was admitted by the pleadings that this was community property; that the character of the property was therefore not in issue; and that the court erred in finding, contrary to the admission in the pleadings, that the property was held in joint tenancy. In the first cause of action it was alleged that the respondent and Robert M. Phillips acquired this real property during their married life by their joint efforts, and "that plaintiff is informed and believes and therefore alleges upon such information and belief that the property hereinabove described is the community property of the parties, or that they hold the same as tenants in common." These allegations were included by reference in the fourth cause of action, and were admitted by the answer of the appellant. This was not, as the appellant contends, an admission that this property was held by the respondent and her former husband as their community property, and this issue was not thereby removed from the cause. The answer merely admitted that this property was either community property or property which was held as tenants in common. Despite any insufficiency in the complaint, the case was tried solely on the issue as to whether this property had been held by respondent and her former husband as community property or as joint tenants. The respondent introduced the joint tenancy deed. The appellant confined his efforts

to attacking the apparent legal effect of this deed, and introduced testimony by Mr. Phillips in an attempt to show an intention on his part, when the property was acquired, that it be taken as community property. No objection was made at any time to the sufficiency of the complaint in the respect here in question, or that the issue as to the community or joint tenancy character of the property was not properly before the court. In passing upon the materiality of certain evidence, the court remarked that the sole issue as between the respondent and the appellant, as he understood it, "is whether or not this property is actually joint tenancy property or whether it is community property." Respondent's counsel said: "That is right." Appellant's counsel said nothing, and the trial proceeded. Having been tried on this theory and this issue, it cannot be successfully contended for the first time on appeal that the court erred in finding on that issue. Grimes v. Nicholson, 71 Cal.App.2d 538, 162 P.2d 934, and cases there cited. It was not admitted in the pleadings that this was community property, and the court's finding is not contrary to such an admission.

[2] It is next contended that the deed to the respondent and her former husband as joint tenants merely raised a disputable presumption that they took title as joint tenants; that this presumption may be overcome by the evidence of the actual intention of the parties; that the evidence here shows, without conflict, that no joint tenancy was intended and that the property was community property; and that the court should have so found. The argument that such a situation here appears is based upon the testimony given by the defendant Phillips, and that there is in addition "the positive allegation in plaintiff's amended complaint that the real property is community property which was admitted by defendant Reiff's answer." The supposed admission in the pleadings that this was community property must be eliminated, as above pointed out. The joint tenancy deed, and the presumption arising therefrom, was a part of the evidence. The testimony given by Phillips was conflicting at best, and was not necessarily conclusive. In that part of his testimony which is most favorable to the appellant he was asked "when this property was purchased, Mr. Phillips, as you have testified, what was your intention with respect to the property?" He replied: "I intended that to be our home, and that it should be our place to live, and our place to raise our child." He was then asked whether he intended to give his wife "any other interest than a community interest." He replied: "Our future home, and there that we would live indefinitely and raise our family there, and that—I don't know anything about the laws involved, but I thought that would be our community asset." Apart from the indefiniteness of this testimony Phillips did not testify that he had ever communicated his intention, whatever it was, to anyone else. Evidence of the undisclosed intention of one party to a solemn deed could hardly be held to be controlling on the issue here being tried by the court. Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906.

[3-5] Moreover, the manner in which Phillips testified, the character of his testimony and such things as his bias and motives, were matters to be considered by the court in weighing his testimony. Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868. Phillips, who was the stepson of the appellant, displayed great animosity toward the respondent. While his memory was rather good on his direct examination, he was evasive and antagonistic while being cross-examined by respondent's counsel. During the cross examination the court suggested that no further questions be asked along a certain line, saying: "The court has observed the character of the memory of the witness." At the conclusion of Phillips' testimony the court remarked "The evidence that is presented does not convince the court that the property was in any other than—what the record title shows," and that "So far as the court is concerned it is joint tenancy property." After further argument, the court made findings to the same effect. It cannot be held, as a matter of law, that the presumption arising from the joint tenancy deed was overcome by the evidence here produced. Clear and satisfactory evidence should be required to upset the legal effect of such a deed, and this should be especially

true under the situation which obviously existed here. The question was one of fact for the trial court, and the most that could be said is that the court's decision was made upon conflicting evidence.

A third point raised by the appellant is based upon the theory that the real property here in question was admittedly community property, and requires no further consideration.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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91 Cal.App.2d 839

PEOPLE v. VAN WYKE.

Cr. 4293.

District Court of Appeal, Second District, Division 1, California.

May 16, 1949.

Rehearing Denied May 26, 1949.

Hearing Denied June 13, 1949.

1. Larceny 🔑65

Evidence sustained conviction of grand theft.

2. Criminal law 🔑568

Criminal intent is a question of fact which may be proved like any other fact, by acts, conduct, and circumstances connected with the offense.

3. Witnesses 🔑270(2)

In prosecution of general manager of used car lot for grand theft for cashing check for money loaned on automobile and for keeping the money, cross-examination as to the profit and loss of the used car business was improper.

4. Criminal law 🔑448(4)

In prosecution of general manager of used car lot for grand theft for cashing check for money loaned on automobile and for keeping proceeds of check, court properly excluded evidence as to custom of compensation for automobile salesmen in the locality, where witness was not qualified as an expert.

5. Criminal law 🔑338(1)

In prosecution of general manager of used car lot for grand theft for cashing check for money loaned on automobile and for keeping proceeds of check, exclusion of testimony of owner of parking lot as to whether he had filed with county clerk a certificate of fictitious partnership and as to sales books kept by owner before his association with general manager, was properly excluded because immaterial.

6. Criminal law 🔑730(3)

Where offending questions asked by district attorney of defendant on cross-examination were stricken from record, and jury was admonished not to give any consideration thereto, error, if any, was cured.

7. Witnesses 🔑246(2)

Questioning of witness by trial court was not error, since it is the duty of the court to examine witnesses if the court sees fit to do so, and if the examination is without prejudice to the rights of the parties.

Appeal from Superior Court, Los Angeles County; Thurlow T. Taft, Judge.

Arthur Van Wyke was convicted of grand theft, and from the judgment of conviction and order denying a new trial, he appeals.

Judgment and order affirmed.

Clarence H. Jordan and Hunter R. Skinner, Los Angeles, for appellant.

Fred N. Howser, Attorney General and Frank Richards, Deputy Attorney General, for respondent.

DRAPEAU, Justice.

During the latter part of 1947, the defendant and two associates were engaged in buying and selling second-hand automobiles. They became acquainted with a gentleman by the name of Jack L. Keyser and entered into an agreement with him whereby it was agreed to carry on this enterprise with a business setup as follows:

Mr. Keyser was to be the owner. The defendant was to be general manager, and defendant's two associates were to be salesmen and managers of certain used car lots which were to be acquired by the business. Mr. Keyser was to provide working capital, at least in a major part, and was to receive 60% of the net profits; the defendant was to receive 40% of the net profits. Before making this division of profits the salesmen were to receive 25% of the profits at the lots which they were to manage.

A lot was rented, signs painted and placed thereon, reading "Keyser Motor Company" and automobiles displayed for sale.

In this business, in addition to working capital, a large part of the financing is done with what are termed "flooring contracts." A flooring contract is a trust agreement between a dealer, who holds an automobile for sale, and a person who lends money on it. The lender holds title and security interest in the car. When the car is sold, the loan is paid from proceeds of the sale. Section 3014.5, Civil Code. Arrangements for flooring automobiles for Keyser Motor Company were made by the defendant with several finance companies.

The business of Keyser Motor Company expanded rapidly. Mr. Keyser put in some money. Things seemed to be going well, until on December 5, 1947, a De Soto automobile came into the possession of the concern. It was a new car purchased by Mr. Smith, one of defendant's associates, employed by Keyser Motor Company. At that time a new car could be purchased from a new-car dealer and resold on a used-car lot for a considerable profit. This was the reason for purchasing this particular automobile. There was subterfuge involved in this transaction. Ostensibly the De Soto was purchased by Mr. Smith for his own use; whereas he and the defendant knew it was to be re-sold by Keyser Motor Company. And it was understood that when the car was sold Mr. Smith would get his money back which he had paid for it, together with a part of the profit realized from its sale.

When the De Soto reached the Keyser lot, the defendant floored it for $2,665. The individual who loaned the money gave the defendant a check for this amount, payable to Keyser Motor Company. The defendant endorsed the check, presented it to the bank for payment, was paid $2,665 in cash and kept the money.

Whereupon an information for grand theft was filed by the District Attorney against the defendant; he pleaded not guilty, was tried by jury and convicted; then his motion for a new trial was denied, and he was sentenced to the state penitentiary.

At the trial, defendant testified that he cashed the check, and immediately gave the money to Mr. Keyser. This testimony was corroborated to some extent by the testimony of the salesmen and a janitor. On the contrary, Mr. Keyser testified that he did not receive the money and that he was still liable for the obligation on the flooring contract.

For another defense, the defendant testified that the business arrangement between him and Mr. Keyser was a partnership. If in fact there was a partnership the defendant could not have been convicted of grand theft even though he appropriated his partner's money.

Negativing this testimony, Mr. Keyser testified that there was no partnership. And the jury had for its consideration evidence showing a rather complete picture of the business relations of the parties. The defendant signed an approval of a statement as to a reserve account of the Keyser Motor Company, which recited that Mr. Keyser was the sole owner of the business. The usual agreement with the bank on opening the account of Keyser Motor Company, of which defendant had knowledge, made the same statement. The defendant signed an application for a fidelity bond for himself for the benefit of the Keyser Motor Company in which it was stated that he was an employee. There was a similar statement in an application to a financial company for credit. And one witness testified to a declaration by the defendant that he was the manager of the business and that Mr. Keyser was the owner.

[1] By its verdict finding the defendant guilty, the trial jury resolved any conflict in the testimony, and there is substantial evidence to support the verdict,

People v. McKnight, 87 Cal.App.2d 89, 196 P.2d 104.

Several errors in rulings by the trial court on evidentiary matters are asserted. In order to understand the situation which developed as to certain rulings vigorously attacked by the defendant it is necessary to follow the subsequent history of the De Soto automobile heretofore mentioned. While the car was still on the lot and unsold, Mr. Keyser discharged the defendant. The defendant notified his two associates, the car salesmen, by telephone. Shortly thereafter they met with Mr. Keyser and demanded an accounting. A few days later while the De Soto was still on Mr. Keyser's lot, these two associates of the defendant went there, demanded the car, exhibited the white and pink slips issued by the Motor Vehicle Department showing ownership in Mr. Smith, and drove it away.

[2] Testimony as to the taking of the De Soto under these circumstances was received by the court over objections by the defendant. This testimony was material in proof of fraudulent intent. The taking of the car was part of the transaction for which the defendant was on trial. He knew the circumstances under which the De Soto was purchased and that it was held on a flooring contract. He told the owner of the flooring receipt that he hated the way that the car disappeared, and he knew that when the car was taken by his associates that Mr. Keyser was left without the money or the car and with the obligation to pay the amount due on the flooring contract. Intent is a question of fact which may be proved like any other fact, by acts, conduct and circumstances connected with the offense. People v. Fewkes, 214 Cal. 142, 148, 4 P.2d 538; People v. Emery, 79 Cal. App.2d 226, 179 P.2d 843.

[3] Defendant complains of a ruling sustaining objection to a question on cross-examination relative to profit and loss of the Keyser Motor Company business. This was not proper cross-examination and the ruling was correct.

[4] Next, complaint is made of the exclusion of evidence showing custom as to compensation of automobile salesmen in southern California. Defendant argues that this evidence would have been of material assistance in proving his contention that there was a partnership. Objection to this testimony was properly sustained because the witness under examination was not qualified as an expert and his opinion under those circumstances would have been hearsay, even if such evidence were material.

[5] On cross-examination Mr. Keyser was asked whether he had filed with the County Clerk a certificate of fictitious partnership required by the Civil Code; also questions relative to sales books kept by him before his association with the defendant. There was no error in excluding this evidence because it was immaterial to any issue in the case.

Defendant complains of misconduct on the part of the District Attorney, principally because of the following occurrence on the trial: During cross-examination of the defendant by the District Attorney, he was asked if he knew that the De Soto had been pledged on a flooring agreement twice, once seven days before it was floored as already described. It later appeared that the car had been pledged but once, and the District Attorney offered to stipulate that reference to prior flooring be stricken from the record. This was done and the jury was admonished not to give any consideration to the matter.

[6] It would have been better if the District Attorney had refrained from mentioning duplicate pledging of the car, not having definite proof thereof. However, the offending questions were stricken from the record and the jury admonished. If there was any error this must be deemed to have cured it. People v. Gray, 63 Cal. App. 59, 62, 218 P. 49; People v. Black, 45 Cal.App.2d 87, 98, 113 P.2d 746.

[7] Defendant also suggests misconduct by the court in tone and manner, and general conduct appearing to favor the prosecution. There is nothing in the record which indicates any misconduct of the trial judge. No reference to, or objection to any of these things was voiced by counsel for the defendant at any time during the trial. The court did question one of the witnesses. There is nothing wrong about

that. In fact it is the duty of the trial judge to examine witnesses if he sees fit to do so, and if the examination is without prejudice to the rights of the parties. People v. Golsh, 63 Cal.App. 609, 219 P. 456.

Finally, defendant claims error in the giving, refusal, and modification of several instructions. A reading of the instructions as a whole demonstrates that the jury was fully and fairly instructed as to the law applicable to the case and that there was no error as to the matters complained of by the defendant.

The judgment and the order denying a new trial are affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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91 Cal.App.2d 258

PEOPLE v. WAHRMUND.

Cr. 719.

District Court of Appeals,
Fourth District, California.
April 14, 1949.

1. Criminal law ⇨1111(1)

On appeal from an order denying motion to vacate a judgment of conviction of issuing checks without sufficient funds record showed that conviction was not had upon hearsay evidence, that it was not based on defendant's record, and that there was sufficient evidence before the court to show an intent on the part of the defendant to defraud. Pen.Code, § 476a.

2. Criminal law ⇨997

The general rule is that a writ of error coram nobis will not be granted for newly discovered evidence going to the merits of the issues tried, since issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on a motion for new trial.

3. Criminal law ⇨997

The "writ of error coram nobis" is limited to those situations in which the remedies provided by statute, such as motion for new trial and arrest of judgment, appeal and motion to recall remittitur, are not available and it cannot serve the purpose of bringing before the trial court evidence of facts that existed at the time of the trial.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Writ of Error Coram Nobis".

4. Criminal law ⇨997

The writ of error coram nobis does not lie to correct errors of law and is not intended to authorize any court to review or revise its opinions.

5. Criminal law ⇨986

The report of probation officer is not evidence, and is not binding on the court.

6. Criminal law ⇨982

Probation is not an absolute right to which the defendant is entitled but is an act of clemency which may be granted, and the matter of exercising the power of probation is discretionary with the court.

7. Criminal law ⇨982

Where defendant had been convicted of issuing a check without sufficient funds in 1916, and had a long history of misdemeanor theft charges and in addition to his imprisonment in San Quentin, he had served fourteen months in the State Penitentiary at Folsom, the court did not abuse its discretion in refusing probation on conviction of issuing check without sufficient funds. Pen.Code, § 476a.

8. Criminal law ⇨997

The contention that judgment as rendered was incomplete and did not specify the crime for which the defendant was sentenced could have been presented on appeal, and was not available to defendant on a writ of error coram nobis.

Appeal from Superior Court, San Diego County; William A. Glen, Judge.

August M. Wahrmund was convicted of issuing checks without sufficient funds, and thereafter filed a motion to vacate the judgment. From an order denying the motion, the movant appeals.

Order affirmed.

Elizabeth Cassidy, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant appeals from an order denying his motion to vacate a judgment of conviction of a violation of 476a of the Penal Code.

Defendant was charged by an information with the crime of issuing checks without sufficient funds, in violation of section 476a of the Penal Code, a felony. He waived jury trial, was tried by the court and found guilty. The judgment was pronounced January 27, 1948, and the defendant, showing no legal cause why he should not have judgment pronounced against him, was committed to the state prison. No motion for a new trial was made and no appeal was taken.

On October 22, 1948, defendant filed this motion on the grounds (1) that the conviction was based on hearsay evidence and on the defendant's prior record; (2) that there was no evidence of intent to defraud; (3) that the court disregarded the report of the probation officer; (4) that the court by its comments showed bias against defendant because of his prior record; (5) that the judgment is incomplete in that it does not specify the crime for which defendant was sentenced or the term of imprisonment. It is also stated that the motion is made to permit the trial court to correct errors made in connection with the conviction and sentence of defendant and to prevent a miscarriage of justice and violation of defendant's constitutional rights. In support of his motion defendant filed his own affidavit substantially setting forth the grounds of the motion, and also filed an affidavit and letter from officers of the Millbrae, California, Branch of the Bank of America stating that since June 1, 1945, the defendant had a commercial account in that bank amounting to the sum of $69.15 and that an attachment was served against the account on that date. The motion was heard and denied by the court on November 1, 1948, and this appeal followed.

Verle LeRoy Loyd, a prosecution witness, testified at the trial of the action that he was a clerk in a grocery store in San Diego where wine and beer were sold; that on September 27, 1947, defendant came into the store and cashed the check described in the information; that the check was payable to "Cash" in the amount of $30, was drawn on the Bank of America National Trust & Savings Association, San Diego, California, and dated September 27, 1947; that he saw defendant write out the check at that time and obtain the $30 in cash; that defendant had been in the store about once a week for a period of six weeks in connection with placing orders for Ziegler beer but had not previously cashed checks and that nothing was said by defendant as to his not having an account at the Bank of America in San Diego or as to holding the check; that the check was returned from the bank marked "No Account"; that defendant left the store after the check was cashed and was not thereafter seen by the witness for four or five weeks when he paid the witness the sum of $30 on the day of his arrest. An assistant cashier of the Bank of America testified that there was no record of an account in the name of the defendant at the San Diego Branch of the bank.

Defendant testified in his own behalf that he had lived in San Diego for two years and as a representative of the Ziegler Brewing Company had called at the store frequently; that he presented the check in question to Mr. Loyd on the date it bears and obtained the full amount in cash; that he went into the store to and did buy a quart of whiskey; that he knew he had no account in the main branch of the Bank of America but thought he was giving a check on the Millbrae Branch where he had a balance of $69; that the last check he gave on his Millbrae account was in 1944 and that he had moved from Millbrae in 1945, coming to San Diego; that he thought Mr. Loyd called him on the phone about the check but was unable to recall the date; that at that time he was in Los Angeles trying to get a cash bond in the sum of $2,500 put up by him with the Ziegler

Brewing Company in connection with his employment; that he wrote out the check before going into the store and did not notice that it was drawn on the Bank of America at San Diego; that he had been convicted of a felony on a charge of issuing a check with insufficient funds in 1916.

The trial court found defendant guilty. An application for probation was made and from the report of the probation officer the court learned that defendant had a long history of misdemeanor theft charges and that in addition to his imprisonment in San Quentin he had served 14 months in the state penitentiary at Folsom. On the basis of this criminal record probation was denied by the court and defendant was sentenced to the state penitentiary.

[1] An examination of the record convinces us: (1) that the conviction was not had upon hearsay evidence; (2) that it was not based on defendant's record, and, (3) that there was sufficient evidence before the court to show an intent on the part of the defendant to defraud. It is apparent that the court did not believe defendant's story as to the circumstances under which the check in question was written. Defendant's testimony that the check was written before entering the store is not reconcilable with that of the clerk; his statement that he purchased a quart of whiskey is at variance with his admission that he obtained the full amount of the check in cash. His statement that he carried around blank checks of the Millbrae Branch of the Bank of America on an account inactive since 1944, his failure to take any steps to pay the check until the day of his arrest some five weeks later, his conviction of a felony and other circumstances all support the court's belief that defendant's story was not true.

[2] Each of the contentions of defendant could have been urged and considered upon a motion for new trial. Pen.Code, § 1181. Defendant, however, made no motion for a new trial nor did he appeal from the judgment. If we treat defendant's motion as an application for a writ of error coram nobis, which is the position taken by him on this appeal, we find nothing in the record to authorize the court to grant the relief sought. The general rule is announced in People v. Tuthill, 32 Cal.2d 819, 822, 198 P.2d 505, 506, where it is said: "It is a general rule that the writ will not be granted for newly discovered evidence going to the merits of the issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial. (Citing cases.)"

[3, 4] The use of the writ is limited to those situations in which the remedies provided by statute, such as motion for new trial and arrest of judgment, appeal and motion to recall remittitur, are not available and it cannot serve the purpose of bringing before the trial court evidence of a fact that existed at the time of trial. People v. Knight, 73 Cal.App.2d 532, 533, 166 P.2d 899. See, also, People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435. The writ does not lie to correct errors of law, and is not intended to authorize any court to review or revise its opinions. People v. Tuthill, supra, 32 Cal.2d at page 822, 198 P.2d 505.

[5-7] Defendant contends that the court ignored the report of the probation officer in which that officer stated that defendant did not attempt to defraud anyone and recommended that defendant be sentenced to the county jail. There is no merit in this contention as the report of the probation officer is not evidence and is not binding on the court. Probation is not an absolute right to which the defendant is entitled but is an act of clemency which may be granted. The matter of exercising the power of probation is discretionary with the court. People v. Jackson, 89 Cal.App.2d 181, 200 P.2d 204. The defendant's prior record was such that the court was fully justified in refusing probation and no abuse of discretion is shown.

A careful reading of the transcript discloses that the trial judge was not biased nor prejudiced. On the contrary defendant was given wide latitude in the presentation of his defense and the court's comments on the evidence disclose an entire absence of prejudice or bias.

[8] Defendant's contention that the judgment as rendered is incomplete and doesn't specify the crime for which he was sentenced, or the term prescribed by law, is likewise without merit as this is a matter which could have been presented on appeal, being part of the judgment roll.

It is apparent that defendant was regularly tried and convicted and that the evidence is sufficient to support the conviction.

Order affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

91 Cal.App.2d 880

ROWLAND v. CLARK.

Civ. 3775.

District Court of Appeal
Fourth District, California.
May 17, 1949.

1. Partition 🔑22

Right to partition property is not absolute and may be defeated by agreement between cotenants permitting a variance from the ordinary incidents of such cotenancy.

2. Trusts 🔑72

Where title to property is taken in name of one party and consideration for the transfer furnished by another, a trust is presumed to result in favor of the latter.

3. Appeal and error 🔑1009(1)

While there must be clear and convincing proof to establish a trust; such proof may be indirect consisting of acts, conduct, and circumstances, and question whether showing is clear and convincing being primarily for trial court.

4. Partition 🔑63(3)
Trusts 🔑89(1)

Evidence established that property, title to which was taken in the joint names of plaintiff and defendant and consideration for which was furnished by defendant, was held under a resulting trust in favor of defendant and that defendant did not intend to relinquish her right to occupy the property during her lifetime, so that, while defendant lived, plaintiff was not entitled to partition of the property. Code Civ. Proc. § 752.

5. Infants 🔑31(1)

Right of a minor to disaffirm a joint tenancy deed, under which property was held with defendant who furnished the consideration and who was to be permitted to live thereon during her lifetime, was subject to the applicable principles of equity.

Appeal from Superior Court, Kern County; Norman F. Main, Judge.

Suit by Thelma Rowland, formerly known as Miss Thelma Flanagan, against Mrs. Pearl Clark to compel the sale of a house acquired by defendant as her home. From the judgment plaintiff appeals.

Affirmed.

T. R. Claflin, Bakersfield, for appellant.

West, Vizzard, Howden & Baker, Bakersfield, for respondent.

MUSSELL, Justice.

This is an appeal from a judgment for defendant in an action for partition.

Plaintiff is the granddaughter of defendant and at the time this action was tried, was married and of the age of 19 years. At the age of nine, plaintiff, whose parents were deceased, with her two sisters and a brother came to live with defendant in Oklahoma. Defendant, a widow, assumed responsibility for the care and education of the children and brought them to California in 1942. In 1944, defendant, who supported herself and the children by doing laundry work, taking care of children, and odd jobs, purchased the property here involved. The initial payment of $750, and the balance of the purchase price, approximately $300, was all paid by defendant from her meager earnings. At the time of the execution of the deed, defendant had the title to the property placed in her name and that of plaintiff, as joint tenants. When questioned at the trial as to her reason for the execution of a joint tenancy deed, defendant testified as follows:

"Q. (By Mr. Vizzard) Did you ever have any conversations with Thelma about taking this house in joint tenancy? She was fourteen when you bought the house? A. I told her we would buy the place and fix it up for a home; it would be our home.

"Q. How old was she when you bought the house? A. Well, she was—I don't believe she had come fourteen.

"Q. Thirteen or fourteen; is that correct: A. Thirteen or fourteen; I don't know whether she had had her fourteenth birthday.

"Q. Did you talk to her and tell her why her name was put in the deed as a joint tenant? A. I did.

"Q. What did you say to her? A. I told her I would put her name on the deed so she could get the property at my death; it would be hers.

"Q. Did you tell her you desired to live and continue living there? A. I did. It was my home.

"Q. What did she say to that? A. She didn't say anything. I don't remember anything.

"Q. She didn't say, 'aye,' 'yes or no'? A. No, she was just a kid, and she wasn't interested in anything like that."

Plaintiff lived with defendant until August, 1946, and during that time was working part time taking care of children, and working in a plant in Oildale. She contributed a little money "when she wanted to" for her food and living but paid nothing on the purchase price of the house or the improvements, taxes or upkeep of the premises.

Plaintiff here seeks the aid of a court of equity against her benefactress to compel the sale of the four room frame house acquired by defendant as her home.

[1] The position now taken by plaintiff is that she has the absolute right under the provisions of section 752 of the Code of Civil Procedure to a partition of the property. However, the right to partition property is not always absolute and may be defeated by reason of an agreement between the co-tenants, permitting a variance from the ordinary incidents of such co-tenancy. Asels v. Asels, 43 Cal.App. 574, 578, 185 P. 419; Miranda v. Miranda, 81 Cal.App. 2d 61, 65, 183 P.2d 61. The trial court found in the instant case that there was a parol agreement between plaintiff and defendant whereby the property was taken under a deed naming plaintiff and defendant as joint tenants, but under said parol agreement the defendant was to retain the property for her lifetime and to enjoy a life estate therein and plaintiff was to hold the remainder interest therein, which remainder interest, by operation of the joint tenancy deed would be terminated by the condition of plaintiff predeceasing the defendant; that defendant paid for the property from her own funds.

[2, 3] We conclude that where, as here, the title to the property was taken in the name of one party and the consideration for the transfer furnished by the other, a trust is presumed to result in favor of the latter. Goes v. Perry, 18 Cal.2d 373, 379, 115 P.2d 441. While there must be clear and convincing proof to establish a trust, such proof may be indirect, consisting of acts, conduct and circumstances, the question whether the showing is clear and convincing being primarily one for the trial court. Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, 173, 168 P.2d 946. As was said in Bradley v. Duty, 73 Cal.App. 2d 522, 526, 166 P.2d 914, 916:

"A resulting trust is implied from the facts, and neither written evidence of an agreement nor a fraud on the part of the alleged trustee is essential to its existence. It arises where title of a property is vested in the trustee while the consideration therefor is paid by the beneficiary."

And in Berniker v. Berniker, 30 Cal.2d 439, 182 P.2d 557, 562, the court, quoting from Lezinsky v. Mason Malt W. D. Co., 185 Cal. 240, 251, 196 P. 884, there said:

"A resulting trust is not founded on the simple fact that money or property of one has been used by another to purchase property. It is founded on a relationship between the two, on the fact that as between them, consciously and intentionally, one has advanced the consideration wherewith to make a purchase in the name of the other. The trust arises because it is the natural presumption in such a case that it was their intention that the ostensible purchaser should acquire and hold the property for the one with whose means it was acquired."

[4] The evidence here presented indicates clearly that defendant did not intend to relinquish her right to occupy the property in question during her lifetime. It was her only home during her declining years, purchased and improved from her limited earnings over a period of several years.

There was testimony by plaintiff, in rebuttal, that her grandmother stated in effect that the property should be put in both names as joint tenants, and that at any time appellant decided to move out of the premises, the house would be sold and the funds equally divided. As to this testimony there was a conflict in the evidence which was resolved in favor of defendant by the trial court. Plaintiff also testified to the effect that her grandmother took $700.00 in cash from her person, stating that she, defendant, was entitled to one-half of plaintiff's earnings. This testimony was denied by defendant and the conflict rightly determined by the trial court in defendant's favor.

[5] The final contention of plaintiff is that she, being a minor, had a right to disaffirm any agreement during her minority, and that the filing of the present action amounted to such a disaffirmance. This point was not presented in plaintiff's opening brief, and there are no allegations in the complaint upon which to base findings in this respect. If we assume, for present purposes, that there was such a disaffirmance, plaintiff is nevertheless bound by the principles of equity applicable and the resulting trust is not affected.

While in the instant case the title to the property involved was not taken in plaintiff's name alone, we are of the opinion that the principle of a resulting trust applies to the title acquired by plaintiff in so far as the life estate in the defendant is concerned.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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91 Cal.App.2d 376

**JEWISH PUBLICATIONS, Inc. v.
GORDON et al.
Civ. 16775.**

District Court of Appeal, Second District,
Division 1, California.
May 16, 1949.

Hearing Denied July 14, 1949.

Appeal and error 🔑1185

Where original opinion incorrectly stated name of party in action involving use of name and had also unduly restricted respondents as to size of newsprint that might be used, the opinion would be modified accordingly in respect of name of such party and would also be modified so as to permit respondents to use newsprint of the standard size, and petitions for rehearing would be denied.

Appeals from Superior Court, Los Angeles County; Frederick F. Houser, Judge.

On petitions for rehearing.

Petitions denied.

Prior opinion, 205 P.2d 65.

Cummins, Goodstein & Paltun, Los Angeles, for Jewish Publications, Inc.

Fred Horowitz, Los Angeles, for defendant Gordon.

Joseph Friedman, Los Angeles, for other defendants.

PER CURIAM.

In their petition for rehearing, respondents point out that, while they are given the right to the use of the name B'nai B'rith Record, they are compelled by the judgment "to publish in close proximity to the masthead of their paper the following words, 'Official Publication of the Southern California Council of the Independent Order of B'nai B'rith Lodges.'" In this connection, they assert that since the name of their organization is, and for many years has been, "Southern California Council of B'nai B'rith Lodges," they should not be required to use that portion of the name which has been abandoned, to-wit: "the Independent Order of."

It is hereby ordered that the judgment appealed from be modified as follows: Whenever the name "Southern California Council of the Independent Order of B'nai B'rith Lodges" appears in said judgment, that it be changed to read "Southern California Council of B'nai B'rith Lodges"; also, said judgment is further modified to permit respondents to use newsprint of the standard size.

As so modified, the judgment is affirmed; each party to bear its own costs on appeal.

The petitions for rehearing are denied.

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91 Cal.App.2d 773

PEOPLE v. ISRAEL et al.

Cr. 801.

District Court of Appeal
Fourth District, California.

May 11, 1949.

Hearing Denied June 9, 1949.

1. Criminal law ⇨1167(1)
Robbery ⇨17(1)

Indictment for robbery alleging that defendants did, while armed with a deadly weapon, rob, but which failed to set forth elements of robbery, did not allege that personalty was taken from possession of another against his will by means of force or fear, was sufficient and did not prejudice substantial rights of defendants, where no demurrer was interposed and record indicated that defendants were not in any doubt as to nature of charge from a factual standpoint. Pen.Code, §§ 951, 952.

2. Robbery ⇨28

General verdicts of guilty in robbery prosecution were not contrary to law in failing to specifically find that defendants had feloniously taken personalty from possession of another by means of force or fear. Pen.Code, §§ 951, 952.

3. Criminal law ⇨881(1)

General verdicts of guilty include an implied finding on each of elements of crime charged.

4. Criminal law ⇨1167(1)
Larceny ⇨29

Information charging defendants with grand theft of an automobile alleging that they unlawfully took property of a certain person, consisting of an automobile, was not insufficient for failing to allege that defendants intended to permanently deprive owner of automobile, and did not deprive defendants of substantial rights, where jury was instructed with respect to necessary elements of theft and evidence was amply sufficient to support implied finding of a felonious intent to deprive owner of its possession. Pen.Code, §§ 951, 952.

5. Criminal law ⇨1167(1)
Weapons ⇨17(1)

Information charging defendants with violation of statute prohibiting felons from carrying firearms capable of being concealed upon person was not insufficient in failing to allege that firearms had barrels of less than 12 inches in length as stated in statute, and substantial rights of defendants were not prejudiced, where information referred to statute, jury was instructed as to essential elements of offense and evidence amply showed a violation of statute. Gen.Laws, Act 1970, § 2.

6. Criminal law ⇨200(1)

Counts of an information charging defendants with violation of statute prohibiting felon from carrying firearms capable of being concealed did not place defendants twice in jeopardy for same offense attempted to be charged in count charging robbery, since two distinct offenses were charged and fact that possession of gun happened to be an element in each offense was immaterial. Gen.Laws, Act 1970, § 2.

7. Criminal law ⚷1144(10)

District Court of Appeal presumed that in reading information, clerk of trial court omitted therefrom general charges of prior convictions admitted by defendant as required by statute. Pen.Code, § 1093.

8. Constitutional law ⚷268

Conduct of trial judge in reading defendants' prior convictions of felony to jury after defendants had admitted them as charged did not deny due process where matter of prior convictions referred only to violation of statute prohibiting felons from carrying firearms capable of being concealed to which defendants pleaded not guilty, defendants' counsel accepted situation and no objection was made at time jury was instructed that aside from purposes of impeachment, evidence of prior felony convictions could be considered only in reaching verdicts under offense for violating statute. Gen.Laws, Act 1970, § 2; U.S.C.A.Const. Amend. 14.

9. Criminal law ⚷1171(1)

Introduction of evidence by district attorney to prove that defendant had attempted to escape from jail was not prejudicial misconduct, where there was nothing to indicate that district attorney was guilty of misconduct or that he attempted to prove a fact when he knew he would not be able to prove it.

10. Criminal law ⚷1166½(12)

Conduct of trial judge in posing questions to defense witnesses was not prejudicial error where it appeared that only purpose of judge was to bring out real facts, and to clarify testimony and no assignment of misconduct or request for an admonition to jury was made.

11. Criminal law ⚷572

Evidence sustained conviction of robbery as against claim of alibi.

12. Criminal law ⚷572

Evidence sustained conviction for grand theft of automobiles as against defense of alibi.

13. Weapons ⚷17(4)

Evidence sustained conviction for violation of statute prohibiting felons from carrying firearms capable of being concealed upon the person. Gen.Laws, Act 1970, § 2.

14. Criminal law ⚷814(20)

In prosecution for robbery, failure to allow jury to find defendants guilty of robbery in second degree was not error under evidence.

15. Criminal law ⚷829(3)

In prosecution for grand theft, failure to charge that automobile must be feloniously driven away with intent to permanently deprive owner thereof, was not error, in view of other instructions given.

16. Criminal law ⚷772(3)

In prosecution for violating statute prohibiting felons from carrying concealed firearms, conduct of trial court in telling jury that aside from purpose of impeachment, evidence of prior convictions could be considered only in connection with two counts charging violation of statute and that such counts charged each defendant with crime of being an ex-convict in possession of a dangerous or deadly weapon, was not error, since such statement was merely a brief identification of counts to which reference was made. Gen.Laws, Act 1970, § 2.

17. Criminal law ⚷778(11)

Charge that defendant's attempt to escape was not sufficient in itself to establish guilt but was a fact which could be considered in light of other evidence in deciding guilt or innocence, was not error. Pen.Code, § 1127c.

18. Indictment and information ⚷114

Defendants could be adjudged habitual criminals without being so charged in information, since habitual criminal statute does not create a substantive offense, but rather provides for more severe punishment for those who proved immune to lesser punishment. Pen.Code, § 644.

19. Criminal law ⚷1109(3)

Where transcripts of court reporter and clerk showed that defendants had been adjudged habitual criminals and reporter's transcript showed that court in entering judgment reserved right to change adjudication within sixty days, error in clerk's transcript which gave ninety days in this part of judgment instead of the sixty days ordered, was harmless. Pen.Code, § 644.

20. Criminal law ⚷1202(1)

Statute requiring that information be filed on certain crimes within three years after commission was inapplicable so as to deprive trial court of jurisdiction to adjudge defendants to be habitual criminals on ground that prior convictions took place more than three years before filing of information, since allegations of previous convictions are not allegations of substantive crimes but merely provided for more severe punishment. Pen. Code, §§ 644, 800.

21. Constitutional law ⚷82
Criminal law ⚷1201

Habitual Criminal Act providing for more severe punishment for those previously convicted of felonies is not unconstitutional on ground that it is a bill of attainder since punishment is imposed after a judicial trial and only as a punishment for new offenses specifically charged in information. Pen.Code, § 644.

22. Constitutional law ⚷250
Criminal law ⚷1201

Habitual Criminal Act providing for more severe punishment for those who previously committed felonies is not unconstitutional as denying equal protection of laws on ground that question of whether defendant is a habitual criminal is left to discretion of trial court, since statute refers to matter of punishment. Pen.Code, § 644; U.S.C.A.Const. Amend. 14.

23. Criminal law ⚷1206(1)

Statutes permitting variations in punishment in discretion of court in accordance with circumstances of a particular case are not unconstitutional. Pen. Code, § 644.

◆

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Morgan A. Israel and Michael Patrick Marvich were convicted of robbery in the first degree, grand theft of an automobile and of possessing firearms capable of being concealed upon person, and they appeal.

Affirmed.

Morgan A. Israel and Michael Patrick Marvich, in pro. per.

Fred N. Howser, Atty. Gen. and Howard S. Goldin, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

About 11:00 A.M. on March 5, 1948, two men, each holding a revolver in his hand, robbed the office of a used car lot in Fresno. They threatened three employees with the guns and took $24. When these employees were unable to open the safe the men left, taking a black Ford car belonging to the owner of the lot. This Ford car was found on another parking lot the next day. The same day, March 6, a Buick automobile owned by Bert Fryrear was taken from a street in Fresno where it had been parked. On March 13, 1948, officers found this Buick car parked on a street in Long Beach with these defendants asleep therein. Marvich had the keys to the Buick in his pocket.

Count I of the information charged each defendant with "Armed Robbery, a felony, in that * * * they did, while armed with a deadly weapon, to wit, a gun, rob——". Count II charged each defendant with a felony, grand theft of an automobile belonging to one Sam Davidson. Count III charged Israel with a violation of section 2, Act 1970 of Deering's General Laws, a felony, in that he had in his possession a firearm capable of being concealed upon the person and that at said time he had been convicted of five felonies which were named, together with the periods and places of imprisonment. Count IV charged defendant Marvich with a similar crime, it being alleged that he had been convicted of three felonies. Count V charged each of the defendants with a felony namely, grand theft of an automobile belonging to Bert Fryrear. It was alleged that all of these crimes were committed in Fresno County, the first four on March 5, 1948, and the fifth on March 6, 1948. The information also charged Israel with five prior convictions of felonies and Marvich with three such prior convictions. The defendants pleaded not guilty as to each count of the information, but each admitted the prior convictions therein charged as to him.

At the trial the defendants denied having committed any of these offenses and denied that they had been in Fresno at the times in question. They attempted to prove an alibi, producing some five witnesses who testified that the defendants were in Sacramento on March 5 and 6, during the hours when the crimes were committed. Marvich testified that during the evening of March 11, he took two drinks in a house at Sacramento; that shortly thereafter he went to sleep; and that the next thing he remembered he was looking into the barrel of the officer's gun in Long Beach at about 3:30 A.M. on March 13. Israel testified that he had taken several drinks from a bottle while riding in a car with two men in Sacramento on the evening of March 11, and that the next thing he remembered was being in the Long Beach jail on March 13. That the jury did not accept the alibi as true is fully apparent and the record discloses ample reason for its action in that regard. Each of the three employees of the used car lot, who were held up on March 5, positively identified the two defendants as the ones who had committed that crime.

The jury found each defendant guilty of robbery in the first degree as to Count I, and guilty of grand theft of an auto as to Count II. On Count III Israel was found guilty of violating section 2, Act 1970 of Deering's General Laws, as charged. On Count IV, Marvich was found guilty of a similar charge, On Count V each defendant was found guilty of grand theft of an auto, as charged therein. A motion for new trial as to each defendant, and a motion for arrest of judgment as to Count I, were denied. The court sentenced each defendant to imprisonment in the state prison until legally discharged. As to Israel, it was ordered that Counts I and V run consecutively but that Counts II and III run concurrently with Counts I and V. As to Marvich, Counts I and V were ordered to run consecutively and Counts II and IV to run concurrently with Counts I and V. Each defendant was further adjudged an habitual criminal under section 644 of the Penal Code, the court reserving the right to change its order within 60 days. The defendants have appealed from the judgment and from an order denying their motion for a new trial.

[1-3] It is first contended that Count I of the information fails to charge a public offense in that it fails to set forth the essential elements of robbery, and does not allege that personal property was taken from the possession of another against his will and by means of force or fear. It is argued that the defendants could not be expected to know the meaning of the word "rob" and thus were not given notice as to the offense for which they must stand trial. No demurrer was interposed and the record indicates that the appellants were not in any doubt as to the nature of the charge from a factual standpoint. While the form of the charge in this count is not one to be especially commended it sufficiently apprised the appellants of the offense of which they were charged, and substantially complied with the form authorized by sections 951 and 952 of the Penal Code. People v. Flohr, 30 Cal.App.2d 576, 86 P.2d 862; People v. Kent, 90 Cal.App.2d 77, 202 P.2d 376; People v. Fallai, 99 Cal.App. 297, 278 P. 449. Moreover, it could not be held in this case that any substantial rights of the appellants were prejudiced by any defects or omissions in the form of this count of the information. It is further argued in this connection that the verdicts on Count I are contrary to law since they found the appellants guilty of robbery as charged in Count I and failed to specifically find that the appellants had feloniously taken personal property from the possession of another by means of force or fear. This contention is without merit for the reasons above given. The verdicts were general and necessarily included an implied finding on each of the elements of the

crime charged. People v. Murray, 42 Cal. App.2d 209, 108 P.2d 748. No objection to the form of the verdict was made at the time it was returned. People v. Gayle, 202 Cal. 159, 259 P. 750.

[4] It is next contended that Counts II and V fail to charge grand theft of an auto because they fail to allege that the appellants intended to permanently deprive the owner of the automobile. In these counts the appellants were accused of felony, grand theft of an auto in that on a certain day they unlawfully took the property of a certain person, consisting of an automobile. This was sufficient under the short form authorized by the Penal Code. People v. Mainhurst, 67 Cal.App.2d 882, 155 P.2d 843; People v. Orona, 72 Cal. App.2d 478, 164 P.2d 769. The jury were instructed with respect to the necessary elements and the evidence was amply sufficient to support the implied finding of a felonious intent to deprive the owner of its possession.

[5] It is next contended that Counts III and IV fail to charge a public offense. It is argued that while these counts charged the respective appellants with being a person who had been convicted of felonies and with having in his possession a firearm capable of being concealed upon the person they fail to allege that said firearms had barrels of less than 12 inches in length and that, consequently, the appellants were not given notice of the charge upon which they were to be tried. The length of the barrel of the firearm referred to in the statute is given in a further definition of some of the terms used. The complaint here not only described the offense charged in plain and understandable language but it referred particularly to the statute itself. Not only were the appellants fully apprised of the nature of the offense charged but the jury was instructed as to the essential elements, and the evidence amply showed a violation of the statute.

[6] It is further contended that Counts III and IV placed the appellants twice in jeopardy for the same offense attempted to be charged in Count I, in which they were charged with armed robbery. These are two distinct offenses and the fact that the possession of a gun happens to be an element in each offense is immaterial. People v. Warren, 16 Cal.2d 103, 104 P.2d 1024; People v. Perry, 99 Cal.App. 90, 277 P. 1080. This is further supported by the decision of In re Shull, 23 Cal.2d 745, 146 P.2d 417, relied on by the appellants.

It is next contended that it was a violation of the due process clause of the Fourteenth Amendment to the Federal Constitution to "read defendants' prior convictions of felony to the jury after defendants had admitted them as charged." It is argued that at the outset of the trial the trial judge informed the entire jury panel that the defendants had previously been convicted of felonies; that upon reading the information to the jury the prior convictions charged therein were also read although these had been admitted by the defendants; that this was in violation of sections 1025 and 1093 of the Penal Code; that the jury was thus informed that Israel had suffered five prior felony convictions and Marvich three prior felony convictions; and that this was prejudicial error. Many cases are cited, including People v. Meyer, 73 Cal. 548, 15 P. 95, and People v. Richardson, 74 Cal.App.2d 528, 169 P.2d 44.

[7] So far as the record affirmatively shows, the only reference to prior convictions was relative to those counts in which the appellants were charged with a violation of section 2, Act 1970 of Deering's General Laws. At the beginning of the trial the judge told the jury panel what the charges were, briefly reviewing the five counts of the information, including those of Counts III and IV. In impaneling the jury 24 prospective jurors were examined. The district attorney did not refer to prior convictions in examining the first of these. However, defense counsel asked this prospective juror if she would be influenced by the fact that both defendants had previously been convicted of felonies. The district attorney then stated to the second juror that some mention of prior convictions had been made and asked the juror whether he could apply such evidence to the counts where that particular thing was charged and not be influenced by that fact with respect to other counts. The district attorney only referred to the matter there-

after while questioning three other jurors, each of whom was asked, in effect, whether he could thus segregate the matter and apply evidence as to prior convictions only to the counts in which it was charged. However, the defense counsel asked fourteen of the prospective jurors whether or not they would be influenced in their verdict by reason of the prior convictions. After the jury was sworn in the record merely shows that the information was read to the jury by the clerk. It must be presumed that the clerk complied with the duty imposed upon him by section 1093 of the Penal Code and that, in reading the information, he omitted therefrom the general charges of prior convictions which followed the five counts.

[8] It would appear, however, that Counts III and IV were read to the jury as part of the new charges and these included, as essential parts thereof, the fact that the appellants had previously been convicted of felonies. When the district attorney started to prove the charges contained in Counts III and IV he put on a witness for the obvious purpose of proving that the appellants had suffered prior convictions. Before anything was said in this regard, the appellants stipulated that the prior convictions as alleged in those counts were correct and the matter was dropped. The matter of prior convictions was an essential part of the charges contained in Counts III and IV, the fact of prior convictions being of the essence of the specific crimes there charged. The matter of prior convictions was referred to only in that connection, the appellants' counsel accepted the situation and went into the matter on the examination of jurors to a much greater extent than did the district attorney, and no objection was made at any time. The court instructed the jury that, aside from purposes of impeachment, the evidence of prior felony convictions could be considered by it only in reaching verdicts under Counts III and IV. Under these circumstances, no prejudicial error appears. People v. Murray, 42 Cal.App.2d 209, 108 P.2d 748. Counts III and IV included, as a substantive part of the offense, the fact that a person charged with having in his possession a prohibited firearm was a person who had been convicted of a felony. By pleading not guilty to those counts the appellants put in issue all of the facts necessary to a conviction thereunder. In such a situation the statutory requirement that the admission of a general charge of prior convictions shall not be read to the jury or referred to cannot be controlling. People v. Forrester, 116 Cal.App. 240, 2 P.2d 558; People v. McFarlan, 126 Cal.App. 777, 14 P.2d 1066. Under such circumstances, the necessary reference to prior convictions could not be held prejudicial. People v. Chapman, 81 Cal.App.2d 857, 185 P.2d 424.

[9] It is next contended that the district attorney was guilty of prejudicial misconduct in trying to prove that Marvich had attempted to escape from jail, knowing that he was unable to prove that fact. A cellmate testified that while confined in jail Marvich secured a file and pliers from a trusty and made active preparations for an escape; that he loosened the screws on a ventilator, filed a part of the door and removed bolts; and that he had seen him take bolts out of the door and go into another part of the building at night. Jailers testified that they learned that an escape attempt was being made; that they found that the cell door had been loosened and could be opened; and that the ventilator had been tampered with and loosened. Appellants' main argument is that the evidence is not factually sufficient to establish an escape attempt. The court was not asked to instruct the jury to disregard this testimony and it is by no means certain that it was inadmissible. People v. Arnold, 199 Cal. 471, 250 P. 168. In any event, there is nothing to indicate that the district attorney was guilty of misconduct or that he attempted to prove a fact when he knew he would be unable to prove it. The court instructed the jury that an attempt to escape while awaiting trial is not sufficient in itself to establish guilt but is a fact which, if proved, may be considered in the light of all other proved facts in deciding the question of guilt or innocence. There is no merit in the contention here made.

[10] It is next contended that the trial judge committed prejudicial error by casting doubt upon the testimony of defense

witnesses. In the first instance, a witness testified that Israel had told him that on a certain occasion he (Israel) called to see a doctor at a military field. The court remarked: "I'll sign an order for that if you want to make an investigation on that." In another, the judge asked an alibi witness "Are you interested in making an alibi for Israel?" When the witness replied "No", the matter was dropped. In another, when an alibi witness was testifying about the markings he had made on a calendar, the judge said: "I think you had better mark this and get it in evidence." "It's marked the 3rd and all the other months are marked the 5th." In another instance the witness had testified that he was in a certain place of business on March 5, and while the district attorney was questioning him as to whether or not he was positive about that the judge said: "Well, I think the record is clear on that. I think he testified to that." The judge then asked the witness several questions as to whether he was sure he was in the place of business on July 5 (which was also marked), reminding him that the 4th of July was celebrated on that day. Nothing appears other than a purpose on the part of the judge to bring out the real facts and to clarify the testimony. No assignment of misconduct or request for an admonition to the jury was made, and we can see in these incidents no improper comment upon the evidence. People v. Warren, 16 Cal.2d 103, 104 P.2d 1024; People v. Stanhope, 37 Cal.App.2d 631, 99 P.2d 1075; People v. Ramos, 66 Cal.App.2d 731, 152 P.2d 758.

[11-13] It is next contended that the verdicts are contrary to law since "the prosecutor relied on and secured the convictions on prejudicial matters, while the defendants established a conclusive alibi." It is further argued in this connection that this is a close case. We do not agree that this is a close case when the evidence is considered. An alibi was not conclusively established and, so far as the written record is concerned, it is difficult to see how any jury could have accepted it as true. On the other hand, the fact that a robbery took place at this used car lot on March 5 and that another automobile was taken on March 6 are not disputed. The appellants were positively identified by three witnesses as the parties who held up employees of the used car lot, and there was a great deal of other evidence which tended to confirm their testimony. Beyond question, the appellants were found in possession of the car which was taken on March 6 and their attempted explanation of that fact was far from satisfactory. The evidence was entirely sufficient to sustain the convictions and the verdicts were not contrary to law for any such reason.

[14-17] It is next contended that the court misdirected the jury. It is first argued that error appears in an instruction to the effect that as the jury might find the facts to be, in relation to Count I, it might bring in either a verdict of guilty of robbery in the first degree or as not guilty of robbery as charged in that count, as applying to each defendant. It is argued that the jury should have been allowed to find the appellants guilty of robbery in the second degree. Under the evidence in this case, the defendants were either guilty of robbery in the first degree or not guilty of that offense, and no error appears. The court did instruct the jury as to the necessary elements of that offense and that it was its duty to fix the degree of the crime in the event it found the appellants guilty. It is admitted that another instruction on grand theft of an auto was a correct statement of the law as far as it went, but it is argued that it should also have told the jury that the automobile must be feloniously driven away "with the intent to permanently deprive the owner thereof." This instruction, with the other instructions given, was sufficient. A third instruction, with respect to the prior convictions involved in Counts III and IV is attacked because the court, after setting forth the exact language of the statute and telling the jury that aside from purposes of impeachment evidence of such prior convictions could be considered only in connection with those two counts, said: "Those are the counts charging each defendant with the crime of being an exconvict in possession of a dangerous or deadly weapon." This was merely a brief identification of the

counts to which reference was made. The objection made is trivial and no prejudicial error appears. It is also argued that the court erred in giving an instruction that attempt to escape is not sufficient in itself to establish guilt but is a fact which might be considered in the light of other evidence in deciding the amount of guilt or innocence. It is argued that this instruction does not comply with the provisions of section 1127c of the Penal Code. The instruction used almost the exact language of section 1127c, and no error appears.

[18] It is next contended that the appellants were not given notice in the information that they were charged as being habitual criminals. It is argued that section 644 of the Penal Code makes the act of being an habitual criminal a separate felony and that the appellants could not be adjudged habitual criminals without a direct allegation in the information charging them as habitual criminals. This contention is completely answered by the case of In re McVickers, 29 Cal.2d 264, 176 P.2d 40.

[19] It is next contended that the trial judge did not specifically adjudge the defendants to be habitual criminals. While this was not necessary In re McVickers, 29 Cal.2d 264, 176 P.2d 40, both the clerk's transcript and reporter's transcript shows that such an adjudication was specifically made. While the reporter's transcript shows that the court, in entering the judgment, reserved the right to change this adjudication within 60 days, there is an immaterial error in the clerk's transcript which gives 90 days in this part of the judgment, instead of the 60 days ordered.

[20] It is next contended that the statute of limitations, Section 800 of the Penal Code, deprived the trial court of jurisdiction to adjudge the defendants to be habitual criminals. It is argued that the Habitual Criminal Act, Section 644, Penal Code, provides for the punishment of a direct and distinct offense and not for an added punishment, and that it follows that the prior convictions here in question, having taken place more than three years before the filing of the information, were barred. This contention is as fallacious as it is novel. It is well settled that the allegations of previous convictions are not allegations of substantive crimes, and the nature and purpose of such allegations are well settled. In re McVickers, 29 Cal.2d 264, 176 P.2d 40; People v. Richardson, 74 Cal.App.2d 528, 169 P.2d 44.

[21] It is next contended that the Habitual Criminal Act, Section 644, is legislative punishment without a legal trial and is unconstitutional "in that it is a bill of pains and penalties (Bill of Attainder)." The punishment here in question was imposed after a judicial trial and only as a punishment for the new offenses specifically charged in the information. People v. Richardson, 74 Cal.App.2d 528, 169 P.2d 44; In re McVickers, 29 Cal.2d 264, 176 P.2d 40.

[22, 23] Appellants' final contention is that the Habitual Criminal Act, Penal Code, Sec. 644, denies equal protection to all who come within its provisions and thus violates the Fourteenth Amendment to the Federal Constitution. This charge is directed to subdivision (c) of section 644, which provides that in exceptional cases, and within sixty days after the commencement of imprisonment, the court may provide that the defendant is not an habitual criminal. It is argued that a discrimination exists since the question of whether or not a defendant is an habitual criminal is left to the discretion of the trial court. This statute refers entirely to the matter of punishment and there is nothing unconstitutional in statutory provisions permitting variations in the punishment in the discretion of the court, in accordance with the circumstances of particular cases. We have no doubt of the constitutionality of the statute in this regard. People v. Richardson, 74 Cal.App.2d 528, 169 P.2d 44; People v. Floth, 8 Cal.App.2d 600, 47 P.2d 817; People v. Maddox, 75 Cal.App.2d 478, 171 P.2d 561; People v. Quiel, 68 Cal.App.2d 674, 157 P.2d 446; People v. Biggs, 9 Cal.2d 508, 71 P.2d 214, 116 A.L.R. 205.

While the appellants have presented this appeal in an unusually able manner their objections are more technical than substantial, and we are able to find neither prejudicial error nor anything indicating that they did not have a fair trial.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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91 Cal.App.2d 818

LOGAN et al. v. SERPA et al.

Civ. 3772.

District Court of Appeal, Fourth District, California.

May 13, 1949.

Rehearing Denied June 10, 1949.

Hearing Denied July 8, 1949.

1. Appeal and error 🔑1010(1)

Finding of trial court based on testimony that title to automobile did not pass to daughter of deceased husband of mother, as alleged, pursuant to statement made by deceased a few weeks before his death that daughter could have automobile if daughter would take care of deceased, was conclusive on appeal.

2. Appeal and error 🔑1010(1)

In action against a mother and her daughter for damages arising out of collision with automobile driven by daughter, finding of trial court, based on testimony, that daughter and mother who accompanied daughter were not engaged in a joint venture, so as to make alleged negligence of daughter imputable to mother, could not be disturbed on appeal.

3. Automobiles 🔑244(32)

In action against a mother and her daughter for damages arising out of collision with automobile driven by daughter, trial court properly found that the automobile driven by daughter had been community property prior to death of husband of defendant mother.

4. Husband and wife 🔑265

Husband has management and control of automobile constituting community property. Civ.Code, §§ 161a, 172.

5. Automobiles 🔑20

Certificate of registration does not conclusively establish true ownership of an automobile, and a different ownership may be shown after death of person in whose name automobile is registered, for purpose of establishing liability under statute making owner of automobile liable for injuries resulting from negligent operation by person operating automobile with permission of owner. Vehicle Code, § 402.

6. Descent and distribution 🔑74
Wills 🔑721

The estate of a decedent vests in his heirs or devisees, immediately upon his death. Probate Code, § 300.

7. Automobiles 🔑195(1)

Under statute, one-half of automobile which had been community property belonged to wife upon death of her husband, as did the other one-half where husband died intestate, and negligence of daughter in operating automobile was imputable to wife as owner pursuant to statute, for purposes of civil damages, where daughter operated automobile with permission of wife and no administrator had been appointed who would have right of possession and control of automobile under statute for purposes of administration. Probate Code, §§ 201, 201.5, 300; Vehicle Code, § 402.

◆

Appeal from Superior Court, Kings County; Clark Clement, Judge.

Action by Leslie B. Logan and Doris Logan against Mrs. John C. Serpa, and Alice Serpa for damages arising out of an automobile collision, wherein defendants cross-complained. From portion of judgment which was in favor of defendant Mrs. John C. Serpa, plaintiffs appeal.

Reversed with direction.

Walch & Griswold, of Hanford, for appellants.

Sidney J. Sharp, Herbert M. Braden and Lawrence W. Clawson, all of Hanford, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant Leslie B. Logan and his wife, Doris, brought this action against defendants and respondents Mrs. John C. Serpa and her daughter Alice Serpa, for damages arising out of an automobile collision.

The complaint alleges that on October 7, 1945, defendant Alice Serpa, aged 24, was driving a Chevrolet belonging to her mother and with her consent, and while so driving was acting for her mother as servant and agent. Defendants denied the allegations and set up a cross-complaint seeking damages against plaintiffs. The trial court, sitting without a jury, granted plaintiff Leslie B. Logan $8,483.30 and Doris Logan $3,500, as a judgment against Alice Serpa and denied defendants the relief sought by the cross-complaint. It found that the Chevrolet, driven by defendant Alice Serpa, was, at the time of the accident, registered in the Department of Motor Vehicles under the name of J. C. Serpa, her deceased father, as legal owner; that there was no relationship of principal and agent, or joint adventurers between the mother and daughter. In one paragraph of the judgment the court specifically ordered "that judgment be entered in favor of defendant Mrs. John C. Serpa."

Plaintiffs appeal only from this quoted portion of the judgment, and contend that there is not sufficient evidence to warrant (1) a finding that she was not the owner of the Chevrolet at the time of the accident; and (2) the finding that there did not exist the relationship of master and servant, principal and agent, or joint adventurers between them.

As to the first contention the evidence shows that the Chevrolet, previous to the accident, was registered in the name of J. C. Serpa; that he passed away on August 24, 1945, 44 days prior to the accident; that the father died without executing a will and no steps had been taken toward the administration of the estate. The heirs were his wife, Alice, and two other daughters. The showing was that the property of the estate was community property. The pink slip was kept by the deceased in his safe deposit box to which Alice had access. Two days after the accident Alice sold the automobile and she signed her father's name to the pink slip without any power of attorney from him. She claimed that she had authority to open the safe deposit box which was, immediately after his death, changed to the name of her mother. She also claimed that she was living with her father and mother on the ranch and that prior to his death no other member of the family drove the automobile except she and her father. She testified that a few weeks before his death the father told her that she could have the Chevrolet car "if she came to take care of him." Her testimony in reference to the claimed gift of the Chevrolet car was corroborated by her mother and another witness. It was used on and about the ranch and gasoline for its use was taken from the family pump located on the ranch. During the father's illness Alice used the Chevrolet in and about the ranch and drove her mother to the hospital to visit her father each day.

The mother testified that she believed, at the time, that the automobile was owned by her daughter.

[1] The finding of the trial court that title to the automobile did not pass to the daughter is conclusive upon this appeal. It is therefore plaintiffs' argument, predicated upon this finding, that in view of the provisions of sections 164 of the Civil Code and 201 of the Probate Code "All property acquired after marriage of a husband and wife is community property," and that "upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse and further, that in the absence of testamentary disposition by the decedent the other one-half goes to the surviving spouse"; that Mrs. John C. Serpa, upon the death of J. C. Serpa, was vested with the ownership and title of the Chevrolet automobile in toto in the absence of testamentary disposition, unless it was disposed of during his lifetime. It is therefore argued that the undisputed evidence shows that, on the date of the accident, Mrs. John C. Serpa was the owner of the car and was present with her daughter who was driving, and that she was therefore liable under section 402 of the Vehicle Code and such decisions as Randolph v. Hunt, 41 Cal.App. 739, 183 P. 358; Goodpastor v. Southern Pacific Co., 54 Cal.App.2d 762, 129 P.2d 963; Grover v. Sharp & Fellows Contracting Co., 66 Cal.App.2d

736, 153 P.2d 83; and Cope v. Goble, 39 Cal.App.2d 448, 103 P.2d 598.

As to the second contention the evidence shows that on the date of the accident Alice Serpa drove the Chevrolet, with her mother sitting in the front seat, on her way to see the foreman of the ranch, which ranch her mother had inherited upon her husband's death.

Alice Serpa testified that she had no separate income of her own; that she did take her mother in the automobile wherever the mother wanted to go, but that the mother did not in any way attempt to control her driving.

The mother testified that she asked her daughter to drive her to this ranch; that at the intersection where the accident took place she knew that there was a boulevard stop sign and saw it on that occasion; that as they were approaching the stop sign she was not talking to her daughter; that apparently Alice did nothing at the time about making a boulevard stop but did eventually stop about six feet "ahead of the stop sign."

[2] Plaintiffs strongly contend that this evidence shows, notwithstanding the finding of the court to the contrary, that the two defendants were engaged in a joint venture, even if it may be assumed that the mother was not the owner of the car, because of the fact that she helped finance the trip in the form of gasoline taken from the family pump and because the daughter was receiving compensation by way of residence in her mother's home. The question as to whether or not there was a joint venture was submitted to the trial court and this issue was decided against plaintiffs and cannot be disturbed on appeal. In the absence of proof of ownership of the Chevrolet by the mother, it cannot be said, as a matter of law that the relationship of principal and agent did exist between the mother and daughter at the time of the accident. It appears to us that the entire question, therefore, depends upon whether or not Mrs. John C. Serpa was the owner of the Chevrolet within the meaning of section 402 of the Vehicle Code, which recites "(a) Every *owner* of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages" (Italics ours), subject to the limitations imposed by subdivision (b) thereof.

[3, 4] The automobile, though registered in the name of the husband, was properly found by the court to be community property. Up to the time of his death he had the management and control of it. Secs. 161a and 172, Civ.Code; Cox v. Kaufman, 77 Cal.App.2d 449, 175 P.2d 260; Wilcox v. Berry, 32 Cal.2d 189, 195 P.2d 414.

[5] It has been held that a certificate of registration does not necessarily or conclusively establish true ownership and that a different ownership may be shown under certain circumstances which would bring the true owner within the provisions of sec. 402 of the Vehicle Code. McCalla v. Grosse, 42 Cal.App.2d 546, 109 P.2d 358.

[6, 7] Under this construction, ownership, for the purpose of establishing liability under sec. 402 of the Vehicle Code must have been in someone, otherwise the real purpose of the act in protecting other people on the highway could be legally defeated by allowing cars to remain in the names of deceased persons. It appears to us, therefore, that since it was established that the car was community property, the argument of plaintiff is tenable, i. e., that under sections 201 and 201.5 of the Probate Code "upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse, and that in the absence of testamentary disposition by the decedent the other one-half goes to the surviving spouse." That the estate of a decedent vests in his heirs or devisees immediately upon his death cannot be disputed. Western Pacific Railway Company v. Godfrey, 166 Cal. 346, 136 P. 284, Ann.Cas. 1915B, 825. Sec. 300 of the Probate Code provides that "When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence

of such disposition, to the persons who succeed to his estate * * * but all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration * * *." Defendants argue that possession and right of control of the automobile was in the administrator or the court, and therefore Mrs. John C. Serpa had no such right of possession or control over it, citing Clayton v. Rickerson, 160 La. 771, 107 So. 569; and Clemmons v. Clemmons, 198 Ark. 430, 128 S.W.2d 994. In the instant case there never was an administrator appointed to take possession of the car. During all of the period in question the wife retained possession of it and exercised control over it, and it was being operated by the daughter with the express or implied permission of the mother. Under these circumstances we conclude that the negligence of the daughter is imputed to the mother for all purposes of civil damages to the extent of the limitation expressed in subdivision (b) of section 402 of the Vehicle Code.

The judgment in favor of defendant Mrs. John C. Serpa is reversed and the court is directed to enter judgment against her in accordance with this conclusion.

BARNARD, P. J., and MUSSELL, J., concur.

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91 Cal.App.2d 926

WOODLAND COOPERATIVE RICE GROWERS v. SMITH et al.

Civ. 7555.

District Court of Appeal, Third District, California.

May 19, 1949.

1. Equity ⚷39(1)

A court sitting in equity, and having taken jurisdiction, has broad powers, and may grant relief as diversified as the means employed to produce grievance complained of, and is not bound to strict legal rights of parties.

2. Mortgages ⚷415(3)

Where buyer paid in advance on promise of seller to deliver tractor within 90 days, and upon failure to deliver seller gave buyer a note to repay advance, secured by second deed of trust on realty, and buyer was given temporary use of another tractor allegedly owned by seller, and thereafter buyer brought suit to foreclose deed and seller counterclaimed for rental of tractor and damages, court could, in view of seller's doubtful ability to satisfy a deficiency judgment, properly allow seller's offset contingent only upon his satisfying judgment for buyer for money advanced, costs, and interest.

3. Bailment ⚷31(3)

In suit to foreclose deed of trust securing note, wherein defendant counterclaimed for rental of tractor and damages, evidence regarding reasonable rentals supported finding regarding value of use to which plaintiff put tractor while in its possession.

◆

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Suit by the Woodland Cooperative Rice Growers, a corporation, against A. R. Smith, also known as Bud Smith, and Betty Smith, to foreclose a deed of trust given to secure a promissory note wherein defendants filed a counterclaim. From the judgment, defendants appeal.

Judgment affirmed.

Hardin Barry, Susanville, for appellants.

Pardee & Cady, Susanville, for respondent.

ADAMS, Presiding Justice.

Defendants, appellants before us, executed and delivered to plaintiff their promissory note for $8300 on or about May 13, 1946, secured by a second deed of trust covering certain real property in Chester, Plumas County. Thereafter defendants turned over to plaintiff one RD-8 caterpillar tractor with bulldozer attachment, either as further security for the note, or as a renting for plaintiff's use in preparing gound for the production of rice.

The note not having been paid by defendants, plaintiff brought this action to foreclose the deed of trust. Defendants filed a counterclaim for the use of the tractor and attachments and damage thereto. The trial court rendered a judgment in favor of plaintiff for the amount of the note, with interest, together with attorney's fees and costs, the total judgment being $9270.69 plus $37.80 costs, with interest from date of judgment at seven percent per annum, and ordered sale of the real property described in the deed of trust. The decree provided that defendants were entitled to an offset in the sum of $3875 for rental of the tractor and attachment and for damages thereto, "such offset however being entirely contingent upon said defendants satisfying in full the above obligation to plaintiff, and that the plaintiff is entitled to have said deed of trust enforced and foreclosed and the said lands and premises hereinafter described sold in the manner prescribed by the law, and the proceeds arising from such sale applied to and upon the payment of said sums of money due as herein set out." It also provided "that if after the payment of the fees and disbursements of said commissioner the balance remaining in his hands shall amount to the total of all the items hereinabove in this paragraph set out, then and in that event the said defendants * * * shall be entitled to have credited against said amount said sum of $3,875.00 and the balance of the above specified amount shall be paid to plaintiff and provided further that should the balance remaining in the hands of said commissioner after the payment of his cost and disbursements shall amount to less than the whole amount due plaintiff as hereinabove specified then the whole thereof shall be paid to said plaintiff by said commissioner; and if there be any surplus after the making of said payments, he shall pay the same to the defendants * * *, and if the proceeds of said sale be insufficient to pay the amount so found due to the plaintiff, with interest, costs and expenses of sale as aforesaid, and it shall [so] appear from said commissioners return and report of said sale, a further hearing in this cause shall be had for the purpose of establishing the amount of the deficiency judgment, if any, to be entered against the defendants * * *, and the court does hereby retain jurisdiction of this matter for that purpose." Subsequently, on motion under section 663 of the Code of Civil Procedure, the judgment was amended to provide that the sale of the real property was subject to the lien of the holder of the first deed of trust.

On this appeal appellants urge, as grounds for reversal, that the offset allowed them as rental for the equipment and damage thereto, should have been allowed absolutely and unconditionally; and that the rental value should have been found to be $990 per month for a period of seven months.

The findings of the court upon which said decree is based recite that defendants authorized plaintiff to take possession of the tractor and attachment, and that they obtained such possession on July 6, 1946 and retained it until February 8, 1947, and used same; that the reasonable value of such use was $3500. There was also a finding that plaintiff became liable for damage to the equipment in the sum of $375. There was no specific finding as to whether such equipment was delivered to plaintiff by defendants as further security for the promissory note, as alleged by plaintiff, or was rented to it, as contended by appellants.

Because of the somewhat unusual form of the judgment in this case, a recital of the circumstances surrounding the transactions as presented at the trial seems to be in order. The evidence shows that on January 23, 1946, defendants were, and had been for several years, engaged in renting tractors and similar equipment, their place of business being Chester, Plumas County. On the aforesaid date Mr. Cox, a member and director of Woodland Cooperative Rice Growers, contacted Mr. Smith, seeking the purchase of a tractor and attached equipment for plaintiff; and Smith agreed to secure same within ninety days, for the sum of $8300. Mr. Cox thereupon delivered to Smith a cashier's check for that amount. Smith failed to secure the equipment and likewise failed and refused to return the $8300. Under pressure from Mr. Cox for the return of the money advanced, Smith, having no other security to offer, gave plaintiff the promissory note, secured by a second deed of trust upon certain real property in the town of Chester, Plumas County, upon which property one Hubert W. Hill already held a deed of trust securing defendants' note for $7500.

Mr. Cox, being dissatisfied with the sufficiency of the security, importuned Smith for additional security; and Cox testified that as Smith had been telling him about some tractors that he owned, he asked for a tractor. Smith said he had one "up north," which plaintiff could have in five or six days; and some time in July, 1946, Cox secured possession of same, on order from defendants, which was used to some extent by plaintiff until it was repossessed by the owner, it subsequently appearing that Smith did not own it but was only renting it from the actual owner. At the trial the evidence also revealed that Smith was in financial straits, and also had been indicted and tried for certain undisclosed crimes, which criminal proceedings were dismissed after two juries disagreed.

On the trial of this action Smith's testimony as to why he failed to return the $8300 advanced to him by plaintiff overtaxes credulity. He said that he had cashed the check in Sacramento and had then gone to San Francisco where he paid the cash over to a man who claimed to be a representative of the War Assets Administration, and who accompanied him on his drive to San Francisco, for the purchase of the equipment desired by plaintiff. He was unable to give the name of such representative, though he stated that he had done business with him before. He took no receipt for the cash so paid, and even stated that he did not know the name or the street number of the building in San Francisco in the lobby of which he had paid the money over; that this man was usually around the Whitcomb Hotel lobby or along among the government buildings in San Francisco, but that he did not know where his office was, or if he had one; that he had no dealings with any other person connected with the War Assets Administration and had never been able to get the tractor ordered nor a return of the cash.

On the other hand the record shows, and and Smith admitted, that he received the $8300 check; and entire good faith on the part of plaintiff in the transaction is undisputed. Also there is evidence tending to show that the value of the real property described in the trust deeds would not, when sold, bring enough to satisfy the indebtedness secured thereby, and that a deficiency in the amount due plaintiff would result. We assume that for these reasons the trial court ordered that the amount claimed by defendants as an offset should be allowed conditionally, and its allowance, at least in full, be made contingent upon full payment to plaintiff of the $8300 advanced, instead of deducting the amount of said offsets from the amount found due to plaintiff and giving judgment to plaintiff for the difference as appellant claims should have been done, since such a judgment would, in effect, result in payment to defendants of the amount of their offset, while, should the sale of the property result in an amount insufficient to pay plaintiff in full, plaintiff would be left with only a deficiency judgment of doubtful if any value.

[1] No question is raised in the case that by retaining jurisdiction of the cause for the purpose stated, the judgment became, in effect, interlocutory or nonappealable. The action is one in equity, and in rendering its decision the trial court was obviously seeking an equitable solution. Defendants were subject to the maxim that he who seeks equity must do equity; and regarding the equity powers of a court it was said in Muchenberger v. City of Santa Monica, 206 Cal. 635, 646, 275 P. 803, 807: "A court sitting in equity, and having taken jurisdiction, has broad powers. It may grant relief as varied and diversified as the means employed to produce the grievance complained of, and is not bound to the strict legal rights of the parties." That decision is cited in Tomas v. Vaughn, 63 Cal.App.2d 188, 193, 146 P.2d 499, 501, where it is said: "Once it acquires jurisdiction, equity's broad powers will permit the granting of relief as varied and diver-

sified as the means employed to produce the injury complained of. And in so doing equity is not bound to the strict legal rights of the parties."

[2] Since the allowance of defendants' set-off was contingent, and the trial court by its judgment retained jurisdiction "for the purpose of establishing the amount of the deficiency judgment, if any, to be entered against the defendants," we assume that after sale of the real property the trial court may redetermine the amount due defendants on their offset.

[3] As for the finding of the court regarding the value of the use to which plaintiff put the equipment while it was in its possession, the $3500. found is within the scope of the testimony regarding reasonable rentals, and we cannot say, as matter of law, that it should have been more or less.

The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.

91 Cal.App.2d Supp. 943

PEOPLE v. STATLEY.

C. A. 2462.

Appellate Department, Superior Court,
Los Angeles County, California.

April 28, 1949.

1. Husband and wife 🔑108

A married woman is not capable of committing a misdemeanor while acting under threats, command or coercion of her husband. Pen.Code, § 26, subd. 7; Pol. Code, § 4468.

2. Husband and wife 🔑108

Evidence made a question of fact for jury as to whether defendant acted under command of her husband and hence could not be guilty of misdemeanor of failing to yield the right of way to pedestrian in crosswalk. Pen.Code, § 26, subd. 7; Pol. Code, § 4468.

3. Husband and wife 🔑108

The common law presumption that a married woman in committing a crime conjointly with or in the presence of her husband acted in obedience to his command and under his coercion and hence is not criminally liable does not apply to a violation of traffic law by a married woman operating a motor vehicle in which her husband is a passenger. Pen.Code, § 26, subd. 7; Pol.Code, § 4468.

4. Statutes 🔑152, 158, 173

A statute is repealed only by further legislation and not by time or changed conditions.

5. Common law 🔑14

A common law principle may become inoperative when the conditions which gave rise to it cease to operate. Pol.Code, § 4468.

6. Common law 🔑14

The common law by its own principles adapts itself to varying conditions and modifies its own rules so as to serve the ends of justice under the different circumstances and when the reason of a rule ceases, so should the rule itself.

Appeal from Municipal Court of Los Angeles; Clarke Edwin Stephens, Judge.

Cora Elizabeth Statley was convicted of unlawfully failing to yield the right of way to a pedestrian in a crosswalk and from the judgment of conviction and an order she appeals.

Judgment and order reversed and case remanded for a new trial.

T. Ed. Scarborough, of Gardena, for appellant.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty. and Walter C. Allen, Deputy City Atty., all of Los Angeles, for respondent.

BISHOP, Judge.

[1-3] Convicted on a charge that she had failed to yield the right of way to a pedestrian in a crosswalk, the defendant

contends that the judgment of conviction should be reversed because the trial court failed to give her requested instruction that "under the laws of this State, a married woman is not capable of committing a misdemeanor while acting under threats, command or coercion of her husband." In support of her contention the defendant advances three arguments: (a) the instruction embodies a correct principle of law; (b) it was called for in this case by direct evidence that she was acting under her husband's command; (c) it was made pertinent by the common law presumption that a misdemeanor committed by a married woman in her husband's presence is done under his coercion. We have reached the conclusion that the instruction should have been given. It was a correct statement of the law, and the evidence before the jurors made it applicable. We cannot, however, square the ancient presumption with the facts of modern life. We are not ready to put our stamp of approval on the statement that, when a married woman who is operating a motor vehicle in which her husband is a passenger, neglects to make a boulevard stop, fails to signal before she turns, or commits any other violation of the traffic laws, the probability is that she did so because he made her do so.

[4] There can be no doubt that the requested instruction is a correct statement of the law, for we find in section 26, Penal Code: "All persons are capable of committing crimes except: * * * Seven. Married women (except for felonies) acting under the threats, command, or coercion of their husbands." One of the two exceptions contained in the language of the section was eliminated in People v. Graff, 1922, 59 Cal.App. 706, 708, 211 P. 829, 830, by rephrasing the quoted provision to read: "Married women are persons capable of committing all crimes, except misdemeanors committed by them when acting under the threats, command, or coercion of their husbands." It may quite properly be restated, for the purpose of this misdemeanor case, to eliminate all exceptions: "Married women are persons not capable of committing misdemeanors when acting under the threats, command, or coercion of their husbands." It was this principle of law that the defendant desired to have implanted in the minds of the jurors in order that she might have the benefit of it. The possibility that this code provision has become anachronistic does not justify the courts in disregarding it. A legislative enactment is not repealed by time or changed conditions, but only by further legislation. Palermo v. Stockton Theatres, Inc., 1948, 32 Cal.2d 53, 63, 195 P.2d 1, 7, and cases cited.

The testimony which gave pertinency to this instruction came from the lips of defendant's husband. After relating how the automobile which the defendant was driving, and in which he was riding, had stopped, to permit the traffic to clear up in the lane between them and the crosswalk, defendant's husband continued by repeating the words he had addressed to her: "You have got plenty of clearance, take it." She had begun to move forward just before he spoke these words, and following their utterance she drove on and into the crosswalk, causing a pedestrian to jump back.

We find in this evidence no basis for concluding that the defendant, in driving across the lane of traffic and into the crosswalk, had acted under a threat or under the coercion of her husband, but, had the matter been submitted to the jury, it is possible that it would have been determined that she acted under his command, or at least have entertained a reasonable doubt, see People v. Hardy, 1948, 33 Cal.2d 52, 198 P.2d 865, about the matter. His declaration to her was couched in the form of a command, and while it must be conceded that the jury might have determined that the defendant paid no attention to what her husband was saying, the question was one of fact, and the defendant was entitled to have the case submitted to the jury on her theory of the facts. Of course, the husband's denial that his words "Take it" constituted a command, no more removed the possibility of a command from the case than did his denial that there was a pedestrian in the crosswalk do away with him.

The defendant contends that the requested instruction was pertinent not only because there was direct evidence of a command but for the further reason that a presumption had arisen that she was acting under the coercion or command of her husband, and she requested, vainly, a further instruction that there was such a presumption. Whether or not such a presumption arises is a question that will be involved in any retrial of this case, and so merits attention. Our determination that there is no such presumption applying in this case is not predicated on any misapprehension about the existence of the presumption at common law. It did exist. It is referred to in O'Donnell v. State, 1941, 73 Okl.Cr. 1, 117 P.2d 139, 141, as being: "the rule of the common law that where a crime, with some exceptions, was committed by a married woman conjointly with or in the presence of her husband, prima facie she was not criminally liable, as it was presumed that she acted in obedience to his commands and under his coercion. This doctrine is announced by Blackstone, who says that it is a thousand years old." See also 41 C.J.S., Husband and Wife, § 222, pages 715-718.

[5] Nor are we unaware of the provision of section 4468, Political Code, that "The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state." We interpret State v. Carpenter, 1947, 67 Idaho 277, 281, 176 P.2d 919, 921, as holding that a statutory provision identical with our seventh subdivision of section 26, Penal Code, "differs from the common law" with the consequence that the presumption is no longer applicable. We are not satisfied, however, to rest our decision on this case, nor do we find the seventh subdivision of section 26 or any other statutory provision to be so inconsistent with the presumption that by virtue of the inconsistency the presumption is destroyed. We have come to our conclusion—that the presumption, which had served for more than a thousand years, has no application in such a case as ours—because we deem it possible for a common law principle to become inoperative when the conditions which gave rise to it cease to operate, and that that is the situation here.

In support of our first premise, that a principle of the common law may in time disappear from it, we present passages from two California cases. We quote first from Lux v. Haggin, 1886, 69 Cal. 255, 379, 385, 4 p. 919, 10 P. 674, 746, 750, the emphasis being that of the court: "In ascertaining the common law of England we may and should examine and weigh the reasoning of the decisions, not only of the English courts, but also of the courts of the United States, and of the several states, down to the present time. We are not limited to the consideration of the English decisions rendered prior to July 4, 1776. * * *

"The common law of England may be said to consist of a collection of principles found in the opinions of sages, or deduced from universal and immemorial usage, and receiving progressively the sanction of the courts. * * * The best evidence of the common law is found in the decisions of the courts, contained in numerous volumes of reports, and in the treatises and digests of learned men, 'which have been multiplying from the earliest periods of English history down to the present time.'"

[6] The following statement from Katz v. Walkinshaw, 1903, 141 Cal. 116, 122, 123, 70 P. 663, 74 P. 766, 767, 64 L.R.A. 236, 99 Am.St.Rep. 35, is also helpful: "* * * In Crandall v. Woods, 8 Cal. [136], 143, the court approved the following rule, quoting from the dissenting opinion of Bronson, J., in Starr v. Child, 20 Wend. [N.Y., 149], 159: 'I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition form no part of the law of this state. * * * It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails.' * * *

"The true doctrine is that the common law by its own principles adapts itself to varying conditions, and modifies its own rules so as to serve the ends of justice under the different circumstances—a principle adopted into our Code by section 3510, Civ. Code: 'When the reason of a rule ceases, so should the rule itself.' * * * In Beardsley v. Hartford, 50 Conn. [529], 542, 47 Am.Rep., 677, the court says: 'It is a well-settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim, "Cessante ratione, cessat ipsa lex." This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which, in the progress of society, gain controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply or to be a controlling principle to the new circumstances.'"

We content ourselves with merely citing two additional illustrative California authorities. Mushet v. Department of Public Service, 1917, 35 Cal.App. 630, 638, 170 P. 653, 657, and Fletcher v. Los Angeles Trust & Savings Bank, 1920, 182 Cal. 177, 182-184, 187 P. 425, 427, 428.

One further quotation on the general subject of the adaptability of the common law to changed conditions will suffice, this from Mitchell v. State, 1937, 179 Miss. 814, 824, 176 So. 743, 745, 121 A.L.R. 258: "The common law, however, both in its substantive and in its adjective features, is not now, never has been, and never will be, static or stagnant. It has been one of the proudest boasts of the common law that it has within itself the potency of steady improvement, and this by judicial action, so long as that action is in accord with existing fundamental legal principles." See also Commonwealth v. Gallo, 1931, 275 Mass. 320, 333, 175 N.E. 718, 724, 79 A.L.R. 1380.

Turning from the general to the particular, we find ourselves confronted by California cases in which opportunities were presented, but not availed of, to adapt common law precepts to today's conditions. We refer to Sesler v. Montgomery, 1889, 78 Cal. 486, 21 P. 185, 3 L.R.A. 653, 12 Am. St.Rep. 76, where it was held that, because a man and wife are one person in the eyes of the common law, slander is not committed by the husband who makes a slanderous remark concerning a third person to his wife; People v. Miller, 1889, 82 Cal. 107, 22 P. 934, and (with evident reluctance) People v. MacMullen, 1933, 134 Cal.App. 81, 24 P. 2d 794, in which it was held, for the same reason, that a man and wife cannot conspire; it takes two persons to commit that crime; and People v. Graff, 1922, 59 Cal. App. 706, 211 P. 829, where the conclusion was reached that a wife may be guilty of embezzlement and forgery respecting her husband's effects, but the decision was placed not on the ground that the common law rule had changed, but on the ground that it had been changed, by statute. But on the other hand, we are told, in Re Estate of Hartman, 1937, 21 Cal.App.2d 266, 269, 68 P.2d 744, 745, that "the common-law rule that regarded a husband and wife as a single entity and made the wife subject to the will of the husband" is a theory that "has long since been abandoned in this state, where the present policy of the law is to recognize the separate legal and civil existence of the wife."

As is evident from the cases listed in the annotations found in 4 A.L.R. 279 et seq., and 71 A.L.R. 1123 et seq., in a majority of the states the common law presumption with which we are concerned is still applied. There is no controlling authority in this state, needless to say, and we find it more acceptable to follow those cases where effect is given to the change that has undoubtedly taken place in our controlling ideas. In Smith v. Meyers, 1898, 54 Neb. 1, 74 N.W. 277, 278, we read: "Two instructions were requested by the defendant to the effect that the law so far presumes the wife to be under the control of the husband that, except for homicide and treason, she is conclusively presumed to commit any crime committed in his presence under compulsion by him, and that, therefore, she could not be convicted of perjury because of her testimony in this case, even if, in the language of the instruction, the action was 'a blackmailing scheme, and set-up job on the defendant.' The language quoted was so undignified, to use no harsher term, that the court was for that reason quite warranted in refusing to give it judicial sanction by incorporating it in its charge. But, beyond this, its object was to discredit the wife's testimony by stating that she was not subject to the penalties of perjury because of the presumed coercion of the husband. The general rule stated may have the sanction of age, and may have been justified by the social conditions of primitive times, when we are told that the husband might moderately chastise his wife, the only issue in such case being the size of the stick employed for such purpose. We do not care to inquire what real sanction it finds in adjudicated cases,—possibly no more than is found for the law of chastisement. Certain it is that such a presumption runs counter to our broad laws as to the competency of witnesses, and counter to the reason of men, in view of the domestic relations as they now exist, protected by more enlightened custom and a kindlier law. A wife is no longer a marionette, moved at will by the husband, either in fact or in law; and, with the legal recognition of a separate and responsible existence, she must assume some of the burdens of life,—among others, that of testifying to the truth, under the customary penalties."

King v. City of Owensboro, 1920, 187 Ky. 21, 218 S.W. 297, 298-299, contains this passage: "It may be conceded that even at the time of Blackstone it had been the rule of the common law for a thousand years that where a crime, with some exceptions, was committed by a married woman conjointly with or in the presence of her husband, prima facie she was not criminally liable, as it was presumed that she acted in obedience to his commands or under his coercion. * * * While it is said that the reason for the rule is not quite clear, it is evident that it must have had its foundation in the peculiar relation which existed between husband and wife in the earlier days. At common law the husband had almost absolute control over the person of his wife; she was in a condition of complete dependence; could not contract in her own name; was bound to obey; she had no will and her legal existence was merged into that of her husband, so that they were termed and regarded as one in law, 'the husband being that one.' 13 R.C.L. p. 983; Elliott v. Waring, 5 T.B. Mon., Ky., 338, 17 Am.Dec. 69; MacKinley v. McGregor, 3 Whart., Pa., 369, 31 Am. Dec. 522. But these conditions have changed. Even at an early day courts of equity disregarded the fiction that husband and wife were one, and treated them as separate and distinct persons where it was necessary to protect the rights of the wife. Elliott v. Waring, supra; Winebrinner v. Weisiger, 3 T.B.Mon., Ky., 32. Indeed, the early rule that the husband might chastise his wife in moderation was never recognized or enforced in this state. * * * Being secure in her person and property, and her separate identity having been established, it is clear that the means through which a husband exercised control and dominion over the person and property of his wife no longer exist. Having sought and obtained these new rights and privileges, which have placed her upon a plane of equality with her husband, she must accept the corresponding obligations and responsibilities which those rights and privileges entail, and can no longer take shelter under the supposed dominion of her husband. This is the view taken by the Supreme Court of Tennessee in the case of Morton v. State, 141 Tenn. 357, 209 S.W. 644, 4 A.L.R. 264, where it was held that the supposed duress of a woman by reason of marriage, which relieves her of liability for crimes committed in the presence of her husband, depends upon her disability by virtue of the marriage, and is destroyed by statutes emancipating her from such disability. We therefore conclude that there is no longer a presumption that a married woman who commits a crime conjointly with or in the presence of her husband acts under his coercion."

Banfield v. Addington, 1932, 104 Fla. 661, 140 So. 893, 898, speaks with a like voice: "At common law the husband had almost absolute control over the wife's person * * *. She was bound to obey her husband, was incapable of making contracts except for necessaries, so that in law they were regarded as but one person. * * *

"But the foregoing view of the legal relationship of husband and wife is no longer warranted, when by modern conditions and through modern statutory provisions the wife has been emancipated with respect to her personal wages and earnings. Where the reason for a rule of the common law, which is the spirit and soul of that law, fails, the rule itself fails. See Abraham v. Baldwin, 52 Fla. 151, 42 So. 591, 10 L.R.A., N.S., 1051, 10 Ann.Cas. 1148."

We conclude, then, that the reign of the thousand year old presumption has come to an end. In our society, where almost no bride promises to obey her husband, and where it is not accepted as the usual that a wife does what her husband wishes by way of yielding obedience to a dominant will, the basis for the presumption has disappeared. A presumption that has lost its reason must be confined to a museum; it has no place in the administration of justice. If, therefore, a wife is to escape the consequences of her disobedience of a statute on the ground that she was acting in obedience to her husband, the fact is not established by the mere circumstance that her husband was present when she offended. The judgment and order appealed from are reversed; the case is remanded for a new trial.

SHAW, P. J., and STEPHENS, J., concur.

33 Cal.2d 905

MOFFAT v. SMITH et al.

Sac. 5997.

Supreme Court of California, in Bank.

May 31, 1949.

1. Abatement and revival ⚷55(1)
Executors and administrators ⚷443(1)

The statute authorizing action against executor or administrator whose testator or intestate, in his lifetime wasted, destroyed, took, or converted plaintiff's property, created departure from common-law rule that action ex delicto does not survive tort-feasor's death to extent of action for injury to property, and fact that complaint states facts which would have constituted cause of action against deceased tort-feasor in his lifetime does not foreclose maintenance of same or similar cause of action against his executor. Probate Code, § 574.

2. Abatement and revival ⚷55(1)

An injury to person's estate, whether present or expectant, as distinguished from personal injury, is injury to "property" within statute authorizing action against executor or administrator whose testator or intestate, in his lifetime, wasted, destroyed, took, or converted plaintiff's property. Probate Code, § 574.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Property".

3. Abatement and revival ⚷55(1)

An injured person's right to support himself in future by carrying on and earning money in his profession constitutes "property" within statute authorizing action against executor or administrator whose testator or intestate, in his lifetime, destroyed plaintiff's property, so that action for loss of future potential earnings as result of injuries received in automobile accident did not abate on tort-feasor's death, but was properly brought against executrix of his estate. Probate Code, § 574.

SPENCE, EDMONDS, and SCHAUER, JJ., dissenting.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Eugene Alan Moffat against Bessie B. Smith, as executrix of the estate of David D. Copenhaver, deceased, for personal injuries sustained in an automobile collision. From a judgment of dismissal, plaintiff appeals.

Reversed with directions.

Prior opinion 197 P.2d 798.

David S. Folsum, Corcoran, for appellant.

Chester O. Hansen and John Said, Fresno, for respondent.

Maurice E. Harrison and Moses Lasky, San Francisco, as amici curiæ on behalf of respondent.

PER CURIAM:

The majority opinion of the District Court of Appeal of the Third Appellate District is adopted as the opinion of this court. It is as follows:

"Plaintiff brought this action seeking the recovery of damages for injuries sustained in an autombile collision alleged to have been due to carelessness and negligence on the part of one David D. Copenhaver. The latter having died subsquent to the accident, the action was brought against the executrix of his last will.

"Plaintiff's complaint alleges that because of the negligence of Copenhaver plaintiff sustained injuries which will prevent him from carrying on his occupation as a chemical engineer, and from advancing in his profession as such; that he would otherwise be capable of earning large amounts of money, and that, because of his injuries, he has been deprived, and will be deprived in the future, of great gains and profits which he might otherwise have made, to his damage in the sum of $50,000. It further alleges that plaintiff filed a claim against Copenhaver's estate which was rejected. A copy of said claim is made a part of the complaint. Therein $50,000 is claimed 'For loss of future potential earnings as a result of injuries received in an automobile accident * * * said injuries having been caused by the carelessness and negligence' of the deceased. A demurrer was filed by respondent on general grounds and on the ground that the alleged cause of action abated with the death of Copenhaver. Said demurrer was sustained without leave to amend, the action was dismissed, and this appeal followed.

"The only question presented here is did plaintiff's cause of action for loss of future potential earnings abate with the death of the negligent tort-feasor.

"Section 574 of the Probate Code, as enacted in 1931, provides:

"'Executors and administrators may maintain an action against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the property of their testator or intestate, in his lifetime, or committed any trespass on the real property of the decedent in his lifetime; and any person, or the personal representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the property of any such person or committed any trespass on the real property of such person.'

[1] "The foregoing section was considered and applied in Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379, and appellant premises his right to recover upon that decision. In that case one Mounsey killed a Dr. Hunt, and then took his own life. Hunt's surviving widow and children filed a claim against the estate of Mounsey for waste and destruction of their property, their property rights and estate. The court said that the legislative tendency may be said to enlarge rather than to restrict the causes of rights of action which will survive; and in construing section 574, supra, said, 28 Cal.2d at page 292, 169 P.2d at page 916:

"'The statute does not use express words of "survival." Nevertheless the section affords the right to maintain actions after the death of those who could have been plaintiffs or defendants if they had lived, in cases of injury to property, and to that extent has created a departure from the common law rule that actions ex delicto do not survive. The fact that the complaint states facts which would have constituted a cause of action against the tort feasor in his lifetime does not foreclose the maintenance of the same or a similar cause of action to the extent authorized by section 574.'

"It also stated, 28 Cal.2d at pages 296, 297, 169 P.2d at page 918:

"'Injuries suffered by the plaintiffs by the lessening of their estate and the invasion and deprivation of their pecuniary interest and right to future support from their decedent by the commission of the wrongful act is as much a destruction [of] or injury to property as was involved in the foregoing cases; and the tort likewise in this case should be deemed to be an invasion of their property rights within the meaning of the present statute. Where the courts have not held such losses to be injuries to property, it has been due to a reluctance to depart from ancient judicial declarations or to the absence of a statute designed to modify the old rule of nonsurvival. The Legislature has definitely spoken by the amendment of our statute so as to enlarge the class of property rights and interests which shall receive protection in the event of the death of the wrongdoer. Where the Legislature has so provided the courts should not countenance a tortious deprivation of property without redress.

[2] "'It follows that wherever a plaintiff has sustained an injury to his "estate," whether in being or expectant, as distinguished from an injury to his person, such injury is an injury to "property" within the meaning of that word in the present statute. The plaintiffs have therefore stated a cause of action for recovery from the defendants of the material losses sustained, including the present value of future support from their decedent considering their respective normal life expectancies, but exclusive of any damages for such items as loss of consortium, comfort or society of the decedent.'

[3] "And while in that case it was the right of the survivors of a decedent whose life had been taken by the action of the tort-feasor that was involved, it would be an anomaly to hold that their right to future support from their decedent constituted property within the provisions of section 574, supra, but that the right of the surviving victim of the tort to his own future

support is not. And when the court in the Hunt case said that when a plaintiff has sustained an injury to his 'estate,' whether in being or expectant, such injury is an injury to property, it laid down a rule which governs in the case before us. * * *"

The judgment is reversed with directions to overrule the demurrer.

SPENCE, Justice (dissenting).

I dissent. The majority opinion rests upon the decision in Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379. I adhere to the views expressed in my dissenting opinion in that case, and I would therefore affirm the judgment.

EDMONDS, and SCHAUER, JJ., concur.

33 Cal.2d 867

SWARS v. COUNCIL OF CITY OF VALLEJO et al.

Sac. 6007.

Supreme Court of California.
May 20, 1949.

1. Administrative law and procedure 🔑485

The basic purposes of findings by an administrative agency are to aid court on review in determining whether there is sufficient evidence to support the findings, to enable court to examine decision of agency in order to determine whether decision is based upon a proper principle, and to apprise the litigants in regard to reason for administrative action as an aid to them in deciding whether additional proceedings should be initiated and, if so, on what grounds.

2. Administrative law and procedure 🔑486

Administrative findings must conform to the statutes governing the particular agency, but they need not be stated with the formality required in judicial proceedings.

3. Administrative law and procedure 🔑749
Municipal corporations 🔑185(13)

Fact that civil service commission of city discharged a police officer for misconduct after a hearing, raised presumption that existence of necessary facts to discharge the officer was ascertained and found, particularly since there was only one charge against officer for misconduct of a given type on a specified occasion.

4. Trial 🔑395(6)

A court in making findings may incorporate by reference.

5. Administrative law and procedure 🔑486
Municipal corporations 🔑185(11)

Motion of Civil Service Commission of city discharging a police officer, incorporating by reference resolution of city council that officer was guilty of misconduct unbecoming an officer, in that officer unnecessarily and unmercifully beat an intoxicated person, sufficiently complied with charter requirement that commission make written findings. St. 1941, p. 3370, art. 20, § 11.

6. Administrative law and procedure 🔑486

Administrative findings may be general as long as they satisfy the dual requirements of making intelligent review by court possible and apprising parties of basis for administrative action.

7. Municipal corporations 🔑185(10)

Evidence that arrested intoxicated prisoner was unharmed immediately prior to arrival of petitioner police officer when prisoner arrived at police station, that petitioner threatened to close prisoner's mouth because prisoner addressed petitioner with words of degradation, that petitioner placed his hand against prisoner's face, and that prisoner was found almost immediately thereafter on the ground suffering from severe injuries, justified discharge of officer on ground that officer had unnecessarily and unmercifully beaten prisoner.

8. Administrative law and procedure 🔑107, 473
Criminal law 🔑635
Municipal corporations 🔑185(8)

A police officer was discharged by city council and filed answer to charges with city Civil Service Commission asking that his discharge be set aside and that he be reinstated, was not a defendant in a criminal prosecution so as to be entitled under Constitution to a public hearing, and the hearing by Civil Service Commission was not a proceeding of a "court of justice" within statutory requirement that sitting of a court of justice be public. Code Civ. Proc. § 124; Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Court of Justice".

CARTER, J., dissenting.

◆

Appeal from Superior Court, Solano County; Mervin C. Lernhart, Judge assigned.

Certiorari by William J. Swars against the Council of the City of Vallejo and the Civil Service Commission of the City of Vallejo, a municipal corporation, to review an order dismissing petitioner from police department of the City of Vallejo. From an adverse judgment, petitioner appeals.

Judgment affirmed.

Prior opinion, 198 P.2d 955.

J. W. O'Neill, Oakland, for appellant.

Rolland L. Pope, Vallejo, and Macklin Fleming, San Francisco, for respondents.

Stanley D. Whitney, City Attorney, Alameda, Francis Hoey, City Attorney, Martinez, and Nathan F. Coombs, City Attorney, Napa, amicus curiae on behalf of respondents.

EDMONDS, Justice.

By writ of review, William J. Swars is seeking to annul an order of the City Council of Vallejo dismissing him from the police department. The principal grounds of his attack upon the judgment adverse to him are that, because of the denial of a public hearing, the insufficiency of the evidence to support the charges against him, and the lack of adequate findings, the municipal officers had no jurisdiction to take the challenged action.

In 1942, the Chief of Police filed with the City Council his recommendation that Swars be dismissed from the police department because of conduct "unbecoming a police officer, such misconduct consisting of unnecessarily and unmercifully beating [Edward J. Verdier] an intoxicated person". Upon receiving this recommendation, the council adopted a resolution declaring the office of Police Sergeant held by Swars to be vacant and dismissing him from the service. Pursuant to the requirement of the municipal charter, notice of this action was served upon Swars, who filed with the Civil Service Commission of Vallejo an answer to the charges made against him, asking that his removal be set aside and that he be reinstated in the position held by him. The commission served Swars with notice of the time set for a hearing of the matter with a request that he then present the facts "relative to this appeal". Swars and his counsel appeared at the time stated, but when they found that the commission had unanimously ordered a hearing closed to the public, they withdrew. The commission then proceeded to hear evidence, which was taken down by a stenographic reporter.

The Chief of Police, the Commissioner of Public Health and Safety, several police officers and Verdier testified before the commission and a statement signed by Swars was also received. The witnesses agreed that about midnight Verdier was proceeding on foot along a Vallejo street after a festive evening, when he was stopped and questioned by Officer McCart. Verdier appeared inebriated and used insulting language. McCart arrested him and stopped a police car which was passing at the time. Verdier was placed in the custody of Officers Robison and Brazil, who took him to the station. The three officers testified that Verdier, very drunk and easily controlled because of that condition, continuously directed opprobrious epithets at them and the police department in general. All of them stated that the prisoner was unharmed at that time.

After the two officers and their prisoner reached the police station, Robison took charge of Verdier. Some difficulty was encountered in holding him, as he was weaving badly. At this juncture, Sergeant

Swars joined Robison and Verdier. Swars was carrying a gun and other equipment in his arms. When Verdier addressed him with words of degradation, he commented that it was about time the prisoner "was closing his big mouth", or, he added significantly, "I will make it my business to close it for you". Verdier replied, "That goes for you, too", whereupon Swars struck him on the cheek, and then handed his gun and equipment to Robison. As related by Robison, Swars ordered him to open a door leading into the police station. While doing this, he heard scuffling behind him, and, on turning around, he saw Verdier on the floor.

The testimony of Robison and Brazil is that Swars pushed Verdier through the door into the police station, whereupon he fell to the floor. He was then placed in a room in the rear of the station. Policemen at the desk in the station, and also officers who later took the prisoner to the hospital for treatment, testified that Verdier was then bleeding profusely from a gash in his lip which later required four stitches, and was suffering from the loss of two front teeth, one of which was broken off. There was blood on his mouth and chin. The prisoner testified that one lens of his glasses was smashed.

After hearing this evidence the Civil Service Commission, by motion unanimously adopted, stated that "* * * we * * * uphold the action taken by the City Council in the adoption of Resolution 28191 N.S., dated October 10th, 1942, wherein the office of Police Sergeant held by William J. Swars is hereby declared vacant and he is hereby dismissed from the services of the City of Vallejo effective the 10th day of October, 1942."

Upon the filing of the petition for a writ of review, an order to show cause was issued and, at the time set for hearing, following argument of counsel, the petition was denied. The order was reversed with directions to issue the writ and, upon a review of the record of the proceedings of the commission, to determine whether there was evidence to support the charges against Swars. Swars v. Council of the City of Vallejo, 64 Cal.App.2d 858, 149 P.2d 397. When the superior court considered the evidence presented to the commission, it concluded that neither the council nor the commission exceeded its jurisdiction in discharging Swars.

As justifying a reversal of the judgment, Swars contends (1) that the Civil Service Commission made no written findings and conclusions as required by the charter, and therefore its order is invalid; (2) that the evidence before the commission was insufficient to support a finding that he was guilty of the charges preferred; and (3) that he was denied a fair and public hearing. The respondents argue (1) that the commission made sufficient written findings in that it incorporated by reference the resolution of the City Council to the effect that Swars was guilty of "* * * conduct unbecoming an officer; said misconduct consisting of unnecessarily and unmercifully beating an intoxicated person"; (2) that Swars waived his right to object to the form in which the findings were rendered and failed to exhaust his administrative remedies by his refusal to participate in the closed hearing; (3) that he was given a full and adequate opportunity for hearing as required by the city charter; and (4) that there was sufficient evidence to support the findings of the commission.

The charter of the City of Vallejo provides inter alia: "The City Council is hereby vested with the right to exercise the disciplinary and removal powers hereinafter provided. * * * An employee who has been * * * removed from office may file a written demand with the Executive Secretary requesting the Civil Service Commission to review such * * * removal. * * * Said Civil Service Commission * * * shall hold a hearing; at which time it shall hear evidence for and against such employee. Hearings may be conducted informally and the rules of evidence need not apply. Written findings and conclusions shall be made by the Civil Service Commission within ten days * * *. The findings and conclusions of the Civil Service Commission * * * shall be final." Article XX, Civil Service, sec. 11, Charter of the City of Vallejo; Stats. 1941, p. 3370.

[1] The necessity for findings by an administrative agency may rest upon constitutional grounds, Wichita R. & L. Co. v. Public Utilities Comm., 260 U.S. 48, 43 S. Ct. 51, 67 L.Ed. 124; Mahler v. Eby, 264 U.S. 32, 44 S.Ct. 283, 68 L.Ed. 549, or, as here, upon a statutory requirement. The basic purposes of findings are to aid the court in determining whether there is sufficient evidence to support them, Atchison T. & S. F. Ry. Co. v. Commerce Comm., 335 Ill. 624, 167 N.E. 831, to enable the court to examine the decision of the administrative agency in order to determine whether it is based upon a proper principle, United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 55 S.Ct. 462, 79 L.Ed. 1023, and to apprise the litigants or parties in regard to the reason for the administrative action as an aid to them in deciding whether additional proceedings should be initiated and, if so, upon what grounds, Beaumont, S. L. & W. Ry. Co. v. United States, 282 U.S. 74, 86, 51 S.Ct. 1, 75 L.Ed. 221.

[2] Although administrative findings must conform to the statutes governing the particular agency, they need not be stated with the formality required in judicial proceedings, Meeker & Co. v. Lehigh Valley R. R., 236 U.S. 412, 35 S.Ct. 328, 59 L.Ed. 644, Ann. Cas. 1916B, 691; Cantrell v. Board of Supervisors, 87 Cal.App. 2d 471, 197 P.2d 218. In connection with the action of an administrative board, the fact that certain action is taken or recommendation made may raise a presumption that the existence of the necessary facts was ascertained and found, Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 323, 144 P.2d 4; Cantrell v. Board of Supervisors, 87 Cal.App.2d 471, 197 P.2d 218; North Side etc. Ass'n v. County of Los Angeles, 70 Cal.App.2d 598, 608, 161 P.2d 613; Bartholomae Oil Corp v. Seager, 35 Cal.App.2d 77, 80, 94 P.2d 614.

[3] The Civil Service Commission concluded its hearing with action dismissing Swars. The fact that the commission discharged him after a hearing raises a presumption that the existence of the necessary facts was ascertained and found under the rule just stated. This is particularly true since there was but one charge against Swars for misconduct of a given type on a specific occasion. However, it is not necessary to rely upon this rule if the commission's unanimous decision incorporated by reference the more detailed findings of the City Council.

[4, 5] A court, in making findings may, and commonly does, incorporate by reference. McEwen v. Johnson, 7 Cal. 258; Kenfield v. Weir, 16 Cal.App.2d 501, 503, 60 P.2d 885; Petersen v. Murphy, 59 Cal. App.2d 528, 139 P.2d 49. Permission to utilize this method has been extended expressly by the legislature to administrative agencies included within the provisions of the Administrative Procedure Act. Section 11518 of the Government Code provides that, "The findings may be stated in the language of the pleadings *or by reference thereto.*" (Italics added.) There is no reason to apply a more strict rule to a municipal Civil Service Commission than that applicable to a court. Indeed, the charter of Vallejo expressly shows an intent to allow the Civil Service Commission to function under broad and informal rules of procedure, in that it provides: "Hearings may be conducted informally and the rules of evidence need not apply."

The motion unanimously passed by the Civil Service Commission was explicit. It incorporated the findings of the City Council by date and the exact number of the resolution. Swars' full name was used, the office held by him was declared vacant, and he was dismissed from service as of the date ordered by the City Council. The use by the commission of the words, "* * * we * * * uphold the action taken by the City Council * * *" is sufficiently clear to meet the informal standards required of administrative agencies. A part of the action upheld was the dismissal of Swars "* * * for conduct unbecoming an officer; said misconduct consisting of unnecessarily and unmercifully beating an intoxicated person".

[6] The resolution of the City Council made clear to Swars and all concerned the

basis for the charge of misconduct and specifically stated the facts in regard to it. The written statement of Swars shows that he was well aware of the identity of the person whom he was charged with beating. Administrative findings may be general as long as they satisfy the dual requirements of making intelligent review by the courts possible and apprising the parties of the basis for administrative action. The findings of the Civil Service Commission were sufficient to meet these tests and it is, therefore, unnecessary to consider whether Swars waived his right to object to their form and sufficiency by his withdrawal from the hearing.

[7] Upon the question of the sufficiency of the evidence for the order of the Civil Service Commission, the record shows testimony to the effect that Verdier was unharmed immediately prior to the arrival of Sergeant Swars, who, according to his own written statement, threatened to close Verdier's mouth for him. The witnesses testified that Swars was seen with his hand against Verdier's face; that Verdier was later on the ground, and suffered severe injuries. This uncontradicted evidence certainly provided a reasonable basis for the finding that Swars was guilty of unnecessarily and unmercifully beating an intoxicated person.

[8] The ordinance implementing the charter of Vallejo provides for a closed hearing, if by unanimous vote the Civil Service Commission shall so order and its conclusion to exclude the public was based upon sound reason and statutory authority. Swars was not a defendant in a criminal prosecution as defined by Article I, section 13, of the State Constitution; nor was the hearing by the commission a proceeding of a "court of justice" within the meaning of section 124 of the California Code of Civil Procedure. Chinn v. Superior Court, 156 Cal. 478, 482, 105 P. 580; Inglin v. Hoppin, 156 Cal. 483, 491, 105 P. 582.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I agree that the findings of the Civil Service Commission are sufficient to satisfy the charter provisions and that the evidence was sufficient to support the action of the Commission in finding grounds for the discharge of petitioner. However, I cannot agree (1) that the lack of findings may be supplied by a presumption when the whole record is before us, nor (2) that it was proper for the Commission to conduct the hearing behind closed doors in "star chamber" fashion.

On the first issue it is said in the majority opinion that "the fact that certain action is taken or recommendation made [by an administrative board] may raise a presumption that the existence of necessary facts was ascertained and found". Then the rule is applied to the instant case, stating: "The fact that the commission discharged him after a hearing raises a presumption that the existence of the necessary facts was ascertained and found under the rule just stated." In the instant case the City Charter expressly requires the Commission to make *written findings.* Charter, City of Vallejo, art. XX, sec. 11, as adopted in 1941, Stats. 1941, p. 3370). Written findings were made in the case at bar and *the complete record of the Commission's action is before us.* That record shows precisely what was done. Therefore, there is no room for a presumption as to what was done. The sole question is one of whether the findings as shown by the record are sufficient. Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 144 P.2d 4, relied upon by the majority, presented a case *where the record did not show whether findings were or were not made* and thus the presumption was indulged. It is said in that case, 23 Cal.2d at page 323, 144 P.2d at page 15: *"In the present state of the record herein it is impossible to isolate the several factors which may have moved the Board of Permit Appeals to make its respective rulings.* It was neither required by law, nor did it undertake, to set forth the reasons for its action either at the conclusion of the hearing or the rehearing in this matter. However, the proposition that said board, in making such investigation as it deemed the case warranted, was acting within its authority cannot be seriously challenged in view of the above-mentioned broad municipal regulations defining its appellate functions. Pertinent here is the observation in Bartholomae Oil Corp. v. Seager, 35 Cal.App.2d 77, 80, 94 P.2d 614, 616, relative to a city planning commission's recommendation upon an application for a variance permit: 'In connection with the action of such a commission, composed usually of laymen, the fact that a certain action is taken raises the presumption that the existence of the necessary facts had been ascertained and found.'" [Emphasis added.]

The charter expressly requires a hearing by the Commission. When such is the requirement, the necessary implication is that such hearing be open to the public unless some valid reason is shown for excluding all or some portion of the public. For illustration it is said in Railroad Comm. v. Pacific Gas Co., 302 U.S. 388, 393, 58 S.Ct. 334, 338, 82 L.Ed. 319: "The right to a fair and *open* hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement." [Emphasis added.] This policy is expressed in our statutes: "The sittings of every court of justice shall be public, except as provided in the next section." Code of Civil Procedure, sec. 124. While that refers to courts of justice, it must be remembered that a local civil service commission, in hearing and determining whether an employee should be discharged, is exercising quasi-judicial functions, Steen v. Board of Civil Service Com'rs., 26 Cal.2d 716, 160 P.2d 816; LaPrade v. Department of Water & Power, 27 Cal.2d 47, 162 P.2d 13, and by analogy, rules for proceedings in courts are to some extent applicable to such bodies, Steen v. City of Los Angeles, 31 Cal.2d 542, 190 P.2d 937. Certainly where there is a fundamental principle involved, such as the need for a public trial or hearing, bottomed upon the distaste for "star chamber" proceedings and their attendant evils, the charter must be interpreted to require a hearing which is open to the public. That being true, no ordinance providing for closed sessions would be valid. In the instant case, there appears no reason whatsoever, much less a valid one, for a closed hearing, and appellant was, therefore, justified in refusing to participate in the closed hearing held by the Commission at which the evidence was presented, which, it is claimed, supports the findings of the Commission.

I would, therefore, reverse the judgment.

33 Cal.2d 885

BROCK v. HALL.

S. F. 17625.

Supreme Court of California, in Bank.

May 26, 1949.

Rehearing Denied June 23, 1949.

1. Wills 🔑439, 470, 478

Court must ascertain the intention of testator from instrument read as a whole and give effect to such intention if possible, and where intention to make a gift clearly appears in will, though imperfectly expressed, court will raise a gift by implication.

2. Trusts 🔑112

Where trustor clearly indicates his desires as to disposition of trust property, absence of a rule of construction similar to that in the case of wills favoring construction against intestacy furnishes no reason for defeating trustor's intent. Probate Code, § 102.

3. Trusts 🔑112

Construction of instrument creating inter vivos trust depends on trustor's intent at time of execution as shown by face of instrument and not on any secret wishes, desires or thoughts after the event, and possibility that trustor may be alive at time gift fails should have no effect upon interpretation to be given the trust instrument.

4. Trusts 🔑112
Wills 🔑439

The primary duty of court in construing all documents is to give effect to intention of maker, regardless of whether instrument operates inter vivos or takes effect at death, since intention to be gathered from similar words or provisions, whether contained in a declaration of trust or a will, would ordinarily be the same.

5. Trusts ⚷112
Wills ⚷478

A gift may be implied from provisions of instrument creating a trust, regardless of whether it is a will or an inter vivos transfer in trust.

6. Trusts ⚷112
Wills ⚷478

Where intention to make a gift clearly appears from instrument taken by its four corners and read as a whole, considering its general scheme, the property involved, and persons named as beneficiaries, the gift may be implied.

7. Trusts ⚷112
Wills ⚷478

Courts may not indulge in conjecture simply because instrument seems to have omitted something which it is reasonable to suppose would have been provided, but a gift will be raised by necessary implication where a reading of entire instrument produces a conviction that a gift was intended.

8. Trusts ⚷112

In ascertaining intention of trustor, court may consider the necessary implication arising from language of instrument as a whole and is not limited to determining what is meant by any particular phrase.

9. Trusts ⚷112

That trust instrument is incomplete in some particular does not nullify an intention which is clearly shown.

10. Trusts ⚷112

Where instrument creating inter vivos trust for benefit of two daughters until each attained age of 35 when one-half of corpus would be distributed to each, provided that surviving issue of either would take deceased's share and that in absence of issue, surviving husband and sister would each take one-half, and that, if either daughter died unmarried, survivor would take deceased's entire share, there was an implied gift to survivor of entire share of sister who had married but died before age of 35 survived neither by husband nor issue.

11. Trusts ⚷112
Wills ⚷478

The intent of maker as disclosed by will or trust document determines whether a gift should be raised by implication.

EDMONDS, SHENK, and SCHAUER, JJ., dissenting.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Action by Mildred Hall Brock against Elbert J. Hall, substituted as defendant for the trustee of a certain trust, to compel distribution to plaintiff of assets of trust remaining in hands of trustee. From a judgment sustaining a general demurrer to the complaint, plaintiff appeals.

Judgment reversed.

Prior opinion 198 P.2d 69.

Lloyd W. Dinkelspiel, Donald W. Falconer, and Heller, Ehrman, White & McAuliffe, San Francisco, for appellant.

Pillsbury, Madison & Sutro, Maurice D. L. Fuller, Francis N. Marshall, and Noble K. Gregory, San Francisco, for respondent.

GIBSON, Chief Justice.

The sole question before us is the proper interpretation of an instrument by which defendant Elbert J. Hall created a trust for the benefit of his two daughters, Mildred and Carolyn. Mildred seeks to recover the assets of the trust on the theory that she became entitled thereto on the death of her sister Carolyn, and she has appealed from a judgment entered upon the sustaining of a general demurrer to the complaint.

The trust instrument which was executed in 1924 provided that the trustee was to hold the property transferred together with the net income until the two daughters, "Mildred Miriam Hall, now sixteen years old, and Carolyn Mary Hall, now six years old, shall have respectively reached the age of eighteen years; provided that when said

Mildred Miriam Hall shall have reached the age of eighteen years she shall thereafter be entitled to have paid to her by and receive from the said trustee one-half of the net income from said trust property thereafter accruing until she shall have reached the age of thirty-five years, whereupon she shall be entitled to receive and have turned over to her by the said Trustee and there shall go to and vest in her absolutely one-half of the said trust property together with one-half of the net income thereof, if any, theretofore accrued and undistributed; and when the said Carolyn Mary Hall shall have reached the age of eighteen years she shall thereafter be entitled to have paid to her by and receive from the said Trustee one-half of the net income from said trust property thereafter accruing until she shall have reached the age of thirty-five years, whereupon she shall be entitled to receive and have turned over to her by the said Trustee and there shall go to and vest in her absolutely the remaining one-half of the said trust property together with the net income thereof, if any, theretofore accrued and undistributed; that is to say, the trust hereby created shall terminate as to one-half of said trust property when said Mildred Miriam Hall shall have reached the age of thirty-five years, and as to the remaining one-half thereof when the said Carolyn Mary Hall shall have reached the age of thirty-five. * * *

"In the event of the death of said Mildred Miriam Hall, or said Carolyn Mary Hall, the portion of said trust property or of the income thereof belonging to such deceased shall, if such deceased shall have married and leave issue, go to and vest in such issue, or if such deceased shall be married and leaving her surviving a husband but no issue, then one-half of her respective share of said trust property shall go to such surviving husband absolutely and discharged of these trusts, and the remaining one-half * * * to the survivor of said Mildred Miriam Hall and Carolyn Mary Hall; or if either of the last mentioned persons shall die, never having married, then the share of such deceased in said trust property shall * * go to and vest in the other of them surviving. * * *"

Upon reaching the age of thirty-five Mildred received the portion of the trust estate which was to be paid to her at that time. Carolyn married but her husband died, and she thereafter died before reaching thirty-five, leaving no children. This action involves the portion of the trust estate which would have been paid to Carolyn had she lived.

[1] Their father, the trustor, contends that, since there is no express gift to Mildred if Carolyn died a widow and without issue, such a gift can be raised only by implication, and that gifts may not be implied in inter vivos instruments, but only in wills. The implication of gifts in wills rests upon the primary rule of construction that the duty of the court in all cases of interpretation is to ascertain the intention of the maker from the instrument read as a whole and to give effect thereto if possible, and it is well settled that, where the intention to make a gift clearly appears in a will, although perhaps imperfectly expressed, the court will raise a gift by implication. Estate of Blake, 157 Cal. 448, 468, 108 P. 287; Estate of Sloan, 7 Cal. App.2d 319, 340, 46 P.2d 1007; see Estate of Heard, 25 Cal.2d 322, 328, 153 P.2d 553; Estate of Franck, 190 Cal. 28, 31, 210 P. 417.

Although there is some authority to the contrary, it has been held that the reasons for implying gifts in testamentary instruments are equally applicable to inter vivos declarations of trust and that gifts may be implied where a trustor establishes a trust during his lifetime. Eustace v. Dickey, 240 Mass. 55, 132 N.E. 852, 858; First Nat. Bank & Trust Co. of Yonkers v. Palmer, 261 N.Y. 13, 184 N.E. 477; Bank of New York v. Vanneck, Sup., 68 N.Y.S. 2d 226, 234; cf. Manufacturers Trust Co. v. Chase Nat. Bank, 171 Misc. 49, 11 N.Y.S. 2d 895, 897; In re Scott's Trust, 322 Pa. 1, 184 A. 245; see also Rest., Property, §§ 115 [Comment a], 272 [Comment a], Vol. 1, Appendix, p. 16; 30 Harv.L.Rev. [1916] 187; 2 Simes, Law of Future Interests [1936] p. 259; but see Chater v. Carter, 238 U.S. 572, 585-586, 35 S.Ct. 859, 863-864, 59 L.Ed. 1462.

[2] In support of his position that wills should be treated differently from inter vivos instruments the trustor argues that there are considerations affecting the determination of intent in wills which are not present in inter vivos transfers. He asserts that a will necessarily contemplates divesting the testator of all interest in the property disposed of by the will since nothing can come back to him personally and that there is a statutory rule favoring construction against intestacy. Probate Code, § 102. It is true that where a testator makes a will disposing of his property he ordinarily has in mind transferring the entire property and does not intend any interest to pass by intestacy. It is also true that this is a factor which may not be present in the establishment of an inter vivos trust but which may be considered by the court in ascertaining the intent of a testator from an imperfectly expressed testamentary scheme. Where, however, a trustor clearly indicates his desires as to the disposition of the trust property, the absence of a rule of construction similar to that favoring construction against intestacy furnishes no reason for defeating that intent.

[3] It is further argued that the trustor may be alive at the time an inter vivos trust instrument is construed and can make a second disposition of the trust property if the gift fails, and that this furnishes justification for making a distinction between such trusts and wills with respect to the implication of gifts. However, the possibility that the trustor may be alive should have no effect upon the interpretation to be given the trust instrument. Its construction depends upon the trustor's intent at the time of execution as shown by the face of the document and not on any secret wishes, desires or thoughts after the event. See Foster v. Ypsilanti Sav. Bank, 299 Mich. 258, 300 N.W. 78, 82; City Bank Farmers Trust Co. v. Macfadden, Sup., 65 N.Y.S.2d 395, 397; 2 Scott on Trusts [1939] § 164.1, p. 830; cf. Bixby v. California Trust Co., 33 Cal.2d 495, 202 P.2d 1018.

[4, 5] There appear to be no other reasons for treating wills differently from inter vivos transfers in trust with respect to the implication of gifts. As we have seen, the primary duty of the court in construing all documents is to give effect to the intention of the maker, and we can see no justification for any distinction in this regard between instruments operating inter vivos and those taking effect at death since the intention to be gathered from similar words or provisions, whether they be contained in a declaration of trust or a will, would ordinarily be the same. Accordingly, we are of the opinion that implied gifts may be raised in both wills and inter vivos transfers in trust.

[6, 7] When the intention to make a gift clearly appears from the instrument taken by its four corners and read as a whole, considering its general scheme, the property involved, and the persons named as beneficiaries, the gift may be implied. Estate of Franck, 190 Cal. 28, 31, 210 P. 417. Although the court may not indulge in conjecture or speculation simply because the instrument seems to have omitted something which it is reasonable to suppose should have been provided, a gift will be raised by necessary implication where a reading of the entire instrument produces a conviction that a gift was intended. Estate of Blake, supra, 157 Cal. at page 468, 108 P. 287; see Estate of Franck, supra, 190 Cal. at page 32, 210 P. 417; Estate of Swan, 5 Cal.2d 635, 639, 55 P.2d 1171; Estate of Vizelich, 129 Cal.App. 347, 353, 18 P.2d 773; Metcalf v. Framingham Parish, 128 Mass. 370, 374.

[8] Gifts by implication have been sustained from remote times where no direct language is found to support them, and the tendency is rather to extend than narrow the rule raising such gifts. Estate of Blake, 157 Cal. 447, 466, 468, 108 P. 287. There is no merit in the trustor's argument that, even though an actual, existing intention appears on the face of the instrument, the court may not imply a gift from a construction of the entire instrument, but must find some specific clause which may be construed as operating to make a gift. This argument is obviously contrary

to the decided cases and, if accepted, would render the doctrine of gifts by implication unnecessary. See Estate of McCray, 204 Cal. 399, 268 P. 647; Estate of Franck, 190 Cal. 28, 210 P. 417; Estate of Blake, 157 Cal. 448, 108 P. 287; Estate of Sloan, 7 Cal.App.2d 319, 46 P.2d 1007; see also Rest., Property, §§ 115a, 258 [Comment g], 272, 323 [Comment f], 367(2). Accordingly, in ascertaining the intention of the trustor the court is not limited to determining what is meant by any particular phrase but may also consider the necessary implication arising from the language of the instrument as a whole.

In the present case, as we have seen, there is no express provision for a gift to Mildred of the remainder of the trust property upon the happening of the contingency which occurred, namely, that Carolyn died a widow and without issue prior to reaching thirty-five, and the next question, therefore, is whether there is such a clear showing of the trustor's intent as to justify the implication of a gift to Mildred in this situation. The trust was established when the two children were minors, and the provisions of the declarations of trust demonstrate that it was created primarily for their benefit and that the trustor's purpose was to take care of his children so long as either of them was alive. The income was to be accumulated until each daughter became eighteen, and as each reached that age she was to be paid one-half of the income of the trust property until she became thirty-five, when she was to receive one-half of the corpus and any accrued and undistributed income. If either daughter married and died leaving issue, the portion "belonging to such deceased" was to go to her issue, but if she left a husband and no issue, then "one-half of her respective share of said trust property" was to go to the husband and the remaining one-half to the surviving daughter, and if either died, "never having married, then the share of such deceased in said trust property" was to go to the surviving daughter.

On its face the document was an absolute conveyance and did not expressly provide for a reversion to the trustor in any contingency. Instead, it referred to the trust property as "belonging to" the daughters and provided for distribution of the share "belonging to such deceased" in case of the death of either daughter. The general plan for disposition of the trust property shows that the trustor intended a surviving daughter to have all the property in the event the other specified beneficiaries were not in existence. We think it clear that it was not the chance fact of marriage or nonmarriage which was to condition the gift to the surviving daughter, but the existence or nonexistence of a surviving husband or issue, the purpose being to provide first for each daughter and her issue, and second, in case of her death without issue, for those next entitled to her bounty, namely, her sister and a surviving husband, if any. See Eaton v. Hewitt, 62 Eng.Rep. 591, 594.

[9] It is true that the instrument provided the property should go to Mildred in certain contingencies and that there are several contingencies for which no express provision is made, for example, if both children died prior to reaching thirty-five without issue or surviving husbands, or if a daughter should die leaving illegitimate issue, with or without a surviving husband. These factors, however, are insufficient to defeat the dominant plan of distribution shown by the trust document. The mere fact that an instrument is incomplete in one particular does not nullify an intention which is clearly shown. The paramount purpose of the trustor was to care for his daughters, and it would be absurd to say that he intended Mildred to take all if Carolyn died unmarried and to have half if Carolyn left a surviving husband, but to receive nothing if Carolyn died a widow without issue. The provisions for a gift to Mildred of one-half in the event Carolyn left a husband surviving and of all in the event she died "never having married" show the trustor's general purpose and plan, and tend to show an intent to make a gift in the contingency which did occur rather than to indicate the absence of such intent. See Metcalf v. Framingham Parish, 128 Mass. 370, 377.

[10] Any other interpretation would not only defeat the trustor's primary pur-

pose of providing for his children, but would also impute caprice in the disposition of his property. In view of the situation of the parties the obvious and only reasonable intention to be gathered from the plan of distribution, when the instrument is taken by the four corners and read as a whole, is that a surviving daughter should receive all the property if a deceased child left no issue or husband surviving. Accordingly, a gift to Mildred in this contingency should be implied.

[11] The trustor relies on California decisions where the court, while recognizing that gifts by implication may be raised in appropriate circumstances, refused to do so on the facts there presented, but those cases are not controlling because in none of them was the language or general plan similar to the wording and dispositive scheme involved here and in none of them did the court find that there was a clear intent to make a gift. See Estate of Swan, 5 Cal. 2d 635, 55 P.2d 1171; Estate of Wattson, 66 Cal.App.2d 743, 153 P.2d 87; Estate of Ottoveggio, 62 Cal.App.2d 880, 145 P.2d 700; Estate of Kruce, 10 Cal.App.2d 426, 51 P.2d 1174; Estate of Vizelich, 129 Cal. App. 347, 18 P.2d 773. The intent of the maker as disclosed by the will or trust document determines whether a gift should be raised by implication, and each decision must of necessity depend upon the wording of the particular instrument involved when considered with the intention manifested by the document as a whole. In the present case, when the language used is considered in the light of the dominant dispositive plan of the trust instrument, the necessary implication, as we have seen, is that a gift to Mildred was intended if Carolyn died a widow without issue, and the probability that the trustor intended to make a gift in this contingency is so strong as to nullify the existence of any other possible intent. Accordingly, the trial court erred in sustaining the demurrer to the complaint wherein Mildred sought to reach the remaining assets of the trust.

No question has been raised with respect to whether the property was vested in Carolyn subject to defeasance upon the happening of the specified contingencies or whether the vesting of her interest was subject to the condition precedent that she survive to the age of thirty-five (see Estate of Blake, 157 Cal. 448, 459–466, 108 P. 287; Rest., Property, §§ 249–259) and, in view of the conclusion we have reached, it is unnecessary to decide this problem.

The judgment is reversed.

CARTER, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

"In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, *not to insert what has been omitted* * * *." Code Civ.Proc. sec. 1858 (emphasis added). The declaration of trust disposes of the property upon three contingencies,[1] but it includes no provision vesting the corpus in at least four situations,[2] one of which has occurred. Without purporting to construe ambiguous language or to apply any of the established rules of construction grounded upon interpretation of particular language, the majority opinion, in effect, asks the question: What would the trustor have done about this situation *if* he had considered the possibility of such a contingency? Thus on the basis of conjecture this court decides to "insert what has been omitted" and by judicial disposition, to supply the omissions, whether accidental or intentional, of the trustor.

First, unquestionably there is no ambiguity in the terms used. By the language of the trust instrument, Mildred could receive the money if Carolyn "shall die, *never having married.*" Such language is clear and unequivocal, and by no judicial authority to interpret language can it be said to be synonymous with "unmarried at the time of death," which is the situation shown by the present record. Douglass v. Board of Foreign Missions, 112 N.J.Eq. 361, 164 A. 489; Deal v. Logan, 183 Okl. 513, 83 P.2d 563. Next, considering the rule of construction relied upon in the majority opinion, it appears that in the development of the common law, certain phrases or expressions have come to carry particular meaning and to include implicit extensions or variations. In Estate of Blake, 157 Cal. 448, 469, 108 P. 287, the term "elliptical expression" was aptly used to describe such phrases. In that case the language in question was the much litigated phrase "die without issue." Centuries of judicial construction have given to those words certain connotations which permit reading into them a meaning beyond that of common usage. The same may be said of many other "elliptical expressions." Such is the basis of and explanation for the common law Rule in Shelley's Case and the Worthier Title Doctrine. So also, the courts have developed certain restricted areas in which gifts by implication will be raised. For example, that result has been approved by implying a cross remainder where there was a deed to A and B for life as tenants in common and a gift over of the fee to X. Upon the death of either A or B, a cross remainder will be implied for the life of the survivor of A and B. See Rest. Property, sec. 115; 2 Simes, Law of Future Interests, p. 258. Further illustrations are the rules for determining if a future interest is vested or whether a given limitation creates a condition precedent to vesting. See Rest. Property, secs. 254, et seq.

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[1] (a) "shall have married and leave issue"; (b) "shall be married and leaving her surviving a husband but no issue"; (c) "shall die, never having married."

[2] (a) no issue, husband divorced; (b) no issue, husband predeceased; (c) no issue, husband survives, other sister predeceased [as to sister's ½ remainder share]; (d) never having married and other sister predeceased.

These specific rules of construction, limited to particular words, phrases or situations, are to be distinguished from the principle relied upon in the majority opinion, which is stated as: "When the intention to make a gift clearly appears from the instrument taken by its four corners and read as a whole, considering its general scheme, the property involved, and the persons named as beneficiaries, the gift may be implied." Under this rule prior decisions are of little assistance, for, as the Chief Justice recognizes, "each decision must of necessity depend upon the wording of the particular instrument involved when considered with the intention manifested by the document as a whole." The statement, therefore, is far broader than any of the traditional rules which rest upon specific language and stem from case law. To lift the document "by its four corners" and construe it according to its "general scheme," allows a court to reach any desired result by reciting generalities and stating a positive, if unexplained, conclusion therefrom. Such a rule of construction leads to the disposition of property in such manner as a majority of the judges may determine most fully accords with their views as to whom the corpus of a trust should be distributed.

Although in this jurisdiction there is sufficient authority to sustain such "liberal" construction in the case of a will, Estate of Heard, 25 Cal.2d 322, 153 P.2d 553; Estate of Puett, 1 Cal.2d 131, 33 P.2d 825; the underlying reason for the rule makes it inapplicable to an inter vivos declaration of trust. "[A] will must be construed according to the intention of the testator as gathered from the language used in the entire will, effect must be given to the expressed intention so far as possible and *intestacy must be avoided* where and to the extent the expressed intention makes this possible." Estate of Heard, supra, 25 Cal. 2d at page 326, 153 P.2d at page 555. (Emphasis added.) This conclusion rests upon the long recognized policy to avoid intestacy if that result is not absolutely required by the deficiencies of the testamentary writing. "A construction which results in partial intestacy will not be used unless such intention clearly appears. It is said that the courts will prefer any reasonable construction, or any construction which does not do violence to the testator's language, to a construction which results in partial intestacy." 2 Page on Wills, sec. 926, p. 847. This same policy is expressed in our code: "[O]f two modes of interpreting a will, that is to be preferred which will prevent a total intestacy." Probate Code, sec. 102. Accordingly, this court in applying the rule which, *in order to prevent intestacy*, justifies a construction of the testator's directions in accordance with the general dispositive scheme and not dependent upon his specific language gives effect to the applicable statute.

But this inter vivos trust presents a very different situation from that of a will. The trustor is alive. If there is no gift by implication there will be a resulting trust in the trustor; no question of intestacy can arise and, consequently, no complete frustration of the trustor's intent. Under such circumstances there is no basis for a judicial implication of a gift where none was made.

The trust instrument in this case fails to make any disposition of the property upon the happening of the contingency which occurred. The present case does not require a determination of the trustor's intent at the time of execution of the declaration of trust for at that time, it is clear, he had no intention with regard to this contingency. Apparently the first time such a possibility came to his notice was when the contingency occurred, and this litigation is the result of his first reaction to the situation. Where, then, is there any justification for a decision based upon such a general intent or dispositive scheme as would avoid intestacy? "In construing [a declaration of trust], we are not called upon to strain the meaning of words, as is sometimes done to avoid intestacy when wills are to be construed." Chater v. Carter, 238 U.S. 572, 35 S.Ct. 859, 863, 59 L. Ed. 1462.

The majority opinion states that "it has been held that the reasons for implying gifts in testamentary instruments are equally applicable to inter vivos declarations of trust * * *." The statement is too broad, and the authorities cited therefor either have not analyzed the question or are not here controlling. In four of the five cases cited, the trustor was dead at the time the contingency arose which provided the basis for a gift by implication and, for that reason, considerations of the policy against intestacy were applicable. Eustace v. Dickey, 240 Mass. 55, 132 N.E. 852; Bank of New York v. Vanneck, Sup., 68 N.Y.S.2d 226; Manufacturers Trust Co. v. Chase Nat. Bank, 171 Misc. 49, 11 N.Y.S.2d 895; In re Scott's Trust, 322 Pa. 1, 184 A. 245. In the other case, First Nat. Bank & Trust Co. of Yonkers v. Palmer, 261 N.Y. 13, 184 N.E. 477, apparently the trust was established to carry out a settlement of property rights with only a nominal trustor, and the court mentioned that the trust instrument was wholly contractual in form. Further, in none of these cases is there any adequate discussion of the applicability of the rules concerning gifts by implication to inter vivos trusts, and the decisions construing wills are cited without comment.

For substantially the same reasons, the discussions in the cited texts are inapplicable to the question here presented. The Restatement comment and the discussion in Simes and the Harvard Law Review all refer to the orthodox rule of construction which allows a cross-remainder by implication and are not authority for a construction of a declaration of trust by way of the "four corners of the instrument" in the manner in which that generalization is now used. Clearly, the settled rules of construction of particular language are equally applicable to a will and to an inter vivos trust. It is only when the court purports to fill the omissions in the instrument by construing it as a whole apart from specific language that the question of distinction between an inter vivos trust and a will is of importance, for there is no policy of construction against intestacy which is applicable to a declaration of trust.

As justifying the decision, the Chief Justice states: "Where, however, a trustor clearly indicates his desires as to the disposition of the trust property, the absence of a rule of construction similar to that favoring construction against intestacy furnishes no reason for defeating that intent." This assumes the conclusion. Here, granting that had the trustor thought of it he reasonably might have included a gift over to the survivor if one daughter dies never having married *or* was unmarried and without issue at the time of death, it is just as reasonable to suppose that he had no intention of authorizing a distribution of the corpus of the trust in any contingency for which no express provision was made.

And I cannot agree with the statement that "on its face the document was an absolute conveyance." The declaration of trust conveyed all of the trustor's interest in the property only if gifts may be implied for the unspecified contingencies and, as a matter of factual inference, such gifts may only be implied if he granted his entire interest. This argument, therefore, falls of its own weight.

For these reasons I would affirm the judgment.

SHENK and SCHAUER, JJ., concur.

Rehearing denied; SHENK, EDMONDS, and SCHAUER, JJ., dissenting.

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33 Cal.2d 861

GARSON v. DIVISION OF LABOR ENFORCEMENT, DEPT. OF INDUSTRIAL RELATIONS, et al.

L. A. 20909.

Supreme Court of California, in Bank.
May 20, 1949.

1. Master and servant 🔑14½

Generally, an "employment agency" is any person or corporation engaged in business of finding positions or employment.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Employment Agency".

2. Master and servant 🔑14½

The statutory provision that contract between employment agency and applicant for services thereof need not contain agreement by agency to refer parties' controversies regarding terms of contract to state Labor Commissioner for adjustment, if contract provides for arbitration of controversies as to existence, validity, construction, performance, breach, operation, continuance or termination of contract, raises reasonable implication of general policy to give commissioner comprehensive powers of determination in parties' disputes regarding commissions or fees and their contracts. Labor Code, §§ 1647, 1647.5.

3. Administrative law and procedure 🔑229
Master and servant 🔑14½

Under employment agency statute, controversies between such agencies and applicants for services thereof as to agency's commissions or fees should be first submitted to and decided by state labor commissioner. Labor Code, §§ 1550–1663.

4. Administrative law and procedure 🔑10
Master and servant 🔑14½

The state labor commissioner's statutory authority to decide controversies between employment agencies and applicants for services thereof as to commissions or fees is valid, in view of provisions authorizing complete new hearing in superior court after adverse decision by commissioner. Labor Code, §§ 1550–1663, 1647.

5. Master and servant 🔑14½

The employment agency statute is broad and comprehensive and empowers state labor commissioner to hear and determine all disputes between such agencies and applicants for services thereof, including disputes as to existence and termination of, and liability under, contracts between them, so as to give commissioner jurisdiction to determine dispute as to agency's right to recover damages for applicant's breach of contract by wrongful discharge of agency, as well as to commissions or fees due under contract. Labor Code, §§ 1550–1663.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Proceeding by Henry Garson for a writ of mandate commanding the Division of Labor Enforcement of the Department of Industrial Relations and the State Labor Commissioner and Deputy Labor Commissioner to sustain a demurrer to and dismiss an application by James L. Saphier for settlement of a dispute between him and plaintiff as to plaintiff's liability to applicant for commissions for obtaining employment for plaintiff. From a judgment granting the writ, defendants appeal.

Reversed.

Prior Opinion 199 P.2d 388.

Pauline Nightingale and Edward M. Belasco, Los Angeles, for appellants.

Sanford I. Carter and Philip N. Krasne, Beverly Hills, for respondent.

Gang, Kopp & Tyre, Los Angeles, as amicus curiae.

CARTER, Justice.

This is an appeal from a judgment granting a writ of mandate commanding the defendants, State Division of Labor Law Enforcement of the Department of Industrial Relations and the State Labor Commissioner, to sustain a demurrer to and dismiss a proceeding pending before them.

James L. Saphier, referred to as an employment agent and artists' manager, was engaged in the employment agency business. A dispute having arisen between him and plaintiff, a writer, for whom Saphier was to obtain employment, the latter filed an application with the Labor Commissioner to have that dispute settled. Therein he purported to allege two causes of action. In the first, he charged that on December 1, 1945, he and plaintiff entered into an oral agreement for the employment of Saphier by plaintiff to obtain employment for the latter for a commission of 10% of the earnings received by plaintiff. Saphier rendered services under that agreement and obtained employment for plaintiff to July 1, 1947, and plaintiff paid the 10% commission to September 25, 1946. On October 12, 1946, plaintiff, without cause, discharged Saphier in violation of the agreement, and the latter claims commissions on the compensation thereafter received by plaintiff. In the second, Saphier claims that on May 22, 1942, plaintiff employed him for five years by written contract; that the parties were released from that contract by a writing dated August 15, 1945. In that writing it was provided that the 1942 agreement should continue as to certain named employment procured for plaintiff; that as to compensation received up to May 22, 1947, the commission was to be 5%; and that as to other phases of the 1942 contract, the parties were released. There is thus presented the question of the rights of the parties under the written contract of 1942, the oral agreement of 1945, and the effect, if any, on each of the written contract of August 15, 1945, all of which embrace a dispute between the parties as to the liability for commissions under an employment agency arrangement.

Plaintiff demurred to the foregoing application and moved to dismiss it upon the ground that the Labor Commissioner was without jurisdiction to determine the issues presented by the application. The demurrer was overruled and motion denied. The superior court, in the instant action, decided that the Commissioner lacked jurisdiction and ordered a writ of mandate to compel him to dismiss the proceeding.

[1] It is clear from the whole tenor of the employment agency statute, Labor Code, secs. 1550–1663, that there is conferred upon the Labor Commissioner the power to determine disputes between an employment agency and the applicant, who requests the services of such agency to find employment for him, in regard to the commissions or fees payable by the applicant for services performed by the agency Generally speaking, an employment agency is any person or corporation engaged in the business of finding positions or employment. Particular mention is made of "artists' managers," "theatrical employment agencies" and "motion picture employment agencies." The statute establishes a complete system of regulation and licensing of employment agencies. Labor Code, secs. 1550–1663. Such agency must deposit a $1000 bond as assurance that it will comply with the law and pay all sums due to applicants ("applicants" as used herein refers to those seeking and obtaining the services of the agency in obtaining employment for them), and damages for fraud, Labor Code, secs. 1589, 1590, and an applicant may bring an action in court on the bond, Id. sec. 1620. The agency's license may be revoked for cause. Id. sec. 1596. The agency must give to the applicant a contract and detailed provisions are made for its contents, such as name of agency, name of prospective employer, amount of fee to be paid

agency, and all other terms agreed upon by the parties. Id. secs. 1624, 1630, 1644. It is to be signed by both parties, Id. sec. 1627, and forms thereof used by the agency must be approved by the Commissioner. Id. sec. 1628. The agency must agree therein "to refer any controversy between the applicant and the employment agency regarding the terms of the contract to the Labor Commissioner for adjustment." Id. § 1626. The agency must file and post a schedule of its fees. Id. sec. 1631. It is expressly provided: "In all cases of controversy arising under this chapter the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to appeal within ten days after determination, to the superior court where the same shall be heard de novo. To stay any award for money, the party aggrieved shall execute a bond approved by the superior court in a sum not exceeding twice the amount of the judgment. In all other cases the bond shall be in a sum of not less than one thousand dollars and approved by the superior court." Id. sec. 1647. It is further provided that, notwithstanding section 1280 of the Code of Civil Procedure (dealing generally with arbitration), and section 1647 of the Labor Code above quoted, and section 1626 of the Labor Code requiring the agency to provide in the contract that matters will be submitted to the Commissioner, the parties may have a provision in their contract "providing for the decision by arbitration of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination * * *: (a) If the provision is contained in a contract between an employment agency and a person for whom such employment agency under the contract undertakes to endeavor to secure employment, (b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to an employment agency, (c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and (d) If the contract provides that the Labor Commissioner or his authorized representative has the right to attend all arbitration hearings.

"Except as otherwise provided in this section, any such arbitration shall be governed by the provisions of Title X of Part III of the Code of Civil Procedure.

[2] "If there is such an arbitration provision in such a contract, the contract need not provide that the employment agency agrees to refer any controversy between the applicant and the employment agency regarding the terms of the contract to the Labor Commissioner for adjustment, and section 1647 shall not apply to controversies pertaining to the contract." Id. § 1647.5. It is a reasonable implication from this section that the general policy is to give comprehensive powers of determination in disputes between the agency and applicant in regard to commissions or fees and their contracts. They may provide in their contract for a broad and inclusive arbitration and it should follow that similar broad powers are granted to the Commissioner to settle disputes where the parties do not provide for arbitration as contemplated by section 1647.5.

[3, 4] In harmony with the plain purport of the above statutory provisions, it has been held that, under the statute, controversies between the applicant and an gency in regard to commissions or fees payable under the contract should be first submitted to and decided by the Labor Commissioner. Collier & Wallis, Ltd., v. Astor, 9 Cal.2d 202, 70 P.2d 171; Abraham Lehr, Inc., v. Cortez, 57 Cal.App.2d 973, 135 P.2d 684; see Friedlander v. Stanley Productions, 24 Cal.App.2d 677, 76 P.2d 145. And the authority granted the Commissioner has been held valid inasmuch as the provisions of section 1647 of the Labor Code, supra, are interpreted as authorizing a complete new hearing in the superior court after an adverse decision by the Commissioner. Collier & Wallis, Ltd., v. Astor, supra.

[5] It is urged, however, that where, as here, the proceeding is not alone to recover for commissions or fees claimed to be due under an agency contract, but is also for damages for breach of the contract based

upon the wrongful discharge of the agency by the applicant, and a question of which contract controls, the Commissioner has no jurisdiction for the reason that the contract no longer exists. The cases, Abraham Lehr., Inc., v. Cortez, supra, and Friedlander v. Stanley Productions, supra [cf. Warner v. Marchetti, 52 Cal.App.2d 172, 125 P.2d 838; Haldor, Inc., v. Beebe, 72 Cal.App.2d 357, 164 P.2d 568] so hold. On the other hand, the facts in the Collier & Wallis, Ltd., v. Astor, supra, presented a case of damages for breach of contract arising from a wrongful discharge of the agency. While the point of distinction made in the Lehr and Friedlander cases was not discussed by this court in that case, the result of the decision was that no such distinction existed. The Lehr and Friedlander cases were based upon Hanes v. Coffee, 212 Cal. 777, 300 P. 963. See also, Loving & Evans v. Blick, 33 Cal.2d 603, 204 P.2d 23; Silva v. Mercier, 33 Cal.2d 704, 204 P.2d 609; Johnson v. Atkins, 53 Cal.App.2d 430, 127 P.2d 1027; Stetson v. Orland Oil Syndicate, Ltd., 42 Cal.App.2d 139, 108 P.2d 463. The Hanes case did not involve an agency contract nor the powers of the Labor Commissioner. It was concerned with a lease having an arbitration clause to the effect that any questions of fact affecting the rights of the parties under the lease should be settled by arbitration. The lessor in his court action contended that by reason of the failure of the lessee to commence operations under the lease within the time limited, it never became operative, or, if it did, it was terminated. The court held that the arbitration clause did not embrace such a controversy for if the lessor's contentions were sustained there would be no lease and thus no arbitration clause.

We do not believe that this case should be controlled by the Hanes case or those cited as supporting its holding (supra). The scope of the power of the Labor Commissioner to settle disputes between an agency and applicant relating to their dealings with reference to the former obtaining employment for the latter is broader than that of the arbitrator involved in those cases.

It is apparent from the wording of the statute, the policy expressed thereby, and the practicalities of the situation, that the Labor Commissioner is given power to settle all disputes between the agency and applicant arising from their dealings with each other with respect to the agency-applicant relationship embraced within the Labor Code provisions regulating employment agencies. As we have seen, the statute is broad and comprehensive and it is indicated by sections 1647 and 1647.5, supra, in permitting an alternative to a hearing by the Commissioner and the other provisions, that the Commissioner is empowered to hear and determine all such disputes including the existence of the contract, termination, liability thereunder and the like. To hold to the contrary might mean that there would be a splitting of the dispute arising out of one transaction whereby a court would hear and determine a part of the issues involved, and the Commissioner another, such as where damages are claimed for a wrongful discharge as well as commissions claimed to be due before the wrongful discharge. The creation of such an anomalous situation should not be said to have been the legislative intent.

Therefore, to carry out the policy and purpose of the Labor Code provisions, it requires the conclusion that the construction given to an arbitration clause in Hanes v. Coffee, supra, should not be applied to the Labor Code provisions here examined. Therefore, Abraham Lehr, Inc., v. Cortez, supra, and Friedlander v. Stanley Productions, supra, insofar as they are in conflict with the holding herein, are disapproved.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

92 Cal.App.2d 124

PACIFIC EMPLOYERS INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (two cases).

Civ. 7621, 7622.

District Court of Appeal, Third District, California.

May 27, 1949.

1. Workmen's compensation ⚷1250

Evidence that employee notified foreman that he was unable to continue work of lifting boxes because of his painful shoulder and that he was assigned to other work was sufficient notice of injury to afford employer an opportunity to investigate and furnish medical treatment if necessary.

2. Workmen's compensation ⚷1252, 1381

Failure by employee to give notice of injury is not a bar to compensation unless employer is prejudiced by such failure and burden is upon employer to show prejudice if it existed. Labor Code, § 5403.

3. Workmen's compensation ⚷1680

Evidence did not establish that employer was prejudiced by alleged failure of employee to give notice of injury so as to bar recovery of compensation for injuries. Labor Code, § 5403.

4. Administrative law and procedure ⚷788
Workmen's compensation ⚷1939

Courts can not overturn findings of Industrial Accident Commission where there is some competent evidence to sustain them, and their awards are not subject to review except in so far as they may be made without any evidence to sustain them.

5. Workmen's compensation ⚷1490, 1628

Evidence supporting findings of injury to shoulder of employee and resulting disability, authorized an award of compensation therefor.

6. Workmen's compensation ⚷558

That employee was predisposed to arthritis which condition was aggravated by injuries sustained, would not relieve the employer and insurer from liability for payment of compensation therefor.

7. Administrative law and procedure ⚷786
Workmen's compensation ⚷1939

Where testimony of employee respecting injuries to his back and hip created a conflict with that of medical authorities, the Industrial Commission alone had power to resolve such conflict.

8. Workmen's compensation ⚷1653, 1655

Evidence supported an award of compensation to employee for injuries to his back and hip notwithstanding conflicting medical testimony that the employee was able to work.

◆

Proceeding under the Workmen's Compensation Act by N. E. Huffman opposed by the Pacific Employers Insurance Company, and the Winter King Packing Company. From awards of compensation in favor of the employee by the Industrial Accident Commission of the State of California, the Pacific Employers Insurance Company filed petitions for review.

Awards affirmed.

W. N. Mullen, San Francisco, for appellant.

T. Groezinger, Robert Ball, San Francisco, for respondents.

ADAMS, Presiding Justice.

Petitioner has filed separate petitions for the review of two awards made by respondent Industrial Accident Commission in favor of N. E. Huffman, said awards being based upon an alleged injury to Huffman's left shoulder on August 23, 1947, and a later injury to his hip and back incurred September 13, 1947, both sustained while he was employed by the Winter King Packing Company, for which company petitioner was the insurance carrier.

The award made by the Commission for the shoulder injury was for the costs of further medical treatment to cure and relieve the effects of such injury, and reimbursement for his self-procured medical expense to be determined upon the filing of itemized bills and the approval of same by the Commission in the event the parties are unable to adjust same.

Regarding the hip and back injury the Commission found that it had caused temporary total disability from September 13, 1947, through April 13, 1948, and indefinitely thereafter, entitling applicant to $30 per week exclusive of the waiting period of one week; that he might be in need of further medical treatment and was entitled to have same furnished, and also entitled to payment for self-procured medical expense upon filing of itemized bills, etc.

It is contended here, in the proceeding involving the shoulder injury, that there was no notice of injury as required by law, and that there is no evidence to support a finding that such injury was sustained or that any disability occurred as a result of any such injury.

[1-3] Answering the first of these contentions respondent calls our attention to testimony of Huffman that after about two weeks' work lifting boxes of peaches weighing 65 to 90 pounds each, at a rate of one box every one and one-half minutes, and feeding them into a slicer, he developed pain in his left shoulder, and that he then notified his foreman that he was unable to continue such work because of his painful shoulder, and that he was then assigned to work operating a hand truck. This we think constituted sufficient notice of injury to afford his employer an opportunity to investigate the facts and furnish medical treatment if found necessary. At any event failure to give notice is not a bar to recovery unless the employer is prejudiced by such failure, and there is no evidence in the record that Huffman's employer was prejudiced, though the burden was upon him to show prejudice if it existed. Labor Code, § 5403; United States Fidelity & Guaranty Co. v. Industrial Acc. Comm., 84 Cal.App. 226, 230, 257 P. 895; Williams v. Industrial Acc. Comm., 71 Cal.App.2d 136, 161 P.2d 979.

[4] As for the contention that there is no evidence to support the finding of injury to the shoulder and resulting disability, it is well established that courts are powerless to overturn the findings of the Industrial Accident Commission where there is some competent evidence to sustain them; and that their awards are not subject to review except in so far as they may be made without any evidence to sustain them. Ethel D. Company v. Industrial Acc. Comm., 219 Cal. 699, 28 P.2d 919; Los Angeles County v. Industrial Acc. Comm., 14 Cal.App.2d 134, 137, 57 P.2d 1341; Phoenix Indemnity Co. v. Industrial Acc. Comm., 31 Cal.2d 856, 859, 193 P.2d 745.

[5] While there is evidence which would support contrary conclusions in this case, we cannot say that there is no competent evidence, nor any inference reasonably deducible from evidence, to support the conclusions of the Commission. While the opinions of the several doctors who examined Huffman are conflicting, Dr. Scheck, who was appointed by the Commission to examine him, gave as his opinion: "I have no doubt that this man's complaints have an organic basis, and my diagnosis is peri-arthritis of the left shoulder caused by injury." He recommended that novocain injections into the left shoulder be given, that the patient be put on a reducing diet, and thus treated for at least eight weeks before a final evalution of the case be made.

Huffman's own testimony showed that prior to his work feeding peaches into the slicer he had engaged in heavy construction work, but after his injuries the only work he had been able to do was one and one-half hours' thinning peaches, which required reaching up, and a short period picking berries; but that he was compelled to stop because of pain in his back, hip and arm.

[6] From Dr. Scheck's report and oral testimony it is reasonable to infer that Huffman was predisposed to arthritis which condition was aggravated by the injuries sustained; but such aggravation of a pre-existing condition does not relieve petitioner here. Colonial Ins. Co. v. Industrial Acc. Comm., 29 Cal.2d 79, 83-84, 172 P.2d 884.

Turning now to Huffman's claim for injuries to his back and hip, petitioner's principal contention is that if such injury did occur it did not cause disability beyond April 13, 1948, nor even after January 29, 1948, or November, 1947, since there was medical testimony that on those dates applicant was able to return to work. The accident which caused such injuries occurred on September 13, 1947, when Huffman slipped on the wet floor and fell while hauling peaches in a hand truck; and the finding of the Commission was that his injury caused temporary total disability from that date through April 13, 1948, and indefinitely thereafter; and that he might be in need of further medical treatment thereafter. He was taken by his employer to a hospital when the accident occurred, but was discharged on the 16th. After that time he was ordered to continue physiotherapy treatments. Subsequently he sought advice from Dr. Kempner who by X-Ray examinations found a fracture of the transverse process of the first lumbar, with evidence of a severe lumbo sacro sprain; and this doctor reported on October 20, 1947, that accident was the cause of the condition, that Huffman was confined to a hospital and that he would require two or three months' further treatment. Subsequently Huffman was examined by two other doctors, who gave opinions that he was feigning or exaggerating his symptoms, and that he was able to return to work. However, Dr. Harbaugh, medical director for the Commission, apparently was not satisfied with these reports and Dr. Scheck was appointed to examine the patient. This he did on April 13, 1948. He reported under date of April 22, 1948, that X-Rays showed that there had been a fracture of the first lumbar, but that it had healed. He diagnosed the hip condition as peri-arthritis caused by injury, and recommended the giving of novocain injections behind the left trochanter; and that he be treated for at least eight weeks before a final evaluation of his case. On July 2, 1948, Dr. Scheck was called for cross-examination, at which time he attributed the pain then suffered by the patient in the back and hip to the fall which had aggravated a rheumatic predisposition of the soft tissues; but he did state that while the shoulder condition was quite persistent and might go on for months, he did not think that the hip pain would interfere in any way with Huffman's work.

Huffman, also testifying on July 2, 1948, stated, however, that he had tried to work but was unable to continue because of pain; that he had been taking "shots" and heat treatments; that the hip hurt at times as badly as it did the day he fell; that he could not bend over; that he had pain in his back if he bent over much, and that at times it awakened him in the night; that as soon as he started to work he was right back where he started; that he really wanted to work; that he wanted his health so he could go back to work and "do a man's work like I used to."

[7, 8] We cannot say that a contrary conclusion by the Commission would not find support in the record, but, on the other hand, we cannot say that there is no evidence to sustain the conclusion which it reached. The testimony of Huffman created a conflict with that of the medical authorities, which conflict the Commission alone has power to resolve. Compare Western Pac. R. Co. v. Industrial Acc. Comm., 17 Cal.App.2d 119, 120, 61 P.2d 459; Employers' Liability Assur. Corp., Ltd., of London, England, v. Industrial Acc. Comm., 42 Cal.App.2d 669, 670, 109 P.2d 716, both holding that the testimony of the injured party presented substantial evidence to support the finding of the Commission though it conflicted with the opinions of physicians as to the length of the period of disability. Also see 1 Campbell's Workmen's Compensation, p. 940.

The awards in both cases are affirmed.

PEEK and THOMPSON, JJ., concur.

92 Cal.App.2d 55

PEOPLE v. GIBSON.

Cr. 4282.

District Court of Appeal, Second District, Division 3, California.

May 25, 1949.

Rehearing Denied June 6, 1949.

Hearing Denied June 23, 1949.

1. Criminal law ⚿474, 1170(1)
Homicide ⚿156(1), 339

In prosecution for murder of wife, refusal to admit testimony that wife's unfaithfulness and other conduct had been preying on defendant's mind and testimony of psychiatrist that a person in defendant's condition might commit homicide without being conscious thereof was error, but not prejudcial in view of defendant's own evidence that showed that he was conscious when the homicide was committed. Pen. Code, § 26, subd. 5.

2. Homicide ⚿309(6)

In prosecution for murder, court's failure to give an instruction regarding manslaughter was proper in view of the evidence.

3. Homicide ⚿22(1)

When the killing is perpetrated by lying in wait, it is murder in the first degree even if the defendant fell asleep while he was lying in wait.

4. Constitutional law ⚿268

Where the case had been repeatedly continued because of the engagements of defendant's counsel, the denial of further continuance and the appointment of counsel to represent defendant did not deprive defendant of due process, in view of fact that record showed that defendant was ably represented by counsel appointed by the court. U.S.C.A.Const. Amend. 14.

◆

Appeal from Superior Court, Los Angeles County; Thurlow T. Taft, Judge.

Howard D. Gibson was convicted of murder in the first degree, and from such conviction, and from the order denying his motion for a new trial, he appeals.

Affirmed.

Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Frank Richards, Deputy Attorney General, and W. E. Simpson, District Attorney of Los Angeles County, Jere J. Sullivan and Robert Wheeler, Deputy District Attorneys, Los Angeles, for respondent.

WOOD, Justice.

Defendant was charged with the murder of his wife. In a trial by jury, under his plea of not guilty, he was convicted of murder in the first degree, and the punishment was fixed at life imprisonment. In the trial before the same jury, under his plea of not guilty by reason of insanity, the verdict was that he was sane. He appeals from the "conviction" and from the order denying his motion for a new trial.

Appellant admits that he killed his wife by cutting her throat with a butcher's boning knife. He contends that the trial court erred as follows: (1) In sustaining objections to his proffered testimony to the effect that before and at the time of the homicide certain matters regarding the character and conduct of his wife were preying on his mind. (2) In sustaining an objection to his offer of proof, by way of a hypothetical question to be asked a psychiatrist, that if such matters were preying on his mind he might then commit homicide without being conscious thereof. (3) In refusing to instruct the jury regarding manslaughter. (4) In denying appellant's motion that the trial be continued so that counsel of his choice might represent him.

Mrs. Margaret Gibson, aged 49 years, the wife of appellant, worked as a housekeeper for a Mrs. Hellman in Beverly Hills about 4 months, and she lived in an apartment which adjoins the back of the garage at the rear of the premises. About 4 feet back of the rear side (north side) of the apartment there is a 6-foot-high brick wall which extends easterly and westerly along the rear of the premises. Beyond the wall there is an alley. At a place in the wall approximately opposite the middle of the rear side of the apartment there is a wood door or gate. A person entering the apartment from the alley would go through the gate in the brick wall, then turn right (west) and go along the rear of the apartment about 9 feet to the northwest corner of the apartment, then turn left (south) and go about 7 feet to the apartment door on the west side of the building. There is a cement walk, about 4 feet wide, extending from the gate to the apartment door. A tree, about 2 feet in diameter, adjoins the outer edge of the 4-foot cement walk at a place opposite the northwest corner of the apartment. The north side of the tree is about 2 feet from the brick wall. The door of the apartment is about 50 feet from the back porch of Mrs. Hellman's house.

Appellant, aged 49 years, also lived in that apartment for a while, but he had not been living there for a period of 4 or 5 weeks preceding the time when the homicide was committed. About 3 weeks before the homicide Mrs. Gibson had met a Mr. Fricker, aged 78 years, at a dance. In the evening of January 10, 1948, Mrs. Gibson went to a dance with Mr. Fricker. That was the only time they had gone out together. They left the dance about 11:30 p. m. and went in an automobile to a place about one-half block from Mrs. Gibson's apartment, which place was near the entrance to the alley which extended along the brick wall. About midnight they left the automobile there and walked in the alley to the gate in the brick wall. Mrs. Gibson opened the gate and went into the yard. Mr. Fricker remained outside and started to hand to Mrs. Gibson her extra pair of shoes which he had carried as they walked from the automobile. He also tried to kiss Mrs. Gibson, and when he put his head through the gate opening something went over his head, touched his hair, and barely scratched his head. Then he dropped the shoes in the alley and ran about 30 feet. Then as he walked back toward the gate he heard a man inside the wall cursing and saying: "You are a liar. You told me a damn lie. You are no good. You made me believe I [you] was not here any more and then you are still here." "You don't make me believe I [you] don't work here any more." He then heard a woman shout, "Help." Then suddenly it was quiet, he did not hear anything more, and he left.

Shortly after midnight Mrs. Hellman heard a pounding noise, and upon investigating she found Mrs. Gibson lying on the back porch, bleeding profusely, and with a "horrible gash" in her throat. Mrs. Hellman dragged her inside the door and called the police.

The cut in decedent's throat was 4½ inches in length, passed through the thyroid cartilage ("Adam's apple"), and severed the deep blood vessels. There was also a cut, about 2 inches in length, on the upper part of her left arm. There was also a cut, about 1½ inches in length, on her right forearm.

Appellant, a butcher, lived at 1734 South Mansfield Avenue, Los Angeles, during the 6 weeks preceding January 10, 1948. He testified that he saw his wife on January 1, 1948, and she told him that she was moving from Mrs. Hellman's place, but she did not tell him where she was going; that thereafter he telephoned to the Hellman residence and someone told him that Mrs. Gibson was not there and had not left a forwarding address; that he wrote two letters to his wife asking therein that she telephone him at the meat market, but she did not telephone him until January 9th; that on January 9th she telephoned and said that she had received the two letters, that she did not like her new place, and that she was going to quit. He testified further that he had also sent her a registered letter, with a request for a return receipt, to Mrs. Hellman's address; that on Saturday, January 10, 1948, his wife told him by telephone that she had left Mrs. Hellman's place on January 1st and had obtained employment in Bel Air, that she could not give him the address because there was no street name, and that she did not know the telephone number; that he asked her in that conversation where he could meet her Sunday morning, and she replied that he should remain in his room Saturday evening and she would telephone him and tell where to meet her; that after he left the market that evening he bought a pint of whiskey and took it to his room; that he drank some of the whiskey, lay on the bed and went to sleep; that he was awakened when the landlady came to collect the rent; that he paid her two weeks' rent in advance, and she asked him if he had seen the letter that she had left in his room; that he then saw the registered letter, which he had sent to his wife, lying on the dresser, and it was marked "Refused"; that he then thought it would be a good idea to go to his former residence, the apartment at the rear of Mrs. Hellman's place; that he probably called a taxicab; that he dressed in his better clothes, intending to spend the night there and go to church the next morning; that he finished the bottle of whiskey which he had brought to his room, and when he started to open another bottle of whiskey he could not find his nail file which he customarily used to open bottles; that he then took the knife (the one used in the homicide) from a dresser drawer and started to open the bottle with it, and at that time he heard an automobile horn; that he went out to hail the taxicab and ask the driver to wait for him; that he had intended to return to his room before starting on the trip, but the apartment house door closed and locked when he went outside and he did not have his key; that at that time he did not recall "having the knife in my possession"; that he did not know when he put the knife in his pocket; that he got out of the taxicab at the Pacific Electric station in Beverly Hills and went into a cafe and ordered a drink of whiskey; that he walked from there to his former residence at the rear of Mrs. Hellman's place; that as he approached the place he was a little cautious because he was not sure that his wife was there; that all the blinds in the house were down and the lights in the house were on; that he looked through a crack and saw that some of his wife's things were in the house, and he believed that she was still there; that he knocked on the door but there was no response; that he became worried about his wife because she "never went out at nights that way" in the last year and a half, and because all the windows were closed and there was "only open gas heat in the house, and it was dangerous"; that as he was reaching in his side coat pocket to get a cigaret he "encountered this knife," which was wrapped; that he removed the knife from his pocket, unwrapped it and threw the paper over the brick wall; that he then cut the screen of the bathroom window with the knife; that he used the knife in trying to push the window open but it did not open, and "the knife bent back"; that he "was getting to feel woozy or wobbly," and being unsteady he leaned against the brick wall and the tree, and he stood "there with my back against the tree, and the wall, kind of wedged in between there so that I could look out the driveway and see my wife when she did arrive"; that while he was in that position he "fell asleep or passed out intoxicated"; that when he awoke he saw his wife, with her back and left side toward him, just extending her arms around a man's neck and turning her head sideways, and in turning her head sideways in front of his head she cut off the man's view of appellant; that the man was prevented, by his head, from seeing appellant, "but he [the man], at that time, or prior to that time, when, I don't know—but he had his hands on her buttocks, apparently pulling her toward him," and there "were no shoes in his hands at that time"; that when "I seen him in this position—arms reached, I believe, from him, a step or two removed from him, it seemed as though my best description of it, it was like a toy balloon that was blown up—becoming beyond bounds or out of proportion, only it was like a light, a light bursting, or a light bulb expanding. Everything was a white light. I do remember lunging and striking out at her"; that "That is the last knowledge, the bursting of light, an extreme light or a white light, as you might describe it, that I had any knowledge of it until being in a taxicab on my way home to my residence," and "the next memory I had [after that] was I spoke to the two arresting officers."

A bartender at a place near the Pacific Electric station in Beverly Hills testified that appellant, who was an occasional patron there, came to the bar very late at night January 10, 1948, remained there about 2 minutes, and had one drink of whiskey; that appellant said, "You won't be seeing me around any more"; that the witness asked why he would not be around any more, and he replied that "You will hear; you will be hearing pretty soon."

A taxicab driver testified that appellant entered his taxicab at 12:25 a.m. on January 11, 1948, at the taxicab stand near the Pacific Electric station in Beverly Hills and gave him an address on South Mansfield Avenue as the place where he wanted to go; that after the driver had taken him to that address the appellant said that the driver "would remember that trip for a long time"; that the driver asked him what he meant by that statement and "He told me I would know later."

Mr. Pavlock, who roomed at the same house on South Mansfield Avenue where appellant roomed, testified that he had worked as a butcher in the same shop with appellant; that about 1:10 a.m. on January 11, 1948, the appellant rapped at the side door of the house and asked him to open the door and stated that he had forgotten his key; that he (witness) opened the door and let appellant in, and before appellant entered his room he asked if the witness would do him a favor "tomorrow" and stated, "I am going to write a letter and I want you to mail it for me"; that the witness agreed to mail it; that within a few minutes thereafter he heard appellant talking on the telephone which was in the hall; that he heard appellant say: "I am sorry, Champ. You have been a swell fellow, a nice man to work for. Will you please send my money to * * * an address in Kentucky"; that he heard him saying at that time that he had done something to Margaret; that the witness surmised that something was wrong, and after having talked to his wife and the landlady, he went into appellant's room and asked him what had happened that night and whether there was anything the witness could do to help him; that appellant said, "Oh, everything is all right"; that the witness said, "Come on. Tell me what happened," and that appellant replied, "Well, I will tell you. I killed my wife"; that the witness said, "I can't believe it. It isn't like you to do anything like that"; that appellant said, "Well, I did. I will show you"; that appellant then got the butcher's boning knife (the one used in the homicide) and showed it to the witness; that the blade of the knife was bent, the tip of it was curled, and there were brown stains on it; that appellant then said, "If you don't believe me up to now, I will show you the blood on my clothes"; that he then brought a gray suit and a topcoat from his closet and showed them to the witness; that there was "a brown stain on the right breast side and on the tip of the right sleeve"; that he told the witness that he stuck her 8 or 9 times and then he slit her throat, that he was waiting for her to show up that evening, that he propped himself against a tree and waited until they came home; that, in answer to the witness' question as to why he did that, he said that he was all broken up "about her and him not being together"; that appellant said that he was glad it was all over now, that he would be able to get a night's rest, and that he was not running away, and that "they" would be after him that night or the next morning; that the officers arrived about 5 minutes after he left appellant's room. He testified further that the letter which appellant asked him to mail was given by appellant to Mrs. Pavlock and she gave it to the witness; that the letter was unsealed and he (witness) read it and gave it to the officers; that he knew appellant's handwriting and that the letter was written by appellant.

The letter just referred to is as follows: "Lona & Kiddies Please Forgive & forget me this had to come—no one knows how I have suffered. it is the gas chamber for me but better that than living as I have been. Best wishes to all. Howard." The letter, which was in an airmail envelope and had airmail postage on it, was addressed as follows: "Lona R. Gibson 139 Ashland Dr. Latonia Ky."

Mrs. Pavlock testified that a short time after Mr. Pavlock had let the appellant in the house the appellant came to their room and handed a letter to her and asked that her husband mail it the next morning.

Champ Reese testified that appellant worked for him in one of his meat markets; that on January 11, 1948, about 1:15 a.m. appellant telephoned him and said, "I think you had better get another man to open up your market Monday morning"; that Mr. Reese said, "Well, what is the matter, Howard; what is your trouble?"; that appellant said, "Well, I have had some more family trouble. I would like for you to send my check back" to Latonia, Kentucky, to his (appellant's) son; that he told appellant to call him the next morning and meet him at one of the stores and he would be glad to see if he could help him; that appellant said, "No, I can't"; that the witness then said that unless he could help the appellant he did not appreciate his telephoning at that time in the morning, and "What is your trouble?"; that appellant said, "I just killed my wife."

The taxicab driver, who took appellant to the Pacific Electric station in Beverly Hills, testified that he saw appellant at the Mansfield Avenue address about 10:40 p.m. on January 10th; that when he (driver) arrived at the Mansfield address appellant was waiting in the yard; that he (driver) did not blow the taxicab horn.

Officer Beattie arrived at the scene of the homicide about 12:35 a.m. on January 11th and at that time the deceased was being taken from the back porch of Mrs. Hellman's house to the ambulance. When he arrived there the door of Mrs. Gibson's apartment was open, there were many blood stains on the walk at the entrance to the apartment, on the apartment door, and in the front room and bathroom. There was a large pool of blood on the floor of the stall shower and there were many blood stains on the wall of the shower. The wash basin and lavatory were covered with blood stains. A coat and a pair of glasses were on a chair, and there were several slashes in the coat and there were blood stains on the glasses. There were blood stains on the rear steps and rear door of Mrs. Hellman's house. Mrs. Gibson's shoes were in the alley just outside the rear gate.

Officers Beattie and Alcorn arrived at appellant's room on Mansfield Avenue about 1:45 a.m. Officer Alcorn testified that when they entered appellant's room he (appellant) said, "I know why you are here"; that in response to questions by the officers as to why he thought they were there, appellant replied, "Because I killed my wife"; that in response to their question as to what he used to kill her, he replied, "A knife"; that in response to a question as to where the knife was, he pointed to a table; that the officer took a "sharp six-inch knife" from the table, showed it to the appellant, and asked him if it was the knife with which he slashed his wife; that appellant replied that it was the knife; that he asked appellant how he had used the knife upon his wife, and appellant stated that he had slashed her 7 or 8 times and then cut her throat; that in response to a question as to why the knife became bent he replied that it must have happened when he struck her with the knife; that he (officer) went to Mrs. Pavlock's room and obtained a letter from her (the letter above quoted addressed to Lona R. Gibson); that they then took appellant to the police station in Beverly Hills.

While appellant was in jail (the following Monday) he wrote a letter to his son James Gibson, 139 Ashland Drive, Latonia, Kentucky, and handed it to the jailer for mailing. That letter is as follows: "Monday. A.M.

"Dear Jim;

"I am addressing this to you, but it is for the entire family.

"I am in one terrible predicament, one that has but one ending. I am somewhat ashamed, and forgive me for the shame and suffering this will cause. try to find solace in God, as that is what I am going to have to do.

"I can't exactly explain how it all happened, but I killed Margaret, Sat. night or Sunday morning. went insane I suppose.

"My attorney a Mr. Westermore will keep in touch with you, and send my personal bel*on*ings to you.

"There is nothing any of you can do but pray for me, please don't come as that would only hurt all of us.

"Love to all

"Dad.

"You can keep in touch with me through my attorney"

Officer Alcorn testified further that immediately after taking appellant to the police station they took him to the police chief's office and there the officers had a conversation with appellant regarding the homicide, and that his statements were free and voluntary. Officer Alcorn testified that in said conversation the appellant made statements, in addition to those included in appellant's testimony, as follows: That appellant said that about 10 p.m. on January 10th, with the thought still on his mind that his wife had lied to him about her place of residence, he went to a dresser drawer and removed from it a knife which was wrapped in butcher paper and a magazine; that he placed the knife in his overcoat pocket, left the room, called for and met a cab in front of his house; that he went to a large tree which was about 10 feet from the door of his wife's apartment, removed the knife from his overcoat pocket, took the paper from the knife, threw the paper over the fence, and stuck the knife in the tree; that he waited there about 2 hours until his wife and an unknown person arrived at the back gate; that he saw the gate open, saw his wife enter, and he "believed this other person to be a man who was standing there," and "with this," he said he "blew his top," ran over to the gate, and with the knife in his right hand slashed at his wife 7 or 8 times, and berated her for being untrue to him; that his wife forced her way past him, went to the apartment door, took her key from her purse, unlocked the door, and entered the apartment; that she went across the living room to the bathroom, and he followed her into the bathroom; that she then walked into the shower room, and he followed her into that room and "with the knife still in his right hand, and with one sweep, cut her throat"; that before he cut her throat she was merely standing in the corner of the shower; that he believed that "with his left hand he grabbed his wife's head by the hair and held it back while he slit her throat"; that he had been married to her about 4 years; that shortly after their marriage he had reasons to believe that she had been unfaithful to him, and he had had an act of this type in mind for some time.

After that conversation, about 2 a.m., Officers Alcorn, Beattie, White and Chief Anderson, took the appellant to the scene of the homicide. Officer Alcorn testified that appellant showed them the tree by which he stood, the gate through which his wife came, where she was when he first slashed her, the route she took into the house, into the bathroom, into the shower room, and where he slashed her throat. He testified further that the pointing out of those places by appellant corresponded with the conversation they had had with him, and that appellant indicated to them that he had stood behind and on both sides of the tree. He testified further that on January 14th he and Officer White found, in the alley and directly over the wall from the tree, some meat paper and a meat market magazine which were wrapped in a "sharp V-shape" and with "sticky tape" at the bottom and a rubber band at the top; that they showed the paper to appellant and he said that it was the paper in which he had wrapped the knife before placing it in his overcoat pocket. On cross-examination, Officer Alcorn testified that appellant said as follows: He was emotionally upset. He loved his wife. She had sold a house in Louisiana without his knowledge. She had taunted him regarding her conduct with other men. He believed that his wife had been involved in prostitution in Akron and had been arrested there. She said she had been a prostitute before her marriage to him.

[1] Appellant contends, as above stated, that the court erred in sustaining objections to testimony offered by him to the effect that before and at the time of the homicide certain things were preying on his mind. In response to a question by his attorney he testified that something was preying on his mind prior to the incident involved here. He testified that due to his wife's past conduct he was worrying a great deal because on various occasions she had been unfaithful to him. His attorney asked him if one of the things that was preying on his mind was the fact that his wife had deceived him as to the number of times she had been married. An objection to the question on the ground that it was leading was sustained. His attorney then asked if one of the things that was preying on his mind was the fact that his wife had sold a house and absconded with the proceeds of the sale. An objection to the question on the ground that it was leading was sustained. After extended discussion by the judge and attorneys regarding the

admissibility of such evidence, assuming that it could be elicited other than by leading questions, the judge indicated that such evidence was not admissible. Then appellant's attorney offered to prove that at the time of the homicide various things were preying on appellant's mind, which things were as follows: that shortly after their marriage he learned that his wife had been a prostitute; that she had absconded with his funds and left him penniless in Louisiana, just prior to the time they were to occupy a new house purchased by him; that she taunted him upon frequent occasions regarding sexual relations she had had with other men; that he had loved her and had always forgiven her transgressions; that he had made her the recipient of many gifts and she was ungrateful and unfaithful; that she had deceived him as to the number of times she had been married and had stated that she had been married twice whereas in fact she had been married seven times; that about midnight on January 10th he observed her in the arms of another man. Then appellant offered to present testimony of a psychiatrist, by way of a hypothetical question based upon the assumption that if said things above mentioned were preying upon the mind of a man, the man might commit homicide without being conscious thereof. The court rejected the offer of proof regarding the things that were preying on appellant's mind, and rejected the offer of the testimony of the psychiatrist. The deputy district attorney argued to the effect, in support of those rulings of the court, that such offers related to the issue of insanity under appellant's plea of not guilty by reason of insanity and that such evidence was not admissible at the first stage of the trial under the plea of not guilty. Those rulings of the court were erroneous. See People v. Wells, 33 Cal.2d 330, 202 P.2d 53. In the cited case the court held, 33 Cal.2d page 343, 202 P.2d 53, that at the first stage of the trial, under the plea of not guilty, the trial court properly allowed the defendant to give testimony as to his state of mind which tended to show lack of malice aforethought. The defendant therein was not allowed to introduce proffered evidence of physicians, who had observed the defendant, to the effect that he was suffering from an abnormal mental condition (not insanity). In that case defendant made an offer of proof to the effect that two days before the alleged assault he was examined by a psychiatrist who concluded that the defendant therein was suffering from a "state of tension," that is, a condition in which the body and mind are in a state of high sensitivity to external stimuli. That offer of proof was refused by the trial court. The court therein said, 33 Cal.2d at page 345, 202 P.2d at page 62: "Under the circumstances the materiality of this evidence in defendant's case is patent. * * * In resolving this question in a close case the jury could well be materially aided by the knowledge that, in the opinion of qualified experts, the defendant's condition was such that he might readily have acted from genuine fear rather than from a desire for vengeance or from any other malicious purpose." It was also said therein, 33 Cal.2d at page 351, 202 P.2d at page 66: "Evidence which tends to show legal insanity (likewise, sanity) is not admissible at the first stage of the trial because it is not pertinent to any issue then being litigated; but competent evidence, other than proof of sanity or insanity, which tends to show that a (then presumed) legally sane defendant either did or did not in fact possess the required specific intent or motive is admissible." The erroneous rulings of the court herein rejecting said offers of proof, however, were not prejudicial. The evidence was offered in support of appellant's asserted defense that he committed the act charged without being conscious thereof. Section 26 of the Penal Code provides in part as follows: "All persons are capable of committing crimes except those belonging to the following classes: * * * Five. Persons who committed the act charged without being conscious thereof." According to appellant's own testimony he carried the butcher's boning knife in his overcoat pocket from the place where he was rooming to the home of his wife; that when he found that she was not at home he removed the knife from his pocket, unwrapped it and threw the wrapping paper over the brick wall; that he then stood in a narrow place between the tree and the brick wall so that he could see his wife when she arrived home. Although he testified that "the bursting of light" was the last knowledge he had until he was "in a taxicab on my way home," he also testified that he did "remember lunging and striking out at her." The fact that he knew he lunged and struck at her establishes that he was not unconscious for a while at least after the alleged "bursting of light." In view of that testimony of appellant showing that he was conscious of making the assault, the proffered testimony of the psychiatrist, to the effect that in his opinion there might be circumstances in which a man might commit an assault and might not be conscious thereof, would be practically valueless. It is also to be noted that appellant testified in fine detail as to what he saw when his wife and the man arrived at the place where he was waiting —he saw her back and left side toward appellant, she was "just extending" her arms around a man's neck, she was "turning" her head sideways, her head was in front of the man's head, the man could not see him, and there were no shoes in the man's hands. The period of time from the alleged "bursting of light" to the time he arrived at his home was approximately an hour. Since he testified that he regained consciousness while in a taxicab on the way home, it appears that the period of alleged unconsciousness was less than an hour A bartender testified that appellant was in the bar late at night and told him that he would not be seeing appellant around there any more—that he (bartender) would be hearing the reason "pretty soon." That incident, indicating consciousness, was before he entered the taxicab to return home. Also he gave the taxicab driver his correct address. Almost immediately after he arrived home he wrote a letter to his relatives stating, in part, "Forgive & forget me this had to come" and "it is the gas chamber for me." In view of the fact that at the time he wrote that letter no one had informed him that he had killed his wife, the statements in the letter that "this had to come" and "it is the gas chamber for me" are wholly contradictory of the theory or assertion that he was not conscious at the time he killed her. The testimony of appellant that he was at the gate when he lunged and struck at her and the fact that blood was outside and inside the apartment and a large pool of blood was in the shower stall indicates that appellant pursued her from the gate to the shower. In order to accept appellant's theory that he became unconscious when his wife was at the gate, a trier of fact would be required to draw the unreasonable conclusion that while he was unconscious he cut her with the knife when she was at the gate and then, while he was still unconscious, pursued her to the shower and there inflicted the fatal cut.

In the case of People v. Danielly, 33 Cal. 2d 362, 202 P.2d 18, 25, the defendant was convicted of murder in the first degree. He was not living with his wife. About 12:30 a.m. on October 13th he shot and killed his wife as she sat in an automobile in front of her home. Just prior to the homicide, his wife and another woman and two men went from her home to the automobile. As they approached the automobile, the defendant left his automobile, which was parked across the street from his wife's house, and went, with a pistol in his hand, to the other automobile where he killed his wife. The defendant's alleged defense was that he was at his home in bed from 6 p.m. on October 12th until the police awakened him about 1:30 a.m. on October 13th, and that he had no memory of, and never was conscious of, anything during some 6 to 8 hours immediately preceding the arrival of the police at his home. In that case the defendant sought to show by lay and expert testimony that he was "highly unstable, highly emotional," and suffered from "nervous disability." Objections to that testimony were sustained by the trial court, and those rulings were upheld on appeal. The court therein said, 33 Cal.2d at page 378, 202 P.2d at page 28: "There is a complete absence of evidence of any objective situation, occurring at or near the time in question, which would furnish any cause, reasonable or otherwise, for defendant, devoid of malice, to react in a 'highly emotional, highly unstable' manner and on that account leave his bed, take a loaded gun and go to his wife's residence." The court also said therein, 33

Cal.2d at page 369, 202 P.2d at page 22: "It is to be noted that the fine detailing of events * * * beginning when the police 'came barging in' to his [defendant's] room * * * is the testimony of the defendant who, it is now urged, has absolutely no memory of, and never was conscious of, any events or acts during some six to eight hours immediately preceding such 'barging in' of the police."

As above noted, appellant herein testified in fine detail as to happenings immediately preceding the alleged "bursting of light." It appears from all the evidence herein, and particularly from the circumstances hereinabove specially referred to which refute appellant's theory of unconsciousness, that the issue in the present case as to appellant's state of mind was not a close one, and that the exclusion of the psychiatrist's opinion testimony was not prejudicial. See, People v. Wells, supra, 33 Cal. 2d 330, 202 P.2d 53. In the present case, as stated in the case just cited, 33 Cal.2d at page 358, 202 P.2d at page 70, it does not appear that there is "any reason for the jury's having been in doubt or difficulty in resolving against defendant the question of his state of mind."

"An act committed by a person while in a state of voluntary intoxication is nonetheless criminal by reason of his having been in such condition." People v. Anderson, 87 Cal.App.2d 857, 860, 197 P.2d 839, 841.

[2] Appellant's further contention that the court erred in not giving an instruction regarding manslaughter is not sustained. He testified that the "bursting of light" was the last knowledge he had until he was in a taxicab on his way home. If he committed the act charged while he was unconscious he was not guilty of manslaughter or any crime. Penal Code, sec. 26, subd. 5; People v. Danielly, 33 Cal.2d 362, 202 P.2d 18. The court, at appellant's request, gave three instructions to the effect that if appellant was not conscious of his acts at the time he killed his wife the jury should find him not guilty. The jury did not believe his testimony to the effect that he was unconscious. It found either that the killing of his wife was the result of his willful, deliberate and premeditated intent to kill her, and that the killing was accomplished by his lying in wait, or it found that the killing was the result of his willful, deliberate and premeditated intent to kill her, without finding as to lying in wait. In either event it was murder in the first degree. When the killing is perpetrated by lying in wait it is murder in the first degree. People v. Tuthill, 31 Cal.2d 92, 99-101, 187 P.2d 16. Even if appellant fell asleep while he was lying in wait, that fact did not exclude lying in wait as a "means" through which he accomplished the killing. People v. Tuthill, supra, 31 Cal.2d 92, page 101, 187 P.2d 16. The preparation for carrying the long sharp knife, the carrying of it in his overcoat pocket from his room to his wife's home, the removal and disposal of its wrapping or "sheath" after arriving there and sticking the knife in the tree, and standing in the obscure but advantageous position between, and against, the tree and wall while he was waiting at midnight for her arrival (which position was a few feet from the rear gate and the apartment door, and from which position he could see the rear gate and the front driveway), are strong evidences that he had formed a specific intent to kill her and that he was lying in wait. In People v. Danielly, supra, 33 Cal.2d 362, 202 P.2d 18, the facts are similar to the facts herein. In that case, wherein the charge was murder, the defendant left his bed in the nighttime, took a loaded gun and went to his wife's residence and killed her when he saw her leaving her home about midnight with another woman and two men; and he asserted as an alleged defense that he was unconscious and had no memory of his acts. The court therein said, 33 Cal.2d at page 378, 202 P.2d at page 27: "The evidence in its material aspects, therefore, may be said to show either that the defendant is guilty as charged or wholly not guilty because he acted while unconscious." Also in that case, in discussing defendant's contentions that the offense was at most manslaughter and that the trial court had erred in refusing to admit certain evidence which defendant asserted would tend to show that he acted in a "heat of passion," the court said, 33 Cal.

2d at page 371, 202 P.2d at page 23: "There is no evidence whatsoever that the killing resulted from a sudden quarrel and in the heat of any reasonably aroused passion." In the present case the court did not err in not giving an instruction regarding manslaughter.

Appellant also contends that the court erred in denying his motion for a continuance. The information was filed on January 29, 1948. On February 2, 1948, appellant appeared, with his counsel Mr. Morris Lavine, for arraignment, and upon appellant's request the matter was continued to February 13, 1948. On February 13th the matter of arraignment was continued to February 20th, and then it was continued to February 26th. On February 26th appellant entered his pleas and the trial was set for April 27, 1948. On April 27th Mr. Safier, an attorney, appeared in court with appellant and stated that Mr. Lavine, counsel for appellant, was engaged in another trial, and he asked for a continuance in the case to May 18th. The trial judge said if the case is to be continued "it will have to be Monday, June 7th." The case was then continued to June 7, 1948. On said last mentioned day, at 10 a. m., Mr. Ralph R. Rubin, an attorney employed by Mr. Lavine, appeared in court with appellant and made a motion for a continuance on the ground that Mr. Lavine was engaged in a trial. He also said that Mr. Lavine had not anticipated that the case he was trying would require as much time as it had required, that it was then about concluded, and that the arguments were then being presented to the jury; and that on "June 15th, Mr. Lavine must start a trial in the case of United States v. Kawakita," in which case witnesses had come from Japan, and that the case would "last from four to six weeks." The court referred to the continuances that had been had, and stated that on April 27th the witnesses were present and the plaintiff was ready for trial and the case was continued for the same reason that a continuance was then being asked. The court also stated that the only continuance that could be granted would be a continuance for two months or longer. Mr. Rubin stated "that there would probably be a disposition in the case." The motion for a continuance was denied. Mr. Rubin stated that he was not prepared to defend the appellant, and the appellant said that he was not prepared to go to trial without Mr. Lavine's presence. A recess until 11 o'clock was then taken, and after the recess the court appointed Mr. Rubin to defend appellant. Mr. Rubin stated that he was not prepared to try the case. An adjournment was then taken until the next day, June 8th, at 10 a. m.

At said time on June 8th Mr. Rubin filed affidavits of himself, the appellant, and Mr. Frankenberger, in support of a motion for a continuance. Mr. Rubin's affidavit stated that he was admitted to the bar in June, 1947; that he had tried two misdemeanor cases and two civil cases but he had not tried a felony case; that by reason of his inexperience he was not ready to try the case; that he requested a continuance to enable Mr. Lavine to be present, and that he objected to being substituted in the place of counsel of defendant's choice. Appellant's affidavit stated that he had employed Mr. Lavine as his counsel; that the court had appointed Mr. Rubin, over appellant's objection, to act as attorney for appellant. Mr. Frankenberger's affidavit stated that since May 17, 1948, Mr. Lavine had been continuously engaged in the trial of a felony case in department 37 of the superior court. The trial judge read the affidavits, and denied the motion, and told Mr. Rubin that if he was not in a position to proceed that morning with the examination of jurors the matter would be continued until 2 p. m. The judge also told appellant that appellant had the right to examine the jurors himself, or that Mr. Rubin could represent him in that connection, or that if he did not want Mr. Rubin to help him the judge would appoint an attorney other than Mr. Rubin to advise appellant, and that the actual trial would commence the next day, June 9th, at the latest. Mr. Rubin again objected to being appointed to represent appellant. Appellant stated that he was being denied the privilege of having an attorney of his choice, that he did not care to proceed with Mr. Rubin, that he did not believe Mr. Rubin was qualified and for that reason he had refused his services. Thereupon an adjournment was taken until 1:30 p. m. of that day.

At said last mentioned time Mr. Rubin asked that his appointment as counsel be terminated. The judge denied the motion, and stated that the trial would proceed at that time, and that if the appellant desired to examine the jurors himself he might do so. The judge also appointed Mr. Colvin for the purpose of consulting with appellant and advising him of his rights. Appellant stated that he had no faith in counsel appointed by the court, and that he did not care to examine the jurors himself. Mr. Colvin stated that he had no knowledge of the circumstances of the matter and that he did not think he was qualified to examine the jurors but he would be glad to assist the appellant. Then the appellant said: "If I am to go to trial with the attorneys, the court attorneys present here, might I at least have the Court's consent or permission to let Mr. Rubin act as my counsel? He had at least appeared in court once with me before and I believe would know a little something of the proceedings." The court said, "You prefer Mr. Rubin acting alone?" The appellant said, "That is entirely up to the discretion of the court." Then the court, upon the request of Mr. Colvin and the appellant, excused Mr. Colvin as counsel. A jury was then impaneled and sworn to try the issues in the case. Mr. Rubin then objected to the proceedings in the case on the ground that the appellant was being deprived of his constitutional rights. Appellant then stated that Mr. Rubin was not the attorney of his choice, "as provided for under the Fourteenth Amendment of the Constitution of the United States," that Mr. Rubin was not qualified and he did not have confidence in him; that he reposed his confidence in Mr. Lavine; that he accepted Mr. Rubin only under the force of the court's order. Then an adjournment was taken until the next day, June 9th, at 1:30 p. m.

At said last mentioned time the trial proceeded, the appellant being represented by Mr. Rubin. On June 11th the jury returned its verdict of guilty. The insanity issue was tried on June 14th, the appellant being represented by Mr. Rubin. On July 9, 1948, Mr. Rubin as counsel for appellant made a motion for a new trial, and in his "Specification of Errors" in connection with that motion he asserted that the court erred in denying a continuance of the trial and in compelling appellant to go to trial with an attorney without previous experience in such cases. The motion for a new trial was denied.

The case was set for trial on April 27th, which was two months after appellant had entered his pleas. On April 27th, when it was represented to the court that appellant's counsel Mr. Lavine was then engaged in another trial, and when a motion for a continuance was made, appellant was granted a continuance of approximately six weeks, that is, to June 7th. On June 7th, when another motion for a continuance was made on the same ground, namely, that Mr. Lavine was engaged in another trial, it was represented that the arguments in the other trial were then being presented to the jury and that the case was almost concluded. It was also said at that time that about a week later Mr. Lavine would have to start a trial in the federal court which would require about two months. The trial judge denied the motion for a continuance, but he did continue the matter until the next day, June 7th, at 1:30 p. m., when the examination of prospective jurors was commenced. After the jury had been selected in the afternoon of June 8th, he continued the matter until the next afternoon, June 9th. In other words, after it was stated on June 7th at 10 a. m. that the arguments were then being made in the other case which Mr. Lavine was trying and that the case was almost finished, the trial judge herein continued the case 1½ days before starting the selection of the jury, and 2½ days before starting the testimony. It does not appear why the continuances, from session to session of the court, were made, but it might well be that the trial judge anticipated that, during those continuances, the arguments in the other case might be finished, which arguments allegedly were about finished on June 7th when the motion for a continuance was made. In any event, the effect of such continuances was to afford Mr. Lavine an opportunity (2½ days) to finish the other case and to appear in the present case.

In the case of People v. Dorman, 28 Cal.2d 846, 172 P.2d 686, a defendant who had been convicted of murder in the first degree, contended that the trial court violated his constitutional rights by refusing a requested continuance. The court therein held that appellant's rights were not violated. In that case, in referring to the case of Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377, wherein a similar question was involved, the court said, 28 Cal.2d at page 850, 172 P.2d at page 689: "The sole question there presented was whether, in violation of the Fourteenth Amendment, the petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial, where, after appointment of competent counsel, the trial court denied a continuance. The Supreme Court observed that the disposition of a request for continuance was a matter for the exercise of the court's discretion and not ordinarily reviewable. However, it was pointed out, the denial of any representation at all would constitute a clear violation of the Fourteenth Amendment; and denial of opportunity by appointed counsel to confer, to consult with the accused, and to prepare his defense, could convert the appointment into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel, and would not satisfy the Constitution's guarantee. [Citing case.] In the Avery case the petitioner was convicted of murder and the death penalty was imposed. He had been arraigned on March 21, 1938, when the court appointed two practicing attorneys to represent him. His trial was set for March 23. It was not reached then but was called the next day when the attorneys moved for a continuance on the ground that, being busy with other trials, they had not had time to prepare the defense. Apparently the motion was denied for the trial proceeded, and a motion for a new trial, made on the ground that denial of a continuance deprived the defendant of equal protection of the laws, was denied. In concluding that the petitioner had not been deprived of the benefit of counsel guaranteed by the Fourteenth Amendment, the court examined the record and found that appointed counsel 'performed their "full duty intelligently and well". * * * Their appointment and the representation rendered under it were not mere formalities.' * * * At page 452 of 308 U.S., at page 325 of 60 S.Ct., 84 L.Ed. 377, it was said: 'That the examination and preparation of the case, in the time permitted by the trial judge had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted.'"

[3] The record in the present case, which includes the arguments to the jury, shows that Mr. Rubin, as counsel for appellant, performed his full duty intelligently and well; that his representation of appellant was not a mere formality, but was an able, earnest, and thorough representation throughout the trial. His arguments to the trial judge and the jury, his cross-examination of witnesses, and his objections to questions and procedure establish that he was well informed concerning the law and the facts in the case, and that he was alert and immediately ready to meet and to present the legal and factual questions involved. The reporter's transcript consists of 447 pages and this opinion should not be extended by referring to and quoting the portions thereof which illustrate that appellant's counsel represented him in the manner above stated. In the case of People v. McNabb, 3 Cal.2d 441, the court said at page 448, 45 P.2d 334, at page 336: "In short, the voluminous record is a formidable answer to any claim that counsel was not fully prepared for trial." In the case of People v. Ives, 17 Cal.2d 459, 110 P.2d 408, wherein the defendants had been convicted of murder in the first degree and wherein one of the appellants had been represented by an attorney appointed by the court, it was contended that his attorney, who had been admitted to the bar one year, was incompetent to properly represent that appellant. The court therein said, 17 Cal.2d at page 477, 110 P.2d at page 418: "The reason advanced [referring to admission to the bar] is hardly pertinent in gauging the competency of an attorney to conduct a murder trial. He might have had twenty

years of experience in the trial of civil cases and yet be grossly incompetent to defend one upon a charge of murder. One may be specially adapted to try criminal cases, irrespective of the length of time he has been practicing. * * * The best criterion of the competency, care and alertness of the attorney referred to is the record in the case." In the present case it does not appear that a more seasoned attorney could have done more in representing appellant than was done by appellant's counsel. The appellant admitted orally and in his letters that he killed his wife. He was permitted to give his testimony in narrative form, and he was not cross-examined. On appellant's motion for a new trial the trial judge considered his assertion that the court had erred in denying the motion for a continuance, and in compelling him to go to trial with Mr. Rubin as his attorney. The denial of the motion for a new trial indicates that the trial judge, who of course had observed the manner in which appellant had been represented at the trial, was of the opinion that counsel for appellant had performed his full duty intelligently and well. The appellant was not deprived of "due process of law." None of his substantial rights was prejudicially affected by the denial of his motion for a continuance.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; CARTER, J., dissenting.

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92 Cal.App.2d 33

GIBSON v. COLONIAL INS. CO.

Civ. 16651.

District Court of Appeal, Second District, Division 3, California.

May 24, 1949.

Rehearing Denied June 14, 1949.

Hearing Denied July 21, 1949.

1. Insurance 🔑539(5)

Violation by insured of condition of policy, requiring notification of insurer of happening of accident insured against as soon as practicable, is not a valid defense against injured party unless insurer was substantially prejudiced by delay.

2. Insurance 🔑539(1)

Requirement in a public liability policy that insurer be notified "as soon as practicable" after occurrence of accident insured against, merely requires notice which is prompt and reasonable under the circumstances.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "As Soon As Practicable".

3. Insurance 🔑539(5), 668(14)

Failure of insured under a public liability policy to notify insurer of accident in which plaintiff was injured until some seven and one-half months later, notwithstanding policy provision requiring notice as soon as practicable, did not bar plaintiff, whose judgment against insured was unsatisfied, from recovering on policy unless insurer was in fact prejudiced by delay, and fact of prejudice was for jury.

4. Insurance 🔑665(7)

In action by judgment creditor of insured against insurer, to recover on liability policy, record disclosing that only physical evidence which could not be found by reason of insured's delay in reporting accident to insurer, was not necessary to a defense and that all testimony was made available to insurer which would have been available if it had been notified sooner, justified a finding that insurer was not prejudiced by delay and hence could not defeat recovery on policy on that ground.

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Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by George Gibson against Colonial Insurance Company, to recover on a liability policy as the judgment creditor of defendant's bankrupt insured. Judgment for plaintiff and defendant appeals.

Affirmed.

Syril S. Tipton, Los Angeles (Robert E. Ford, Los Angeles, of counsel), for appellant.

Spray, Davis & Gould, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal from a judgment upon a jury verdict in favor of plaintiff, George Gibson. On June 4, 1945, plaintiff, a truck driver employed by Maas Steel Company, recovered a judgment in the sum of $65,000 against Columbia Stamping and Manufacturing Company for personal injuries suffered while unloading some sheet steel which he was delivering to Columbia. Columbia became bankrupt, and the judgment was not satisfied either in whole or in part. Plaintiff brought the present action to enforce a claimed obligation of defendant insurance company to pay the judgment to the extent of $25,000 by virtue of a policy of liability insurance in that amount which it had issued to Columbia.

Plaintiff's complaint contained two causes of action. The first, after setting forth the foregoing facts, alleged compliance with all the terms and conditions of the insurance policy. The second, as amended at the conclusion of the evidence to conform to proof, alleged that defendant was notified of the accident some seven months and thirteen days after it occurred and that defendant was in no way prejudiced by the lack of an earlier notification. Defendant's answer denied liability by reason of a claimed violation of a condition in the policy, reading: "Upon the occurrence of an accident written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable." The policy further provides, "No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all of the terms of this policy * * *." At the conclusion of the trial a nonsuit was granted upon plaintiff's first cause of action. Defendant's motions for a nonsuit and for a directed verdict on the second cause of action were denied, and the issue framed thereby, namely, whether the delay in notifying defendant of the accident was prejudicial to it, was submitted to the jury. By its verdict, this issue was resolved in favor of plaintiff.

The legal principles which must govern our decision were stated in Abrams v. American Fidelity & Casualty Co., 32 Cal.2d 233, 195 P.2d 797, 799. In that case, as in the present one, an injured plaintiff was seeking to enforce the contract liability of the insurer after his judgment against the insured went unsatisfied. The policy required the insured to give "immediate written notice" of any accident covered by the policy. Upon the assumption that "immediate" notice meant notice within a reasonable time, the Supreme Court held 32 Cal.2d at page 237, 195 P.2d at page 799, that "the delay of forty-one days which occurred here was not so great that the trial court was precluded from finding as a fact, as the court did, that defendant was not prejudiced thereby; i. e., the court was not required to conclude as a matter of law that prejudice resulted." The defendant in that case placed reliance upon several cases, including Purefoy v. Pacific Automobile Indemnity Exchange, 5 Cal.2d 81, 53 P.2d 155, in which substantial and unexplained delays in giving notice of accident were held to give rise to a presumption of prejudice. In distinguishing these cases, which are also relied upon by appellant here, the court expressly refuted the proposition "that such a presumption or inference is a conclusive one which cannot be overcome by evidence that no actual prejudice occurred", and laid down the rule that "[t]he ultimate conclusion in each case must depend on its own facts." The evidence in the Abrams case was held sufficient to support a finding that the delay in giving notice did not prejudice the insurer in defending the action against the insured, and a judgment for plaintiff was affirmed.

[1] Defendant contends that the Abrams decision is not controlling here, and that the issue of prejudice should not have been left to the jury. Its argument is that irrespective of any question of prejudice, the insured's delay of seven and one-half months in giving notice bars recovery, since as a matter of law, such a delay constituted a direct and substantial breach of the condition precedent that notice be given "as soon as practicable." The record, so defendant maintains, shows without contradiction that Columbia's officers were informed of the accident upon the day it occurred, but contains nothing

by way of explanation to excuse or justify the lengthy delay in notifying defendant thereof. Conceding these facts, we nevertheless are of the opinion that defendant's contention cannot be sustained. The statement in Hynding v. Home Accident Ins. Co., 214 Cal. 743, 752, 7 P.2d 999, 1002, 85 A.L.R. 13, that "the violation of the condition by the assured cannot be a valid defense against the injured party unless in the particular case it appears that the insurance company was substantially prejudiced thereby", has been regarded as a controlling principle in numerous actions where breach of a cooperation clause or notice provision has been asserted as a defense. It has never been overruled, although, upon occasion, it may have been overlooked, cf. Coolidge v. Standard Accident Ins. Co., 114 Cal.App. 716, 722, 300 P. 885, and in the Purefoy case, supra, the Supreme Court suggested that the soundness of the statement might be open for re-examination in a proper case. The subsequent decision in the Abrams case, however, must be regarded as approving the rule stated in the Hynding case.

[2] Our determination of the present appeal must be governed by the Abrams case. The requirement of notice "as soon as practicable," which appears in Colonial's policy in the instant case, cannot be deemed to impose a more rigorous duty than the condition of "immediate" notice which was the basis of the unsuccessful defense in Abrams' suit. The latter phrase has been regarded as merely requiring notice which is prompt and reasonable under the circumstances, see Purefoy v. Pacific Automobile Indemnity Exchange, supra, 5 Cal. 2d 81, 86–87, 53 P.2d 155, and authorities there cited, and we think the former must receive a similar interpretation. Cf. Brown Materials Co. v. Pacific Automobile Ins. Co., 52 Cal.App.2d 760, 127 P.2d 51; Arthur v. London Guarantee & Accident Co., 78 Cal.App.2d 198, 201, 177 P.2d 625.

[3] In distinguishing Arthur v. London Guarantee & Accident Co., supra, 78 Cal. App.2d 198, 177 P.2d 625, the Abrams opinion states: "In the Arthur case the opinion recites, page 201 of 78 Cal.App.2d page 626 of 177 P.2d, that the insurer 'established' that by reason of an *eleven months'* delay in notifying it of the accident, it was 'unable to make an effective investigation of the accident and was thereby prevented from discovering the two men who were riding' in one of the vehicles involved 'at the time of the collision.' The action of the trial court in granting the insurer's motion for judgment notwithstanding the verdict against it was, *on the record then before the court (there being apparently no conflict in the evidence),* upheld on appeal." (Emphasis added.) The obvious implication is that if there had been a conflict in the evidence, the question of prejudice, even following a delay as long as eleven months, would have been for the jury. This view is further supported by the statement in the next paragraph of the Abrams opinion, expressly disapproving "any implications which may be found to the contrary" in Distributors Packing Co. v. Pacific Indemnity Co., 21 Cal.App.2d 505, 70 P.2d 253, 254. In that case, a delay of more than eleven months in giving notice of an accident, where the policy required "prompt" notice, was held to be "prejudicial to the insurer as a matter of law." Accordingly, on the authority of the Abrams decision, we hold that Columbia's failure to notify defendant of the accident in which plaintiff was injured, until some seven and one-half months later, does not bar recovery on the policy unless defendant insurer was in fact prejudiced thereby. The presumption of prejudice is not a conclusive one. Insofar as the decision in Brown Materials Co. v. Pacific Automobile Ins. Co., 52 Cal.App. 2d 760, 127 P.2d 51, upon which defendant here relies, may be inconsistent with this conclusion, it must yield to the controlling authority of the Abrams case.

[4] Examination of the record discloses sufficient evidence to support the jury's implied finding that defendant was not prejudiced by the delay in receiving notice. The accident occurred on October 7, 1943. Plaintiff had driven his loaded truck partly into Columbia's warehouse. With the help of Charles E. Haag, an employee of Columbia, he was attempting to unload certain steel sheets from the truck by means of a hoist. Two slings which were

attached by chains to a master ring on the hoist were first placed by plaintiff beneath part of the steel sheets. When force was applied to the hoist to raise the load, the master ring broke and the steel sheets slid from the truck, pinning plaintiff's leg beneath them. Defendant's claim of prejudice is based chiefly upon the fact that the broken master ring, which it says "was the most important physical evidence in determining the cause of the accident," could not be located when defendant made its investigation of the accident upon receipt of notice in May, 1944. It is also claimed that because of the delay defendant was precluded from making a prompt investigation which might have disclosed a good defense of contributory negligence to plaintiff's action against Columbia. Defendant admittedly prepared and conducted the defense for Columbia in the prior action, although under a reservation of its rights.

From the record of the trial of the instant action it must be concluded that the accident was caused either by a defect in the ring or the overloading of the hoist. Proof that the ring was defective would have justified a finding of negligence on the part of Columbia. The record shows that two of Columbia's employees, Carr and DeHemmer, who made the master ring in question, testified in the former trial as to the construction and physical characteristics of the ring; and the latter testified, and was cross-examined at some length, "as to its manufacture and where it broke." Written statements of these two witnesses, taken by defendant's investigator prior to the trial, describe in some detail the appearance of the broken ring following the accident. Another master ring, similar in appearance and constructed in the same manner and out of steel of the same specification, was produced and used at the trial. If the original ring had been available as evidence at the trial it would have been useful to the defense only for the purpose of proving that it was not defective. It does not appear in the record, nor is it contended by appellant, that there was any. evidence that it was defective. Columbia was under no duty to prove that it was not defective.

Upon the other hand, if it had been shown by the evidence that the overloading of the hoist alone caused the ring to break, responsibility might have rested upon Columbia's employee who was assisting in the unloading, or upon plaintiff. Upon this latter issue the record warrants the conclusion that substantially the same evidence was available to appellant as would have been available if notice of the accident had been given promptly. Inspection of the file in the former action which was admitted as an exhibit in the present case, discloses that contributory negligence was squarely placed in issue by the answer, and that the jury was fully instructed thereon. It is not contended that there were any material witnesses to the accident who were unknown to the defendant or unavailable at the trial; nor is there any claim that the ones who were called did not testify fully and accurately as to the matters in issue.

The record as a whole is adequate to justify the conclusion reached by the jury that Columbia's defense to plaintiff's action was in no way prejudiced by the delay of seven and one-half months in receiving notice of the accident. We find it unnecessary, therefore, to consider plaintiff's contention that there was a waiver of the notice requirement by defendant.

The judgment is affirmed.

WOOD, and VALLÉE, JJ., concur.

91 Cal.App.2d 931

In re RAPHAEL'S ESTATE.

RAPHAEL v. BERTHA RADO RAPHAEL.

No. 13749.

District Court of Appeal, First District, Division 1, California.

May 20, 1949.

Hearing Denied July 14, 1949.

1. Executors and administrators 🔑314(3)

Where administrator filed petition for partial distribution alleging that all of decedent's estate was separate property and that widow and brother were entitled to distribution share and share alike, written objections of widow alleging that substantial part of estate was community property of decedent and surviving widow, constituted a sufficient denial of allegations of petition to raise issue as to whether entire estate was separate or community property.

2. Executors and administrators 🔑314(12)

Where administrator filed petition for partial distribution alleging that widow and himself as brother were entitled to have realty described in attached exhibit distributed to them share and share alike, and at final hearing widow produced evidence as to community character of all property of the estate and not only as to that described in the exhibit and administrator and brother made no objection, they could not complain for the first time on appeal that trial court was limited to determining nature of realty described in the exhibit.

3. Appeal and error 🔑197(1)

Even where issues are not specifically alleged in a complaint or other pleading, if evidence is introduced on those issues without objection, such issues are properly involved, and objection may not properly be made for the first time on appeal that such issues were not presented by the pleadings.

4. Appeal and error 🔑989

In disposing of contention that findings are not supported by the record, appellate court's power begins and ends with a determination as to whether there is any substantial evidence to support the findings.

5. Appeal and error 🔑1012(1)

Weight of wife's testimony as to statements of deceased husband indicating intent to transmute husband's property from separate property to community property was for the trial court in administrator's proceeding for partial distribution of husband's estate.

6. Husband and wife 🔑266

All that is required to show an executed oral agreement of transmutation of separate property to community property, is proof of acts and conduct of the parties in dealing with their property.

7. Contracts 🔑6

An "executory contract" is one in which some act remains to be done, while an "executed contract" is one in which everything is completed at time of agreement without any outstanding promise calling for fulfillment by further act of either party.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Executed Contract" and "Executory Contract".

8. Husband and wife 🔑266

Where husband orally told wife that they were partners, that everything he had was hers and that everything she had was his, oral agreement of transmutation of husband's separate property to community property was fully performed when made, and separate property of each spouse became community property.

9. Evidence 🔑236(3)

Where wife after death of husband attempted to show that husband's separate property had been transmuted into community property, income tax returns of husband and wife were properly received as declarations against interest of husband. Code Civ.Proc. §§ 1853, 1870, 1946, subd. 1.

10. Husband and wife 🔑266

Oral agreement between husband and wife that all his property was hers and all hers his, corroborated by documentary evidence, was not unenforceable as too uncertain to transmute separate property into community property.

11. Husband and wife 🔑266

Where wife in showing husband's transmutation of previous separate property into community property by oral agreement, testified that husband stated that they were married and were partners and that marriage was a partnership and that everything he had was hers and that everything she had was his, court was not required to find that wife's interest was a partnership interest rather than community property.

12. Appeal and error 🔑1010(1)

Where findings were sufficient to support trial court's conclusion that all of decedent's estate was community property, objecting brother claiming an interest in estate as separate property could not complain on appeal that wife's theory in lower court was that the increase in value of decedent's estate was community property rather than that decedent had transmuted all separate property into community property.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Raymond Theodore Raphael, also known as Raymond T. Raphael, also known as Raymond Raphael, by Harry Raphael as administrator, for partial distribution and for an order authorizing payment of attorney's fees, wherein Bertha Rado Raphael, filed objections. From the judgment and modified judgment, Harry Raphael, individually and as administrator, appeals.

Appeal taken in capacity of administrator dismissed, and judgment affirmed.

Albert A. Axelrod, San Francisco, for appellant.

Holdrook & Tarr, and W. Sumner Holbrook, Jr., Los Angeles, for respondent.

WARD, Justice.

As administrator and as brother and heir at law of the deceased, Harry Raphael appeals from the judgment and modified judgment decreeing "that all of the estate of Raymond Theodore Raphael, both real and personal, on the date of the death of said deceased was the community property of Raymond Theodore Raphael and his widow, Bertha Rado Raphael." The appeal taken in the capacity of administrator of the estate was dismissed by stipulation at the oral argument. See In re Estate of Babb, 200 Cal. 252, 255, 252 P. 1039; In re Estate of Ross, 179 Cal. 358, 360, 182 P. 303; In re Estate of Murphy, 145 Cal. 464, 467, 78 P. 960.

[1] The proceeding began with the filing by the administrator of a "Petition for Partial Distribution and Petition for Order Authorizing Administrator to Pay Attorney's Fees" wherein it was alleged that all of the decedent's estate was his separate property and that decedent's widow and his brother, Harry Raphael, were entitled to have the estate distributed to them "share and share alike" and praying that the real property described in Exhibit "A" attached to the petition be distributed to them "share and share alike." Appellant contends that when respondent filed written objections to said petition she did not deny the foregoing allegations. That there is no merit in this contention can be seen from the fact that in her objections respondent alleged that the "Administrator is asserting that the entire estate of decedent was the separate estate of the deceased, whereas, as a matter of fact, and in law, a substantial part of said estate was and is the community property of said decedent and his surviving widow." Furthermore, when the matter first came before the trial court respondent's counsel stated that the petition for partial distribution was opposed "because of the fact that it is alleged and contended by the administrator that the estate is the separate property, which, as a matter of fact, we deny. We allege in our proceedings that it is community property."

Subsequently respondent filed a "Petition for Order to Determine Interest in Estate" setting forth her claim to "all of the community property and one-half (½) interest in the separate property." Appellant answered that all of the estate was decedent's separate property and that he and respondent were each entitled to have distributed a one-half interest therein.

When respondent's counsel suggested that appellant's petition be set over, appellant's counsel pointed out that "There are two ways to determine title to property in these circumstances; either by a petition for partial or final or ratable distribution, or on a Petition to Determine Heirship. We have filed a petition for partial distribution, which Your Honor has partly heard and which is now at issue, the widow having filed an answer and objections, and having alleged in that petition the very same things that she alleges in this petition for determining heirship * * *. We are entitled to a determination on this petition [for partial distribution]. The issue is whether or not this property is separate or community, and we are asking Your Honor to hear the evidence and make a finding." Thereafter, respondent moved for an order consolidating her petition and the petition for partial distribution. In opposition thereto, appellant's counsel filed an affidavit in which he stated that "It is true that the evidence to be presented * * * on the petition for partial distribution and the petition to determine heirship is identical in many respects; and that the administrator is willing to have the Honorable, Judge Fitzpatrick, on the petition for partial distribution, determine any and all issues that may be presented in the petition to determine heirship with respect to any of the property belonging to the estate that is not included in the petition for partial distribution but that the said attorneys for said widow are not willing to have Judge Fitzpatrick determine said issue and that the said motion * * is an endeavor * * * to divest the jurisdiction of Judge Fitzpatrick from making a decree of partial distribution * *"

[2, 3] Appellant claims that the issues were only joined with respect to the real property described in Exhibit "A" attached to the petition. At the final hearing, however, respondent produced evidence as to the community character of all of the property in the estate. Appellant made no objection as to the admissibility of such evidence. He is, therefore, in not position to complain that the trial court was limited to determining the nature of the real property described in Exhibit "A". "The law is well settled that even where issues are not specifically alleged in a complaint or other pleading, if evidence is introduced on those issues without objection, such issues are properly involved in the case. The objection may not properly be made for the first time on appeal that such issues were not presented by the pleadings. McAllister v. Union Indemnity Co., 2 Cal.2d 457, 42 P.2d 305; Northwestern Mut. Fire Ass'n v. Pacific Wharf & Storage Co., 187 Cal. 38, 200 P. 934; see cases collected 14 Cal.Jur. p. 974, § 62." Guay v. American President Lines, 81 Cal.App.2d 495, 515-516, 184 P.2d 539, 551.

The lower court made the following findings: "III. That it is a true fact that at the time of the marriage of the said decedent, Raymond Theodore Raphael, and his said widow, Bertha Rado Raphael, to wit: August, 1939, all of the estate owned or possessed by Raymond Theodore Raphael was his own separate property; that subsequent to the date of said marriage * * * Raymond Theodore Raphael transmuted all of his property, both real and personal, from its previous separate character to the community property of the said Raymond Theodore Raphael and Bertha Rado Raphael, his wife, by an oral agreement which was fully executed and corroborated by documentary evidence including income tax returns filed by or on behalf of Raymond Theodore Raphael and his said wife, Bertha Rado Raphael. IV. * * * that on the date of the death * * * all of the property * * * was the community property of said decedent and his said widow * * *." The petition for partial distribution was denied without prejudice. When appellant's motion for a new trial was denied, a modified judgment was entered wherein the words "without prejudice" were eliminated from the order denying the petition for partial distribution.

[4] The basic contention made on this appeal is that paragraphs III and IV of the findings are not supported by the record. In disposing of such a contention, this court's power begins and ends with a determination as to whether there is any

substantial evidence to support the findings. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; In re Estate of Meister, 77 Cal.App.2d 487, 175 P.2d 574.

[5] Appellant testified that the property involved was distributed to the decedent under the decree of final distribution in the Matter of the Estate of Bertha Raphael, Deceased, No. 78836, on May 9, 1940. Respondent testified that she and the deceased, a cripple, were married in August, 1939—about nine months before he inherited the property from his mother. Death occurred on February 20, 1946. Over appellant's objections that income tax returns would not prove title to the property, respondent was shown certain certified copies of income tax returns for the years 1940 through 1945. These were subsequently received by the trial court. She identified the 1940 return as a joint return for her husband and herself, whereas the 1941 through 1944 returns were her returns in which she reported half of the total earnings of her husband and herself. She related various conversations with the deceased. The weight of such testimony as to the statements of her deceased husband was for the trial court to determine. In re Estate of Henderson, 128 Cal.App. 397, 17 P.2d 786. It was for the court to believe or disbelieve her when she testified that in February, 1940, "He told me that now that we were married, that we were partners, and marriage is a partnership, and we had to file taxes, and he said that everything he had was mine, and everything I had was his; that we were partners in everything, and everything was fifty-fifty"; that at about the time the 1941 income tax return was prepared he told her, "Now we are partners, and, dear, everything is fifty-fifty, and you have half and I have half; we are partners in everything"; and that when the 1942 return was filed, "he said that we were making some money, and that we were partners in everything * * that everything we had, we had with each other."

The 1945 return is a joint return. Respondent testified that her name was signed thereto by appellant and that her husband's name was signed by the accountant. On cross examination appellant's counsel attempted to show that the reason for filing a joint return was that the Treasury Department had disallowed the claim of community property made in earlier returns; however respondent testified that she never saw the 1945 return until February, 1947, and that appellant had been instructed by the deceased to file a "separate return, the same as he filed the previous year." Respondent further testified that, "My husband always said we were partners in everything we had." She added that at a meeting in the office of appellant's attorney, she had told her former attorney, "that my husband told me if I have any difficulty in case anything happens, I could prove it through taxes."

While respondent's testimony indicates that the deceased intended that all the property of himself and respondent should belong to them "fifty-fifty" and that, accordingly, he directed appellant to report half of his earnings in his wife's returns, the evidence offered by appellant indicates that the registered public accountant who prepared the income tax returns from information received from appellant split the income entirely on his own initiative. Said accountant testified that a joint return was filed for 1945 because he had been informed by a revenue agent that it was improper for him to file separately showing a community interest in the property. Respondent's counsel testified that there had been no determination by the federal government as to the character of the property and that the Treasury Department had indicated that it would make no adjudication until the probate court had made its decision which decision would then be followed by the government. On cross examination he was questioned concerning the report made by a revenue agent dated March 25, 1946, wherein it was stated that income had been erroneously reported as community income. He answered that the revenue agent never talked to the decedent and that his report showed "that all adjustments were discussed with Mr. Harry Raphael and * * * the accountant; no mention is made of Raymond or Bertha; this is all Harry's doings; the wife had nothing to do with it, and the husband had nothing to do with it." Appellant conceded that he caused the investigation. His stand with respect to the 1941-1944 returns being erroneous insofar as they are based upon the property being community property is entirely consistent with his contention that the deceased's estate is all separate property. The evidence introduced by appellant merely shows that a conflict was created which the trial court resolved against him. Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708.

An examination of other cases in which testimony of an oral agreement was held to constitute sufficient proof to support a finding that separate property had been transmuted into community property, indicates that the conclusion reached by the trial court in the present case must be upheld. In Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398, the husband testified that the parties had orally agreed, both before and after marriage, that all property then owned by them or subsequently acquired was to belong to them equally or "fifty-fifty." The appellate court observed in Stice v. Stice, 81 Cal.App.2d 792, 798, 185 P.2d 402, 406, that "the wife testified that the husband 'always said that everything we had was community property—belonged to both of us', and that 'he said it hundreds of times'. The weight and effect of these items of evidence was, of course, a matter for the trial court to determine." In Durrell v. Bacon, 138 Cal.App. 396, 398, 32 P.2d 644, 645, the husband testified that his wife—who had separate property—told him "what is mine is yours and what is yours is mine * * * this money will go into a home for us; it is just as much yours as mine."

[6-8] Appellant advances several propositions in support of his conclusion that paragraphs III and IV of the findings cannot be sustained on appeal. Appellant urges that there is no evidence of any corroborating documentary evidence establishing an executed oral agreement. The trial court found that decedent transmuted all of his property from its previous separate character to the community property of himself and his wife "by an oral agreement which was fully executed and corroborated by documentary evidence including income tax returns filed by or on behalf of Raymond Theodore Raphael and his said wife, Bertha Rado Raphael." As the only documentary evidence corroborating the respondent's testimony is the income tax returns, this finding should be corrected by striking therefrom the word "including" and substituting the word "namely" in its place.

This is not the first case in which income tax returns showing that community income was split between the spouses have been found to constitute proof of the transmutation of property. In Heck v. Heck, 63 Cal.App.2d 470, 475, 147 P.2d 110, 113, the appellate court upheld the trial court's construction of "the income tax returns as evidencing an agreement between plaintiff and defendant converting one half of plaintiff's separate interest in the partnership profits into community property." Followed in Stice v. Stice, supra. All that is required to show an executed oral agreement of transmutation is proof of the parties' acts and conduct in dealing with their property. Kenney v. Kenney, supra. In an executory contract some act remains to be done, while in an executed contract everything is completed at the time of the agreement without any outstanding promise calling for fulfillment by the further act of either party. Mather v. Mather, 25 Cal.2d 582, 154 P.2d 684. The object of the oral agreement of transmutation was fully performed when the agreement was made for it immediately transmuted and converted the separate property of each spouse into community property, and nothing further remained to be done. See Martin v. Pritchard, 52 Cal.App. 720, 199 P. 846. The income tax returns for 1941 through 1944 constitute evidence of the fact that the parties regarded their property as community property.

[9] The income tax returns were properly received by the trial court as declarations against the interest of the decedent. Code Civ.Proc. §§ 1853, 1870, 1946(1); see Horton v. Winbigler, 175 Cal. 149, 165 P. 423. They were not offered as declarations of respondent, but as proof of the decedent's practice of reporting his prop-

erty as community property and of splitting his income with his wife. Respondent's counsel attempted to obtain the decedent's returns but the Department of Internal Revenue would only deliver them to the administrator. Respondent stipulated "that they are identical for each of the years with the ones that Bertha filed." Furthermore, respondent testified that her income tax returns were prepared under the decedent's directions.

[10] There is no merit to appellant's contention that the executed oral agreement found by the trial court lacks all the necessary requisites of a valid contract in that it is indefinite and uncertain and therefore unenforceable. The authorities previously cited indicate that the agreement of transmutation may be of the most informal character. Kenney v. Kenney, supra; Stice v. Stice, supra; In re Estate of Sill, 121 Cal.App. 202, 9 P.2d 243; and see cases cited, 3 Cal.Jur.Supp. 641. The "change in the status of the property may be shown by the very nature of the transaction or appear from the surrounding circumstances." Marvin v. Marvin, 46 Cal. App.2d 551, 556, 116 P.2d 151, 154, quoting Title Insurance & Trust Co. v. Ingersoll, 153 Cal. 1, 5, 94 P. 94.

[11] Similarly, there is no merit to appellant's contention that the oral agreement was one of partnership only. In Martin v. Pritchard, supra, the husband testified that he and his wife had a "matrimonial partnership". The court held, 52 Cal.App. at page 724, 199 P. at page 848, that this evidence was "not such as to require the court to find that [the wife's] interest was joint, or in common, or a partnership interest rather than that of community property." The use of the term "partner" in the popular sense does not necessarily import or imply an intention that a legal partnership should result. Kloke v. Pongratz, 38 Cal.App.2d 395, 101 P.2d 522.

[12] Appellant also contends that respondent's theory in the lower court was that the increase in the value of the decedent's estate was community property, rather than that the decedent had transmuted his separate property into community property. Assuming this to be the case, it is immaterial that the theory upon which the judgment may be affirmed is not identical with that relied upon by respondent since the trial court's judgment must be affirmed if the findings, supported by the evidence, are sufficient to support the trial court's conclusion that all of the deceased's estate was community property. Sears v. Rule, 27 Cal.2d 131, 163 P.2d 443.

The word "namely" is substituted for the word "including" in paragraph III of the findings so that said findings shall state that the oral agreement was "corroborated by documentary evidence, namely, income tax returns * * *."

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

KLEINCLAUS et al. v. RICH et al.

Civ. 13893.

District Court of Appeal, First District,
Division 2, California.
May 23, 1949.*

1. Canals 🔑18

Where defendants, who were engaged in dredging a canal, pumped water into an area enclosed by dikes, and, although knowing that water immediately started to seep onto plaintiffs' airfield, continued to pump water until air field was entirely flooded, and even afterwards, defendants were guilty of actionable negligence.

2. Canals 🔑18

Owners of airfield were not guilty of contributory negligence which would preclude recovery for damages caused by flooding of airfield by water which defendants pumped from canal during dredging operations, merely because a natural drainage ditch which had been carried under plaintiffs' runway through a wooden and metal culvert had become obstructed and did not carry off accumulated water.

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* Subsequent opinion 211 P.2d 582.

3. Negligence ⇨65

The rule which requires one to exercise ordinary care to protect himself from results of negligence of others is subject to exception that, as a person is entitled to use his own premises for any lawful purpose, his failure to protect them from negligence of another is not contributory negligence.

4. Canals ⇨18

Canal dredgers had no right to cast waters pumped from canal upon plaintiffs' airfield and plaintiffs were not bound to anticipate the negligent flooding of their airfield by dredgers nor to maintain a ditch on airfield premises in anticipation of such negligent flooding.

5. Canals ⇨18

Where plaintiffs' airfield was flooded by negligence of defendants in pumping water from a canal which defendants were dredging, plaintiffs were entitled to recover as one item of their damages the expense incurred in opening a ditch which had become obstructed before the airfield was flooded.

Appeal from Superior Court, Marin County; Edward I. Fitzpatrick, Judge.

Action by Charles Kleinclaus and others, against Robert E. Rich and others for damages for flooding plaintiffs' airfield. Judgment for defendants and plaintiffs appeal.

Reversed.

Theodore Tamba, Robert A. Haughwout, San Francisco, for appellants.

Hoge, Pelton & Gunther, San Francisco, Richard A. Boyd, Leo V. Killion, San Francisco, for respondents.

DOOLING, Justice.

Plaintiffs appeal from a judgment adverse to them in an action for damages for flooding their land. Plaintiffs were operating a private airfield and defendants, who had a contract with the United States Army Engineers to dredge a portion of a canal, pumped water from the canal onto property adjoining plaintiffs' airfield, from whence it seeped through the earth dikes surrounding such property onto plaintiffs' airfield flooding it completely and causing the damage complained of. The complaint counted upon defendants' negligence and the trial court found that defendants were not guilty of negligence and that plaintiffs were guilty of contributory negligence in blocking a natural drainage ditch across their own property.

On appeal plaintiffs argue that the rule of absolute liability applies, Nola v. Orlando, 119 Cal.App. 518, 6 P.2d 984, and defendants counter that having proceeded in the trial court on the theory of negligence plaintiffs may not change their theory on appeal to one of absolute liability, Niegel v. Georgetown Divide Water Co., 78 Cal.App.2d 445, 177 P.2d 641. We need not consider these questions since defendants' own testimony establishes their negligence beyond possibility of dispute. We quote from the testimony of defendant Rich:

> "When we started to fill this area, we started here. It takes quite some time to fill that with water. Seepage started, of course, at the first place the water hit. * * * In a week or ten days the mud had pretty well stopped most of the seepage but by that time enough had seeped out that water would run quite some time through here. * * *
>
> "The levee itself was approximately five feet higher than the ground * * * and we ran the water level up to within about a foot to six inches of the top of the levee making it four to four and a half above the ground.
>
> "Q. Did you stop pumping water in after the area became flooded?
>
> "A. No, we continued our operations until we finished dredging. * * * Because the ditch was blocked off was not our responsibility. We notified the people that blocked the ditch they had to open it."

[1] It thus appears without conflict that with knowledge that water started to seep onto plaintiffs' property from the time defendants started to pump they continued to pump water into the area enclosed by the dikes until plaintiffs' airfield was entirely flooded by the seepage and even afterwards.

In view of this admission the finding that defendants were not guilty of negligence is without support in the evidence.

[2, 3] The finding of contributory negligence is based upon the fact that a natural drainage ditch had been carried under plaintiffs' runway through a wooden and metal culvert, this culvert in some manner had become obstructed and did not carry off the accumulated water which had seeped onto plaintiffs' property. This theory of contributory negligence is not well grounded. It is a general rule of law "that the rule which requires one to exercise ordinary care to protect himself from the results of the negligence of others is subject to the exception that, as a person is entitled to use his own premises for any lawful purpose, his failure to protect them from the negligence of another will not be contributory negligence." 45 C.J. 945.

This general principle was given application to damage to goods stored in a building from water negligently cast on the roof of the building in Yik Hon v. Spring, V.W.W., 65 Cal. 619, the court saying at page 620, 4 P. 666.

"Nor does the allegation that the water passed through the roof, or through openings in the roof, establish that plaintiffs contributed to the injury. They had the right to use their own premises for any lawful purpose. If they had placed their goods in canvas tents, this would not have relieved defendant of the consequences of its wrongful act. There was no such relation between the omission to provide means by which water would be effectually excluded from their building and the tort complained of as would make plaintiffs in any degree participants in the conduct which caused the damage. As has been said: 'The right of a man to make free use of his property is not to be curtailed by the fear that his neighbor will make a negligent use of his.' 1 Thomp. Neg. 168. See, also, Fero v. Buffalo R. Co., 22 N.Y. 209, [78 Am.Dec. 178]; and Jefferis v. Philadelphia W. & B. R., 3 Houst., Del, 447."

The same subject with relation to damage by water is fully discussed with a large collection of authorities in North Bend Lumber Co. v. City of Seattle, 116 Wash. 500, 199 P. 988, 19 A.L.R. 415, where the Washington court announced the same rule with regard to the defense of contributory negligence enunciated by our court in Yik Hon v. Spring V.W.W., quoted supra, the court saying 116 Wash. at pages 989–990, 199 P. at page 989, 19 A.L.R. 415:

"We hold, however, that one is not bound to use his property in anticipation of a situation arising, which, because of the negligence of some one else, known to or suspected by him, may or may not cause him damage."

See also Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal.App. 559, 565–566, 200 P. 814; McCarty v. Boise City Canal Co., 2 Idaho 245, 10 P. 623; Shields v. Orr Extension Ditch Co., 23 Nev. 349, 47 P. 194.

[4, 5] The defendants had no legal right to cast waters pumped from the canal upon the plaintiffs' land. The plaintiffs might have deliberately filled in the natural drainage ditch before defendants' operations commenced if they had seen fit to do so. The defendants could not complain that plaintiffs deliberately or through negligence had previously obstructed the natural ditch on their own property nor did that give them a license to cast water artificially collected upon plaintiffs' land. Neither were plaintiffs bound to anticipate defendants' negligent flooding of their land nor to maintain a ditch on their premises in anticipation of such negligent flooding. If the plaintiffs had negligently permitted their ditch to become obstructed after the flooding commenced a different question would be presented. Luthringer v. Moore, 31 Cal.2d 489, 495, 499, 190 P.2d 1. When their land was already flooded and it became apparent that the ditch was obstructed plaintiffs at considerable expense to themselves brought equipment on their property and cleared the obstruction. That is all that they could legally be expected to do, and that expense they were entitled to recover as one item of their damages.

Judgment reversed.

NOURSE, P. J., and GOODELL, JJ., concur.

HANNA et al. v. PIPES et al.

Civ. 3765.

District Court of Appeal, Fourth District, California.

May 26, 1949.

Rehearing Denied June 17, 1949.

Hearing Denied July 21, 1949.

1. Attorney and client 🔑77

Whether attorney, who had been employed to collect notes, exceeded his authority in inserting his name as one of the payees in renewal notes, which he received from makers shortly before last of original notes was outlawed, although it might be material in a controversy between attorney and client, was immaterial in an action against makers on renewal notes, brought in names of both attorney and original payee.

2. Bills and notes 🔑527(1)

In action on notes, evidence authorized finding that, with the exception of certain payments which were credited, no part of principal or interest had been paid and that entire balance of notes was due, owing and unpaid.

3. Affidavits 🔑18

Court was authorized to discredit affidavit of payee of notes where evidence established that payee did not sign affidavit with understanding of its contents and that factual statements attributed to her in affidavits were not true.

4. Alteration of instruments 🔑10

The insertion of the name of an additional payee of notes and the addition of the words "as joint tenants", even though such alteration appears on the face of the notes, is not such a material alteration as would defeat recovery on notes in the absence of anything to show that alteration occurred after notes were signed by makers.

5. Appeal and error 🔑1011(1)

Conflict in evidence as to when notes were altered by insertion of an additional payee with respect to the signing of notes by makers was for trier of fact.

6. Appeal and error 🔑1043(6)

Where everything in plaintiff's deposition that was material was brought out during plaintiff's testimony at the trial, exclusion of plaintiff's deposition was not prejudicial.

7. Abatement and revival 🔑72(2)
Joint tenancy 🔑6

Where renewal notes sued upon were payable to original payee and to her attorney as joint tenants, upon original payee's death during course of trial, attorney was vested with title and with right to continue action as the surviving joint tenant without the necessity of obtaining substitution of a personal representative for deceased original payee.

8. Judgment 🔑251(1)

Where notes were payable to plaintiffs as joint tenants, and death of one of the plaintiffs was brought to attention of court before judgment was entered, judgment was properly entered in favor of survivor.

◆

Appeal from Superior Court, Kern County; Norman F. Main, Judge.

Action by Narcissa Hanna and Samuel Taylor against M. M. Pipes and another to recover on certain notes payable to plaintiffs as joint tenants. During the trial the plaintiff Hanna died. From a judgment for plaintiff Taylor, defendants appeal.

Affirmed.

Dorris, Fleharty & Phillips, Bakersfield, for appellants.

Siemon, Maas & Siemon, Bakersfield, for respondents.

BARNARD, Presiding Justice.

In 1935 Narcissa Hanna employed Samuel Taylor, an attorney at law, to collect three notes totaling $750, with interest at 7%, all dated February 23, 1932. These notes were signed by the defendants and were payable to Mrs. Hanna "and/or" her former husband. Mrs. Hanna delivered these notes indorsed in blank to Taylor with instructions to collect them. A few small payments were made and on February 23, 1939, the date when the last of the three notes would become outlawed the defendants renewed the obligation by signing and giving to Taylor two new notes, one for $745 and one for $223.50. These notes were made payable to Samuel Taylor and Narcissa Hanna, as joint tenants, one year after date with interest at 7%. The defendants paid to Mrs. Hanna, on account of these notes, $50 on December 19, 1939, and $100 on October 2, 1942.

On February 16, 1944, one week before these notes would outlaw, Taylor brought this action on these two notes, naming Mrs. Hanna and himself as plaintiffs. The complaint is in the usual form, in two counts, setting forth copies of the notes and alleging that the plaintiffs are the owners and holders thereof, and entitled to receive payment. In their answer the defendants denied generally each allegation of the complaint, denied specifically that any part of the notes is now due, owing and unpaid and, as an affirmative defense, alleged that any indebtedness alleged in the complaint has been fully paid and satisfied.

At the trial the defendants made some attempt to show that these notes had been altered, and to show both that the notes had been fully paid and that they had been satisfied and discharged in some other manner. While the evidence, including the testimony of the defendant husband, conclusively shows that the notes had not been paid in full the defendants relied upon a letter from Mrs. Hanna to them dated December 15, 1942, and upon an affidavit purportedly executed by Mrs. Hanna on November 24, 1947, a few days before the trial, as showing a complete satisfaction and discharge of the obligation. About two-thirds of the reporter's transcript is taken up with the argument of the defendants' counsel, in various forms and repeatedly made, to the effect that this action could not be maintained because Taylor had no such interest in these notes as would enable him to sue in his own name or which would prevent Mrs. Hanna from discharging him, and that Mrs. Hanna had not authorized him to bring the action. Near the concluson of the trial on December 5, 1947, the question came up as to the mental condition of Mrs. Hanna, who was not present at the trial, and her competency to execute the affidavit offered and to understand the facts therein stated. The case was continued to allow an investigation to be made along that line. Mrs. Hanna died on January 2, 1948, before this investigation was made. On April 16, 1948, the plaintiffs' motion for submission of the cause was granted, and it was further ordered that a motion made by the defendants to have the deposition of Taylor introduced as testimony be taken under submission. The court found in all respects in favor of the plaintiffs, and judgment was entered in favor of Taylor for the balance due on the notes. The defendants have appealed from that judgment.

[1] The appellants first contend that Taylor had no interest as an "owner" of these notes or as attorney for Mrs. Hanna which would entitle him to sue in his own name or would prevent her from discharging him, or prevent her from dealing independently with the makers; that Taylor is not the real party in interest; and that the court repeatedly committed reversible error in denying to defendants the right to show that Taylor had no interest as owner, or otherwise, which would entitle him to maintain the action. The statement of most of these contentions should be a sufficient answer to them under the circumstances shown by the record in this case. The court was very patient, and permitted the appellants to repeatedly bring out the exact situation. Taylor was the agent and attorney for Mrs. Hanna for the collection of the original notes which Mrs. Hanna had delivered to him indorsed in blank. Just before the last of those notes was outlawed Taylor demanded and received from the appellants the notes sued upon. Whether or not he exceeded his authority in inserting his name as one of the payees in the notes might be material as between himself and Mrs. Hanna, but had, and has, no bearing on the present controversy. While Mr. Pipes testified that Mrs. Hanna once told him, in 1942, that she had discharged Taylor as attorney in this matter there is no evidence that Mrs. Hanna ever communicated such a fact to Taylor, and Taylor denied that Pipes had ever told him that Mrs. Hanna had so stated. Taylor had been employed to collect this debt; he secured the new notes when the old ones were outlawed; he continued in

possession of the notes without being discharged and made repeated efforts to collect them; and finally brought suit shortly before the new notes would have outlawed. The contention that the appellants were denied the right to show Taylor's interest or lack of interest is without merit. The exact situation was repeatedly brought out, and was conceded by the other side. The real contention throughout, was and is, that the court should have accepted appellants' interpretation of the situation as conclusively showing that a recovery could not be had in this action. If any reason existed why this action could not be maintained it neither appears nor is suggested by anything contained in this record. It was conceded throughout that anything done by Mrs. Hanna was equally binding on Taylor, and the court gave the appellants ample opportunity to present any material evidence bearing on the question of their liability in this action.

[2] The court found that, with the exception of certain payments which were credited, no part of the principal or interest of these notes has been paid and that the same are now due, owing and unpaid. The evidence fully supports this finding and the appellants do not contend to the contrary. However, in support of their theory that their debt had been forgiven and discharged by Mrs. Hanna they contend that the court committed reversible error in refusing to admit into evidence their "Exhibit D" for identification, which is among the exhibits before us.

Mr. Pipes first testified that he had made various payments amounting in all to more than the principal and interest of the notes but that he could not remember when these payments were made and could not find any checks except for the $50 and $100 payments. He then admitted that he had paid nothing after October 2, 1942, because Mrs. Hanna, in a letter to him dated December 15, 1942, had "inferred" that she had plenty of money. In this letter, which was admitted in evidence, Mrs. Hanna stated that she had heard that a Miss Truesdell was going to write to Pipes, that this woman was no longer her friend, and that "I have plenty of money so don't let *meddlers* bother you." Mr. Pipes testified that he considered this quoted statement as a receipt in full, and that he never paid any more on the notes after that.

Mr. Pipes testified that shortly before the trial he and his wife and his attorney visited Mrs. Hanna in a rest home where she was staying, that after he told her who he was she recognized him, and that she told him: "You don't owe me one thing. You paid me all you owed me. I don't know anything about this." A day or two later Mr. Pipes received a letter from Mrs. Hanna's niece, which was introduced in evidence. In this letter the niece stated that Mrs. Hanna "is in a fighting mood and understands nothing about the business you came to see her about." The letter then stated that if her aunt could help out by signing a paper "I think we can get her to sign it, but it really will take some doing. * * * It will take a lot of sweetening and being with her at just the right moment to get her signature." A day or two later the appellants and their attorney went to the niece's home and there prepared the affidavit, Exhibit D for identification, in which Mrs. Hanna purportedly states that she never conveyed any interest in the notes sued on or any other notes to Taylor, that she never authorized Taylor or anyone to commence and prosecute this action in her name or otherwise, and that the indebtedness which originally existed between Mr. and Mrs. Pipes and herself, which indebtedness was evidenced by the notes sued on, has been for many years totally paid, discharged and satisfied.

Mrs. Hanna was then past 92 years old, the entire evidence shows she was then in a most enfeebled condition, and she died shortly thereafter. The evidence is that the niece held Mrs. Hanna's hand in order to assist her to sign the affidavit. Her signature is almost illegible and shows a marked contrast to her signature on her previous letter of December 15, 1942. When the court asked why Mrs. Hanna's deposition could not be taken appellants' counsel stated "She is so old and her health is such she can never testify nor can her deposition be taken."

[3] Not only does it rather clearly appear that Mrs. Hanna did not sign this affidavit with an understanding of its contents but it also appears that the factual statements attributed to her in the affidavit, so far as material here, are not true. While Mrs. Hanna had not, in words, instructed Taylor to file this action his authority to do so as her agent and attorney sufficiently appears from the facts shown, and it conclusively appears that the debt represented by these notes had not been totally paid, discharged or satisfied many years before or at any time theretofore.

The specific point here raised is that the court erred in not admitting this affidavit into evidence. Assuming that it was admissible as a statement against interest on the part of Mrs. Hanna or for some other reason, its effect was completely overcome by the other evidence, including the testimony of Mr. Pipes, and it would merely have tended to add to an existing conflict in the evidence. The question of its admission into evidence came up a number of times interspersed with a great deal of argument, much of it immaterial, and with other testimony. The court examined the affidavit and commented on it and said: "It is apparent from the entire contents of the affidavit that it is intended as testimony rather than just as a receipt; and in view of the heresay rule we will reject the affidavit." Later, while evidence was being taken with respect to the circumstances surrounding the making of this alleged affidavit, counsel for appellants objected and the court stated that while he had ruled against the admission of the document as constituting a satisfaction in full of the obligation sued on he might be wrong in that ruling and he thought all of the circumstances under which the document was executed should be brought out. Later the court stated he would welcome any information on the matter that might result from an investigation as to the competency of Mrs. Hanna, and the matter was postponed. When the matter came on for final hearing reference was made to the fact that the court had previously rejected Exhibit D for identification, and the court again confirmed this. While, technically, this exhibit should have been admitted in evidence no prejudice appears. There was no jury and the court read the document, considered it and commented on it at length. It was actually offered on the theory that it constituted a written satisfaction in full. In effect, the court held that it was not a receipt for payment and that it should not be received as a satisfaction in full of the debt. Its technical admission into evidence could not have affected or changed the result. It was conceded by the respondents throughout the trial, and is conceded here, that any payments made to Mrs. Hanna or any satisfaction or release of the obligation otherwise given by Mrs. Hanna would be binding also on the respondent Taylor. The evidence, including the affidavit, is amply sufficient to sustain the court's findings that this debt had not been paid and that the balance, as found, is still due, owing and unpaid.

[4, 5] It is further contended that the evidence conclusively shows, as a matter of law, that the notes were altered subsequent to their execution. The notes, which are before us, are payable to Samuel Taylor and Narcissa Hanna, as joint tenants. The appellants testified that when they signed the notes in Taylor's office Mrs. Hanna's name only appeared thereon as payee. The written portions of the notes, with the exception of the signatures of the makers, is admittedly in the handwriting of Taylor. Taylor testified that all of this writing was done by him at one time and that the notes were then read and signed by Mr. Pipes and later by Mrs. Pipes. The appellants argue that these notes show on their face that the words "Samuel Taylor and," and the words "as joint tenants," were written after the words "Narcissa Hanna" were written. Conceding this to be true, there is nothing on the notes to indicate that all of these words were not written before the notes were signed by the makers. The conflict in this regard was settled by the court in favor of the respondents.

[6] The appellants complain that the court erred in refusing to permit them to introduce into evidence a deposition of

Samuel Taylor taken a few days before the trial. This deposition appears in the reporter's transcript but was not admitted in evidence. It was again offered at the final hearing of the action. The court then asked whether there was anything in the deposition that did not appear in Taylor's testimony at the trial, or whether there was anything in the deposition which was inconsistent with that testimony. Appellants' counsel in reply to the court's questions then stated that there were some questions which were not answered and which were not in evidence, and that these were questions with respect to which the court had sustained an objection when Taylor was on the stand. When the cause was submitted the court also took under submission the question of whether or not the deposition would be admitted. No ruling seems to have been made in that regard. Aside from any other consideration, it fully appears that everything in the deposition that was at all material here was brought out during Taylor's testimony at the trial, and no possible harm or prejudice appears.

[7] Appellants further contend that since Mrs. Hanna died prior to judgment the court had no judisdiction, in the absence of the substitution of a personal representative, to proceed with the action or to enter judgment. The notes were payable to Mrs. Hanna and Taylor as joint tenants and, for the purpose of this action at least, Taylor was vested with title and with right to continue the action. Plante v. Gray, 68 Cal.App.2d 582, 157 P.2d 421; Salisbury v. Shirley, 66 Cal. 223, 5 P. 104; Denigan v. San Francisco Savings Union, 127 Cal. 142, 59 P. 390, 78 Am.St.Rep. 35.

The court entered judgment in favor of Taylor as the survivor, and the appellants are neither prejudiced nor in a position to object. As the respondent Taylor concedes, he is accountable to the heirs or personal representatives of Mrs. Hanna for the proceeds of the judgment if and when such proceeds are received by him.

[8] Finally, the appellants contend that the findings and judgment are outside of and beyond the issues as framed by the pleadings because the action was not based on the right of a survivor of joint obligees to sue and recover after the death of his coobligee. This contention is without merit. The notes were payable to the plaintiffs as joint tenants, the death of Mrs. Hanna was brought to the attention of the court before judgment was entered, and judgment was properly entered in favor of the survivor. The fact that the appellants owe the balance of this just debt clearly appears. A reversal on technical grounds, and a retrial of the action, could by no possibility benefit the appellants.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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92 Cal.App.2d 169

NOVACK v. LOS ANGELES SCHOOL DIST. OF LOS ANGELES COUNTY et al.

Civ. 16648.

District Court of Appeal, Second District, Division 3, California.

June 2, 1949.

Rehearing Denied June 30, 1949.

Hearing Denied July 28, 1949.

1. Schools and school districts ⚷121

In action against school district and board of education for injuries sustained when large box used for storage of athletic equipment apparently toppled over onto six-year-old boy on playground of public school on Sunday, when playground was closed and no representative of either defendant was on ground or required to be there, res ipsa loquitur doctrine was inapplicable.

2. Schools and school districts ⚷89.6

School district and board of education were not liable for injuries sustained when large box apparently toppled over onto six-year-old boy on playground of public school on Sunday afternoon, when playground was closed and gates locked, in absence of evidence as to how accident occurred or that it was due to any instability of or defect in box itself. Gen. Laws, Act 5619, § 2.

3. Schools and school districts ⚷121

In action against school district and board of education for injuries sustained when large box used for storage of athletic equipment toppled over onto six-year-old boy on playground of public school, evidence was insufficient as a matter of law to support a finding that box was in a dangerous or defective condition for which defendants would be liable under statute. Gen.Laws, Act 5619, § 2.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Sanford Novack, a minor, by his guardians ad litem, Max Novack and Yetta Novack, against Los Angeles School District of Los Angeles County, a public corporation, and another to recover for personal injuries sustained on playground of a public school. From an order and judgment of nonsuit, plaintiff appeals.

Judgment and order affirmed.

Harry J. Miller, Richard A. Lavine, Los Angeles, for appellant.

W. I. Gilbert, Henry E. Kappler, Los Angeles, for respondents.

WOOD, Justice.

Action by Sanford Novack, a minor, by his guardians ad litem, for damages for personal injuries sustained by him on the playground of a public school. At the close of plaintiff's case, in a trial by jury, defendants' motion for a nonsuit was granted. Plaintiff appeals from the order and judgment of nonsuit.

The accident occurred on Sunday afternoon, September 22, 1946, at the Sheridan Street Grammar School in Los Angeles. The playground of the school was enclosed by a fence about 10 feet high which was constructed of steel wire mesh and iron posts. South of the playground, and adjoining it, there was a school garden which was also enclosed by a fence. The south fence of the playground separated the playground from the garden, and the fence along the other three sides of the garden was 5 feet high and constructed of wire mesh and wooden posts. There were several gates in the playground fence. There was a gate in the garden fence, and a gate in the fence between the playground and the garden. On the day of the accident, about 4 p.m., Sanford's uncle went to the playground to get him. He found Sanford, who was 6 years of age, lying on the playground with a long cut in his scalp, and his right leg under an overturned wooden box. The box, which was used to store athletic equipment, was empty at the time of the accident, was about 6½ feet high, 4 feet in width, 4 feet in depth, and weighed about 200 pounds. The box, when in its normal position, stood upright and rested on three "2 by 4" pieces of lumber which were attached to the bottom of the box—the 4-inch surfaces of those pieces being on the ground. Two doors, on the front side of the box, extended from the bottom of the box to within a few inches of its top, and they opened from the center outward. The roof of the box extended about 4 inches beyond the sides and was covered with sheet metal which was "turned over" the edges. The box had been on the playground about 10 years, and for a period of 5 or 6 years it had been located on the playground close to the south fence (the fence between the playground and the garden) and about 15 feet west of the gate in that fence. The ground where the box was located sloped slightly toward the center of the playground, but the slope was imperceptible.

When plaintiff's uncle went to the playground he entered the garden through the outside garden gate, which was bent over or "down to about a 30 degree angle," and then he entered the playground through an open gate between the playground and the garden. There were a few children on the playground at that time. The uncle did not remove the box which was on plaintiff's leg, but he returned to the home of plaintiff's parents and notified them of the accident. The father then went to the playground, and entered it by climbing over the garden fence and then going through the open gate between the playground and the garden. He tried to move the box which was on the boy's leg, but he was unable to do so without the assistance of others.

Three high school pupils, who had attended the grammar school referred to herein, testified that they continued to play on the grounds of this school after entering high school, and that they played there on Sundays. One of those pupils testified that during the summer there was not much to do on the playground so they pushed the box over (referring to other occasions); that he had seen the box in every position except in the position of standing on its roof; that he had watched baseball games while sitting on the box when it was lying on the ground; that on Sundays they got into the playground by climbing over the fence or crawling through a hole under the fence; and that on some occasions he did not check the gates to see if they were locked. Another pupil testified that there were a few children around the box when (on other occasions) he saw it lying down; that when the playground was closed the gates were locked; that when he went there on Saturdays and Sundays he found the gates locked and he entered the playground by going over or under the fence. The other pupil testified that he had seen children playing around the box when (on other occasions) it was lying on the ground, and that he believed the gates were locked except during school hours and playground hours.

There was evidence that the principal of the school knew there was a hole under the playground fence, and that she knew that children were on the playground on Saturdays and Sundays. She testified that the gates were closed after playground hours; that the playground was not open on Sundays and the gates were locked on that day so far as she knew; and that the hole under the fence had been filled in many times, and the children reopened it. The custodian of the ground testified that prior to the accident he had seen holes under the playground fence.

Appellant contends that all the elements of liability required by Act 5619, Section 2, of Deering's General Laws, 1937 (Stats.1923, ch. 328, p. 675—making school districts liable for negligence in certain instances), were established sufficiently to justify the denial of the motion for a nonsuit. Under section 2 of that act a school district is liable for injuries resulting from the dangerous or defective condition of grounds and property where the governing board of such school district, or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition and failed for a reasonable time after acquiring such knowledge or receiving notice to remedy such condition.

[1-3] There was no evidence as to how the accident happened. There was evidence that at various times prior to the accident the box was pushed over by boys. There was no evidence that the box was unstable or wobbly in its upright position on the playground at the place where the accident occurred or at any place thereon, or that it had ever fallen except when it was pushed over. The box weighed about 200 pounds and there was no evidence from which it could be inferred that the 6-year-old plaintiff could, or did, push or pull the box over. There was no evidence that he pushed or pulled the box, or that he had done anything at all to it. There was no evidence from which it could be inferred that the box fell by reason of weather conditions, or that it toppled over by reason of any instability of, or structural defect in, the box itself. The doctrine of res ipsa loquitur is not applicable here. The box was not under the exclusive control of the defendants or either of them at the time of the accident. No representative of either defendant was on the school grounds on Sunday, the day of the accident herein, and it was not required or intended that such a representative should be there on that day. Customarily the grounds were closed on Sundays and the gates were locked. The grounds were closed on Sunday, the day of the accident, and there was no evidence that the gates

were not closed and locked on that day prior to the accident. When plaintiff's uncle arrived at the playground after the accident, children other than the plaintiff were there. The evidence was insufficient as a matter of law to support a finding that the box was a dangerous or defective condition. Of course, it is wholly unreasonable to assume that the jury would have inferred that the box fell or toppled over without being pushed, in view of the opening statement to the jury by plaintiff's counsel that he intended to prove that the box "was pushed over on the child."

By reason of the above conclusion it is not necessary to discuss appellant's assertions that the court erred in concluding that plaintiff was a trespasser and that the box was not an attractive nuisance.

The judgment and order of nonsuit are affirmed.

SHINN, P. J., and VALLEE, J., concur.

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92 Cal.App.2d 162

In re RYKER'S ESTATE.

DUNHAM v. WEISENBERGER.

Civ. 13991.

District Court of Appeal, First District,
Division 2, California.
June 2, 1949.

Courts 🔑202(5)

An order in probate denying motion to amend an order confirming sale of realty was not appealable, since it is not included within statute specifying orders and judgments in probate from which an appeal will lie. Code Civ.Proc. § 473; Probate Code, § 1240.

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Hazel Ryker, deceased, wherein May F. Dunham, as administratrix of the estate of Hazel Ryker, deceased, individually, and as guardian of the estate of Frank H. O'Donnell, incompetent, moved to amend an order confirming a sale of realty and the motion was opposed by Paul R. Weisenberger. From an order denying the motion, movant appeals.

Appeal dismissed.

Robert E. Hatch, San Francisco, for administratrix of Ryker's Estate.

Norman S. Stimmel, San Francisco, for Dunham individually.

Emmet B. Hayes, San Francisco, for Dunham as guardian of Frank H. O'Donnell, incompetent.

A. J. Zirpoli, San Francisco, for respondent.

NOURSE, Presiding Justice.

The appeal is from an order made in probate denying a motion made under section 473 of the Code of Civil Procedure to amend an order confirming a sale of real estate. The motion was based upon the ground that the portion of the order directing the administratrix to pay a commission on the sale to a real estate broker was inadvertently made because valuable services had not been rendered by him.

Section 1240 of the Probate Code permits an appeal from an order in probate directing a sale or confirming a sale of property of an estate. No provision is found for an appeal from an order denying an amendment to or the vacation of an order of confirmance. In Re Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368, the Supreme Court dismissed an appeal from an order denying appellants' motion under section 473 to be relieved from their default for failure to appear. The court held that since the motion was not one mentioned in section 1240 of the Probate Code, an appeal would not lie. The rule was followed and other authorities were cited in Estate of Brady, 32 Cal.2d 478, 196 P.2d 881.

Appeal dismissed.

GOODELL and DOOLING, JJ., concur.

BOURKE v. FRISK.

No. 13933.

District Court of Appeal, First District,
Division 1, California.

May 23, 1949.

Rehearing Denied June 22, 1949.

Hearing Denied July 21, 1949.

1. Pleading ⚿204(3)

Where cause of action was properly stated, second cause of action in same complaint based on it in form of common count was not demurrable.

2. Licenses ⚿39.6

For purpose of determining whether seller of corporate stock in violation of Corporate Securities Act must refund money so received, validity of sale and not validity of shares or their issuance is crucial question. Gen.Laws, Act 3814, § 1 et seq.

3. Licenses ⚿39.12

Sale of stock at time seller did not have permit required by Corporate Securities Act was void and buyer was entitled to refund of amount paid, although permit for sale of stock had been issued prior to issuance of stock. Gen.Laws, Act 3814, §§ 1 et seq., 2, and (a) (8), 3.

4. Contracts ⚿105

Where a statute prohibits or attaches a penalty to doing of an act, act is void, notwithstanding that statute does not expressly pronounce it so, and it is immaterial whether thing forbidden is malum in se or merely malum prohibitum.

5. Contracts ⚿140

If an agreement grows immediately out of or is connected with an illegal act, a court cannot lend its aid to enforce it though it is in fact a new agreement, and if connection between an original illegal transaction and a new promise can be traced, if latter is connected with, and grows out of former, no matter how many times and in how many different forms it may be renewed, it cannot form basis of a recovery.

6. Licenses ⚿39.17

A purchaser of stock must be equally culpable with corporation before he will be in pari delicto in accepting stock from corporation with knowledge that it had no permit to sell stock so as to preclude his recovery for amount paid. Gen.Laws, Act 3814, § 1 et seq.

7. Licenses ⚿39.15

Buyer of stock from corporation which has no permit to sell shares as required by statute may not recover amount paid where interests of innocent third parties have intervened in reliance on contract of sale. Gen.Laws, Act 3814, § 1 et seq.

8. Licenses ⚿39.8

A sale of stock in violation of Corporate Securities Act cannot be partly invalid and partly valid but is entirely void although a valid sale can be made after prior invalid negotiations. Gen.Laws, Act 3814, § 1 et seq.

9. Licenses ⚿18½(3)

Purpose of Corporate Securities Act is to eliminate unregulated acceptance of money for corporate stock not legally issuable. Gen.Laws, Act 3814, § 1 et seq.

10. Trial ⚿395(2)

Findings that allegations set forth in complaint were true and that each allegation set forth and contained in answer which was inconsistent with allegations of complaint were untrue, was sufficiently definite to support a judgment.

11. Trial ⚿395(2)

Findings need not be in any particular form nor is extreme accuracy of statement or minuteness of detail required but they are sufficient to support judgment if truth or falsity of each material allegation not admitted can be demonstrated therefrom or if they can be made certain either by reference to pleadings or record.

12. Trial ⚿395(2)

Even though a finding might have been more clearly phrased, it is sufficient if its language is clear enough to indicate what court intended, and judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon results by necessary implication from those made.

13. Trial ⚿395(2)

Where parties entered into stipulation of facts, failure of trial court to find specifically upon issues raised by answer could not serve as basis for setting aside judgment on ground that findings were insufficiently definite to support judgment.

◆

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Roger Bourke against Anna Frisk, as administratrix of the estate of William E. Linn, deceased, to recover money paid by plaintiff for shares of stock sold by deceased in violation of the Corporate Securities Act. From a judgment for the plaintiff, defendant appeals.

Affirmed.

Donahue, Richards, Rowell & Gallagher, Oakland, Bryant M. Bennett, Oakland, for appellant.

M. F. Hallmark, Oakland, for respondent.

WARD, Justice.

This is an appeal from an order directing defendant administratrix to pay plaintiff $4,000, plus interest and costs, as restitution of that amount which was paid deceased by plaintiff for shares of stock sold by deceased before a permit had been issued and therefore in violation of the Corporate Securities Act.

The complaint states two causes of action. After alleging that the defendant is the duly appointed administratrix of the deceased, W. E. Linn, and that the Oakland Stadium is and has been since February 18, 1946, a duly organized and existing corporation under the laws of the State of California, plaintiff alleged as the basis of the first cause of action, "That on or about March 10, 1946, plaintiff paid and decedent received the sum of Four Thousand ($4,000.00) Dollars for forty (40) shares of the capital stock of said corporation, for which a written receipt was executed from decedent to plaintiff in words and figures as follows: 'March 10, 1946. Received from Roger Bourke $4,000.00 for Speedway stock. W. E. Linn.' That plaintiff did not receive said stock or any part thereof until on or about June 1, 1946, at which time there was delivered to plaintiff a certificate for forty (40) shares of the capital stock of said Oakland Stadium, a corporation. That neither decedent nor said corporation at any time prior to May 29, 1946, had a permit from the Commissioner of Corporations of the State of California authorizing the sale or issuance of the capital stock of said corporation.

"That plaintiff, on or about the 24th day of January, 1947, presented to said Administratrix a claim for restitution of said Four Thousand ($4,000.00) Dollars referred to herein, but said Administratrix refused to allow the same and on the contrary rejected the same on the 29th day of January, 1947. That the plaintiff has previously offered and herewith offers to return to defendant said certificate of stock."

The second cause of action is in the form of a common count for money had and received and is based on the allegations made in the first count.

A demurrer was filed, one of the grounds of which was uncertainty in "That it cannot be ascertained therefrom whether the decedent or the corporation had a permit to issue the said certificate of stock on or after June, 1946." The demurrer having been overruled, defendant answered that on May 29, 1946, the Commissioner of Corporations issued a permit to the Oakland Stadium authorizing sale and issuance of the corporation's stock; that under the terms of said permit, forty shares were delivered to plaintiff June 1, 1946, which he accepted and retained, and that plaintiff paid $4,000.00 for forty shares "in accordance with a permit issued to said Oakland Stadium."

It was stipulated that the Speedway stock referred to in the receipt was of the Oakland Stadium and that "the signature of W. E. Linn, President, is the signature of the decedent." There was no dispute as to the truth of the facts set out in the complaint. The court found "That all of the allegations set forth and contained in the complaint on file herein are true and that each and every allegation set forth and contained in the answer on file herein which is contrary or inconsistent with the allegations of said complaint are untrue."

[1] Defendant contends on appeal that his demurrer on the ground that the com-

plaint did not show the lack of a permit on the date of delivery of the stock was improperly overruled. He also entered special demurrers to both the first and second causes of action on the grounds of uncertainty, unintelligibility and ambiguity in that it could not be determined from the complaint whether the decedent or the corporation had a permit on June 1st. These also were overruled. Though the complaint merely states that "neither decedent nor said corporation at any time prior to May 29, 1946, had a permit from the Commissioner of Corporations of the State of California authorizing the sale or issuance of the capital stock of said corporation," it was stipulated at the trial that the permit was issued May 29, 1946. It was understood by all the parties and the court to have been in existence at the time the stock was delivered to plaintiff, June 1st. Actually, the important fact and date, as will be seen later, was that the money was taken for the shares on March 10, 1946 before a permit had been issued, and the lack of a permit on that date was alleged. The date of June 1, 1946 is the one on which the case turns only if it can be said a complete sale was made at that time, which was not true in this case. Further discussion of this point seems unnecessary. If the first cause of action is properly stated, the second, based on it in the form of a common count, was good. The demurrers were properly overruled.

[2] The facts of the case being clear, the only vital question on appeal is whether on the basis of these facts a sale of shares took place at any time between the plaintiff and decedent and if so was it at a time when a sale could be validly made. As pointed out in Miller v. California Roofing Co., 55 Cal.App.2d 136, 130 P.2d 740, decided by this court upon facts very similar to those in the present case, it is the validity of the *sale* and not the validity of the shares or issuance which is the crucial question.

The Corporate Securities Act, Stats.1917, p. 673; Deering Gen.Laws 1937, Act 3814, § 3, provides that, "No company shall sell any security, * * * or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do." The definition of "company" includes "all domestic and foreign private corporations, associations, syndicates, joint stock companies, and partnerships of every kind, trustees as hereinafter defined, and also individuals as hereinafter defined." "Individual" includes "only persons selling, offering for sale, negotiating for the sale of or taking subscriptions for any security of their own issue." Supra, § 2.

[3, 4] The words "sold" and "issued" are not synonymous. See §§ 16, 17. Section 2(a) (8) of the Corporate Securities Act provides that, " 'Sale' or 'sell' shall include every disposition, or attempt to dispose, of a security or interest in a security for value. * * * 'Sale' or 'sell' shall also include a contract of sale, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, subscription or an offer to sell." Section 17 provides that, "Every company which shall directly or indirectly offer for sale, or negotiate for the sale of or sell, or issue, or cause to be issued any security contrary to the provisions of this act, or of the constitution of this state, or in nonconformity with a permit of the commissioner authorizing the same * * * shall be guilty of a public offense and shall be punishable by a fine not exceeding ten thousand dollars." The receipt for the money which acknowledged the sale transaction is dated at a time when there was no permit to sell stock. The transaction of March 10, 1946 was a violation of this Act. As stated in the Miller case, supra, where the plaintiff had also paid money for shares before a permit had been obtained for the issuance of those shares, though the shares were not issued until after a valid permit had been obtained, "* * * it is apparent that regardless of whether we consider the transaction entered into on February 18, 1938 [the date of payment], a sale, an offer to sell, or a mere attempted subscription, and the document a mere receipt, the plaintiff having parted with and the defendant corporation having accepted the sum of $2,500 in pursuance thereof, without a permit, the defendants were guilty of a public of-

fense. Deering's Gen.Laws 1937, Act 3814, §§ 17 and 18. This violation of the Corporate Securities Act rendered void the transaction consummated on February 18, 1938. '* * * where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is malum in se, or merely malum prohibitum.' This rule stated by our Supreme Court in the oft-cited case of Smith v. Bach, 183 Cal. 259, 262, 191 P. 14, 15, has been adopted and consistently applied in situations involving violations of the Corporate Securities Act. [Citing cases.]" 55 Cal.App.2d at page 141, 130 P.2d at page 743.

[5, 6] Defendant contends that though there was no valid sale of shares on March 10, 1946 due to the lack of a permit at that time, there was a binding sale on June 1, 1946. This conclusion is arrived at on the theory of a continuing offer made by the plaintiff on March 10th when the money was paid and an "acceptance" by the corporation on June 1st when it issued the shares, thus forming a *new* and binding agreement on June 1st when there was a permit in existence and thus an ability to make a valid sale of validity issued shares. This contention can also be answered with the language of the court in the Miller case. "The subsequent conduct of the parties did not give validity to the sale, because the contract of December 15, 1938 [date of delivery of shares], was connected with, in fact, grew immediately out of, the previous illegal transaction. It is well settled that: 'If an agreement grows immediately out of, or is connected with, an illegal or immoral act or agreement, a court cannot lend its aid to enforce it, though it is in fact a new agreement. If the connection between an original illegal transaction and a new promise can be traced, if the latter is connected with, and grows out of, the former, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery.' 12 Am.Jur., p. 717, § 210." 55 Cal.App.2d at page 141, 130 P.2d at page 744. Though the plaintiff was denied recovery in the Miller case it was for the reason that he was more desirous of acquiring the shares than the corporation was of selling them and therefore, knowing there was no permit, was in pari delicto and not entitled to the protection of the statute to which he would ordinarily be entitled. These exceptional circumstances are not present in this case. "The purchaser must be equally culpable with the corporation before he will be held to be in pari delicto." (Supra, 55 Cal. App.2d at page 144, 130 P.2d at page 745.) There is nothing here to take the case out of the basic rule as given in the Miller case.

Appellant cites three cases in support of his "continuing offer" theory: Moore v. Moffatt, 188 Cal. 1, 204 P. 220; Waring v. Pitcher, 135 Cal.App. 493, 27 P.2d 397; and Robbins v. Pacific Eastern Corp., 8 Cal. 2d 241, 65 P.2d 42. These can all be distinguished from the one here before the court.

[7] Moore v. Moffatt, supra, was a suit by a trustee in bankruptcy to recover for the benefit of creditors the unpaid price of stock. Subsequent cases have consistently distinguished it on this ground from situations similar to those in this case. The court in California Western Holding Co. v. Merrill, 7 Cal.App.2d 131, 151–152, 46 P.2d 175, 185, said that, "An analysis of the case of Moore v. Moffatt, supra, and of the cases which have since followed, has convinced us that the doctrine of that case is, and is intended to be, an exception to the general rule, and applies only to those situations in which a representative of creditors is attempting to recover from parties to whom stock has been issued without full payment, or where the rights of innocent third parties intervene. It is apparent that neither of the exceptions mentioned is included in the situation here. * * * Walker v. Harbor Realty [& Development] Corp., 214 Cal. 46, 3 P.2d 557; Olds v. Simmons, supra, [123 Cal.App. 275, 11 P.2d 36]; Herkner v. Rubin, [supra]; 126 Cal.App. 677, 14 P.2d 1043; Honn v. Hamer, 81 Cal. App. 276, 253 P. 336; Reno v. American Ice Machine Co., [supra], 72 Cal.App. 409, 237 P. 784. In the Reno case, supra, the court says 72 Cal.App. 409, at page 413, 237 P. 784 785: 'The case of Moore v.

Moffatt, 188 Cal. 1, 204 P. 220, relied upon by appellant as contrary to the doctrine we have just announced, does not so impress us. That was not an action between the parties to a void contract, but an action by a trustee in bankruptcy of a corporation to recover the unpaid subscription price of stock for the benefit of creditors. *That situation presents an exception to the rule above announced,* which rule is suspended in the interests of innocent third persons who have relied upon the contract.' (Italics ours.) In the Walker case, supra, the court says 214 Cal. 46, at page 48, 3 P.2d 557, 558: 'No facts have been presented or offered which could bring this case within the exceptions noted in such cases as Moore v. Moffatt, 188 Cal. 1, 204 P. 220; Domenigoni v. Imperial Live Stock [& Mortgage] Co., 189 Cal. 467, 209 P. 36; and Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418, where rights of others than the parties to the void sale or contract were involved and the buyer had by his own conduct made himself answerable to the claims of such third parties. * * * The present action involves the rights only of the parties themselves." Other cases distinguishing Moore v. Moffatt are Imperial Livestock & Mortgage Co. v. Tracy, 208 Cal. 205, 281 P. 50; Miller v. California Roofing Co., 55 Cal.App.2d 136, 130 P.2d 740; and Duntley v. Kagarise, 10 Cal.App.2d 394, 52 P.2d 560. One whose own act is in effect what the statute is designed to protect innocent third parties from cannot take advantage of the protection of the statute.

The Moore case permitted recovery of the value of the stock under the theory of its being a trust fund for the benefit of creditors. The appellant argues that she as administratrix is a representative of the creditors of decedent and therefore within the exception, if any, of the Moore case. The argument has no merit here. The defendant stands in the shoes of the decedent, for no rights of innocent third parties, or creditors, have been shown to have intervened and it is as though the action involved only the rights of the original parties themselves. If defendant's reasoning here were carried to its logical conclusion it could be said that in any case where there is a refusal to give up money, however acquired, improperly or not, the refusal is for the protection of creditors and therefore justified.

In the case of Waring v. Pitcher, supra, the court held that an assignor of a creditor of the corporation could recover from a shareholder who, though having paid for stock before a permit had been obtained, accepted the stock after a permit had been issued. It was not a suit between the parties to the original stock transaction, as is this case in effect. It fell within the exception of the Moore case, recovery being for the benefit of creditors, and Moore v. Moffatt was properly relied upon by the court and made the basis of its decision. The same comments as were made with respect to Moore v. Moffatt would be pertinent in so far as this decision is concerned.

Robbins v. Pacific Eastern Corp., supra, involves a more complicated factual situation, but basically was the payment of American Company stock by the plaintiffs through their agent, American Trust Company, for stock of the Goldman Sachs Trading Corporation, the issue of the case being where the sale took place. There was no permit for such sale and issuance by the Trading Corporation in California. The court held that the sale had been made in New York, that the stock issued there was valid, and that the validity of the sale in New York was not affected by prior illegal negotiations for the sale made in California. The court said that "even if it be assumed that the executory contract, so far as the seller * * * is concerned, was illegal, nevertheless, the performance and execution of the contract in New York, being legal there, and *being complete in themselves,* stand independently of the prior illegality." (Italics added.) 8 Cal.2d at page 277, 65 P.2d at page 60.

The distinguishing point in this case is italicized above and is brought out further by the court 8 Cal.2d on page 283, 65 P.2d on page 63 in speaking of the cases distinguishing the Moffatt case. "The cases distinguishing it, however, *are not cases where there was an independently sufficient trans-*

action after the transaction became legal. The doctrine of the cases referred to and quoted from supra is not based on the ratification of a prior illegal contract, or upon estoppel, but upon the rule that the validity of a sale when made is not affected by a prior illegal contract to make such sale." (Italics added.) The court emphasizes its point by saying that perhaps it would be clearer if the plaintiff shareholders themselves had gone to New York to deliver their shares in payment at the later date instead of leaving it up to their agent, the American Trust Company, to do so, but that the effect was the same.

[8] The line, then, between the Robbins case and the Miller case, California Western Holding Co. case and this case is clear. In the former all essential transactions of the sale took place at a time and place where a valid sale could be made, and prior negotiations alone could therefore not invalidate that sale. In the latter cases money was paid, an essential part of the sale, at a time when there could be no valid sale. Such essential part being tainted with illegality infected the entire transaction and completion of the sale by issuance of the shares at a later time could not make it valid. A sale cannot be partly invalid, partly valid—it is entirely void—though a valid sale can be made after prior invalid negotiations. The factual situations in the Robbins case and the present one differ on this fundamental point.

[9] The purpose of the Corporate Securities Act was to eliminate just such unregulated acceptance of money for corporate stock not legally issuable as is found in this case. To allow the defendant here to retain the $4,000 received from plaintiff would be to completely disregard the public policy expressed in the Act and would seriously hinder its effective enforcement.

[10] Defendant objects to the court's findings of fact as not being sufficiently definite to support the judgment, noting that no finding was made as to the allegation in the answer that the plaintiff accepted the stock after a permit had been issued. The findings were as follows: "That all of the allegations set forth and contained in the complaint on file herein are true and that each and every allegation set forth and contained in the answer on file herein which is contrary or inconsistent with the allegations of said complaint are untrue."

[11, 12] Findings need not "be in any particular form" nor is extreme accuracy of statement or minuteness of detail required. Findings are sufficient "if the truth or falsity of each material allegation not admitted can be demonstrated therefrom" or "if they can be made certain, either by reference to the pleadings or the record. Even though a finding might have been more clearly phrased, it is sufficient if its language is clear enough to indicate what the court intended. * * * the judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon results by necessary implication from those made." 24 Cal. Jur. 963, §§ 200–207.

[13] A complete answer to defendant's contention lies in the fact that the reporter's transcript reveals that no issues of fact were presented to the court upon which findings had to be made. The court had to decide only an issue of law, whether on the agreed facts plaintiff was entitled to recover. Findings need be made only on material issues, and stipulations were entered into on all of these by the parties. 2 Cal.Jur. 1034; Nathan v. Locke, 108 Cal. App. 158, 164, 287 P. 550, 291 P. 286. As stated in De Haviland v. Warner Bros. Pictures, 67 Cal.App.2d 225, 238, 153 P.2d 983, 989, "* * * no harm could have resulted from such failure [to find specifically upon the issues raised by the answer] in view of the stipulation made which covered all of the material facts upon which defendant relies."

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

92 Cal.App.2d 120

In re MOORE'S ESTATE.

THOMAS v. KALB.

Civ. 7585.

District Court of Appeal, Third District, California.

May 27, 1949.

Hearing Denied July 21, 1949.

1. Wills ⚷111(2)

Decedent's writing of name in his own hand at beginning of typewritten instrument purporting to be will was not a "signature" required by the statute prescribing procedure for execution of wills. Probate Code, § 50.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Signature".

2. Wills ⚷108

Intention of testator is not to be given consideration for purpose of determining whether will has been executed in conformity with statutory provisions. Probate Code, § 50.

3. Wills ⚷108

Statutes relating to execution of wills must be strictly followed. Probate Code, § 50.

4. Wills ⚷71

Failure to comply with formalities required by a statute enacted for prevention of fraud is not excused by showing that in particular case there was no fraud.

5. Wills ⚷111(1)

Where purported will was entirely typewritten, decedent's name having been typed at the end, but at time of witnessing decedent wrote name in handwriting at beginning, and there was no showing that decedent himself typed document or knew how to type or by whom or when or where it was typed, and there was no acknowledgment by decedent that typed name was his signature, typed name at end did not constitute decedent's "signature" within meaning of statute prescribing formalities for execution of will. Probate Code, § 50; Code Civ.Proc. §§ 14, 17.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Proceeding in the matter of the probate of a document purporting to be the last will of Charles Willis Moore, etc., deceased, offered by Celina Thomas and contested by Florence Kalb. From the judgment, petitioner appeals.

Judgment affirmed.

Laurence J. Kennedy, L. C. Smith, Redding, for appellant.

Curtiss E. Wetter, Rawlins Coffman, Red Bluff, for respondent.

ADAMS, Presiding Justice.

Charles Willis Moore, also known as C. W. Moore, died November 30, 1947, leaving as heirs at law a sister and numerous nieces and nephews. Celina Thomas, a niece with whom decedent had been living, was appointed administratrix of his estate. In January, 1948, Mrs. Thomas found in decedent's Bible a document purporting to be the will of decedent, which she offered for probate. Florence Kalb, another niece of decedent, contested the will on the ground that it was not executed in conformity with section 50 of the Probate Code, and, on trial of the issues presented, the court denied admission of the instrument to probate.

The evidence shows that the contested document was originally entirely typewritten, "C. W. Moore" being typed at the end thereof; that decedent secured three persons to sign same as witnesses, and at that time personally wrote "C. W. Moore" at the beginning, after the typewritten words "Nov. 5 1947 I." There is no evidence whatsoever that decedent himself typed the document or that he even knew how to type; nor does it appear by whom or when or where it was typed. It was signed by the witnesses in the lobby of the Tremont Hotel in Red Bluff, at Moore's request, and at that time he stated that it was his will. He then wrote his name at the beginning of it, with pen and ink, as aforesaid.

The sole question presented is whether or not the typed name of the testator at the end of the document constitutes his signature, there being no evidence that same was affixed by decedent himself, and no acknowledgment by him that the typed name was his signature.

Section 50 of the Probate Code provides that every will, other than a nuncupative will, must be in writing, and every will, other than a holographic will and a nuncupative will, "must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto." Also, "The subscription must be made, or the testator must acknowledge it to have been made by him or by his authority, in the presence of both of the attesting witnesses, present at the same time."

[1] It is not contended by appellant that the decedents' writing in of his name at the beginning of the instrument constituted his signature thereto. That it did not is expressly held in such cases as In re Estate of Manchester, 174 Cal. 417, 419, 163 P. 358, L.R.A.1917D, 629, Ann. Cas.1918B, 227, and In re Walker's Estate, 110 Cal. 387, 393, 42 P. 815, 1082, 30 L.R.A. 460, 52 Am.St.Rep. 104.

[2] Nor is the intention of the testator to be given consideration for the purpose of determining whether a will has been executed in conformity with statutory provisions. In re Estate of Manchester, supra, 174 Cal. at page 420, 163 P. 358, L.R.A.1917D, 629, Ann.Cas.1918B, 227; In re Estate of Jordan, 81 Cal.App. 2d 419, 422, 184 P.2d 165; In re Estate of Seaman, 146 Cal. 455, 463, and concurring opinion of Beatty, C. J., at page 465, 80 P. 700, at page 704, 106 Am.St.Rep. 53, 2 Ann.Cas. 726.

Appellant cites no cases holding that the typewriting of the name of a testator at the end of a will satisfies the provision that it must be subscribed at the end thereof by the testator himself. In Webster's New International Dictionary, Second Edition, the word "subscribe" is defined as: "1. To write underneath, as one's name; to sign (one's name) to a document. 2. To sign with one's own hand; to give consent to, as something written, or to bind oneself to the terms of, by writing one's name beneath; as, to *subscribe* a bond."

Section 17 of the Code of Civil Procedure provides that "signature or subscription includes mark, when the person cannot write, his name being written near it by a person who writes his own name as a witness; * * *." Also see Civ.Code, sec. 14.

The exception above recognized, that one who cannot write may make his mark, implies that a subscription must be hand written, if the subscriber can write; otherwise he may make his mark. But whoever witnesses the mark must himself write the name of the maker of the mark, as well as his own name as witness. No other exception is provided.

[3, 4] It is generally held that statutes relating to the execution of wills must be strictly followed. In Re Estate of Seaman, supra, 146 Cal. at page 463, 80 P. 700, 106 Am.St.Rep. 53, 2 Ann.Cas. 726, it is said that a failure to comply with the formalities required by a statute enacted for the prevention of fraud is not excused by showing that in the particular case under consideration there was no fraud.

Appellant relies upon such cases as Weiner v. Mullaney, 59 Cal.App.2d 620, 634, 140 P.2d 704; In re Estate of Walker, supra; Kadota Fig Association v. Case-Swayne Co., 73 Cal.App.2d 815, 167 P.2d 523, but they are distinguishable. Weiner v. Mullaney did not involve a will, but only letters, the writing of which by the person who signed them being admitted. In Re Estate of Walker a will was held invalid because one of the attesting witnesses inadvertently signed the surname of the testator instead of his own. The language relied upon by appellant is dictum. In the Kadota Fig case no will was involved; the signature involved was that of the judge who, it was shown, acted as authorized agent of the bonding company in signing a bond.

[5] While in some cases it has been said that an instrument is deemed signed although the signature is typed, lithographed, rubber-stamped, printed or photographed, even assuming that such a sig-

nature might, under some circumstances, be held sufficient to render an instrument enforceable, we think that in the case of a will the statute requires a handwritten signature, or, at the very least, that if typewritten it must be shown that the name of the testator was typed by the testator himself or by some one person in his presence and by his direction who then subscribed his name thereto. To hold that the mere typed name of a testator is sufficient to satisfy the requirements of section 50 of the Probate Code would open the door to an easy form of fraud, when the purported signer was dead. We are in accord with the statement of Mr. Justice Beatty, in Re Estate of Seaman, supra, when he said, 146 Cal. at page 465, 80 P. at page 704, 106 Am.St.Rep. 53, 2 Ann. Cas. 726:

"He [appellant] insists that section 1276 of the Civil Code [now section 50, Probate Code], like the rest of its provisions, must be liberally construed, 'with a view to effect its objects and promote justice.' Civ.Code, § 4. I fully agree with him on this proposition; but I apply it differently. His argument is, in effect, that we should give a liberal construction to wills which deviate from the statute in the mode of their execution, for the purpose of sustaining them, whereas a proper application of the principle requires us to give a liberal construction and full effect to every provision of the statute designed to prevent the probate of spurious wills, although in so doing we may in a particular instance defeat an honest attempt on the part of a decedent to make a testamentary disposition of his estate. The evil of occasionally defeating such an attempt is far less serious than the establishment of a precedent which would open the door to the frauds which the statute was designed to prevent. Every statute of frauds is designed to promote justice by requiring wills and contracts to be executed with such formalities and indicia of genuineness as to make simulated and fraudulent writings of the classes defined impossible, or at least very difficult. Such statutes, in the long run, promote justice—which is their sole object—by shutting out opportunities of fraud. Where they defeat one honest purpose, they prevent unnumbered frauds which in their absence would be feasible and measurably safe. It would not, therefore, be a proper application of the principle invoked to weaken by construction the requirements of our statute prescribing the requisites of a valid will. By so doing we should, no doubt, be dealing most liberally with the efforts of decedents who have disregarded the law, but we should not be construing the law liberally to effect its objects. And unless we are to set ourselves up as better judges of the true policy of the law than the legislature, we should not be promoting justice."

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

In re AKELEY'S ESTATE.

LEMMON et al. v. STATE.

Civ. 16988.

District Court of Appeal, Second District,
Division 2, California.
May 27, 1949.

Hearing Granted July 21, 1949.*

1. Wills 🔑440

Intention of testator can be derived from will only.

2. Wills 🔑448

Court must lean to construction of will that will avoid intestacy.

3. Escheat 🔑4
Wills 🔑1, 866

The right to bequeath one's possessions is derived from statute, and such right cannot be enlarged by judicial decree, and when testator fails to dispose of any share of his estate, such portion must be distributed to his heirs at law, and in absence of heirs portion not devised escheats to the state. Probate Code, § 231.

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* Subsequent opinion 215 P.2d 921.

4. Appeal and error ⚷842(2)

Reviewing court is not bound by conclusion of trial court on questions of law.

5. Escheat ⚷4

Where will devised residue in 25 percent portions to each of three named legatees, but made no disposition of fourth portion and testatrix died leaving neither spouse nor kin, fourth portion escheated to the state. Probate Code, § 231.

◆

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Clara Rood Akeley on final accounting of the executor wherein Russell Lemmon, Rosella Lemmon, and others, claimed a right to the residue, and the State of California claimed a share by escheat. From an adverse order, the State of California appeals.

Order reversed with instructions.

Fred N. Howser, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for State.

Clyde C. Triplett, Los Angeles, for Russell Lemmon, and others.

Sidney N. Bachtell and B. Dean Clanton, Los Angeles, Sidney N. Bachtell, Los Angeles, for Los Angeles Society Prevention Cruelty to Animals.

Newby, Holder & Newby, Los Angeles, Chas. R. Newby, Los Angeles, for Mary Martha Home for Girls.

Hooper & Miller, Los Angeles, Geo. A. Hooper, Los Angeles, for Children's Home Society of California.

MOORE, Presiding Justice.

Clara Rood Akeley departed this life leaving neither spouse nor kin. She had, however, executed a holographic will which, after making bequests to individuals, devised all the rest, residue and remainder of her estate as follows:

"25 per cent to the Childrens Home Society of Calif

25 per cent to the Mary Martha Home for Girls * * *

25 per cent to Los Angeles Society for the Prevention of Cruelty to animals * * *"

The executor in his final account asked for a determination of whether the three residuary legatees should each receive only 25 per cent of the residue with the remaining 25 per cent escheating to the state because testatrix had made no disposal thereof, or whether each of the designated residuary legatees is entitled to receive one third of the residuum. The state promptly filed its "Statement of Claim of Interest in the Estate" alleging that it is entitled to twenty-five per cent of the residue, less one fourth of the expense of administration. In their answer to the petition the same legatees alleged that decedent "intended that the residue of her estate should be divided equally between the three residuary legatees named" and demanded distribution of one third of the residue to each.

Without the aid of any evidence the court construed the will to mean that it was the intention of the testatrix to bequeath the entire residue of her estate to the three designated charitable organizations in equal shares and ordered distribution accordingly.

[1-3] The court's finding and order are without precedential support. The intention of a testator can be derived from his will only. While a court must lean to the construction that will avoid intestacy, its inquiry must not purport to extend to the secret workings of the testator's mind. The intention sought for is not what might have been present when he penned his testament but that which is expressed in the embalmed language of the author. When the latter's purpose has been divined from his solemn words the chancellor's task is finished. His judicial cerebrations must there cease; his conjecture and speculation dehors the will are worth nothing and serve only to confuse his effort to interpret the writing of the decedent. If the will contains inconsistent clauses, still the court must from them find the meaning; if the words are simple and the phrases are definite and consistent from them and them only must the court ascertain the testator's purpose. It must not resort to "ingenious conjecture" to determine wheththe deceased meant something not actually expressed in his will. If the language used

results in intestacy and its meaning is unambiguous, it is beyond the province of the court so to construe the writing as to hold that its author intended to devise all his possessions. His right to select the recipients of his bounty must not be deemed a barrier to his right not to select them. Estate of Beldon, 11 Cal.2d 108, 112, 77 P.2d 1052; Estate of Hoytema, 180 Cal. 430, 432, 181 P. 645; Estate of Seay, 180 Cal. 304, 306, 181 P. 58; Estate of Blake, 157 Cal. 448, 459, 108 P. 287; Estate of Young, 123 Cal. 337, 344, 55 P. 1011; Estate of Maloney, 27 Cal.App.2d 332, 336, 80 P.2d 998. The right to bequeath one's possessions is derived from statute. Such right cannot be enlarged by judicial decree. Consequently, when a testator fails to make disposition of any share of his estate, such portion must be distributed to his heirs at law, Estate of Kunkler, 163 Cal. 797, 800, 127 P. 43, and if there are no heirs at law the portion not devised escheats to the state. Probate Code, sec. 231.[1]

[4, 5] Respondents contend that even though they should not be entitled to receive "all the rest, residue, and remainder of decedent's estate," still, in the absence of heirs at law they should be awarded the remaining one fourth of the residue by virtue of the provision which follows the names of the three residuary legatees. It is as follows: "In the event the total of the bequests to the above named charitable organizations shall exceed the portion of my estate that I may legally give for charitable purposes, then all such bequests shall be proportionately reduced to the extent, that the total of such bequests shall not exceed the maximum amount that I may legally give charity, and in such event, I give, devise and bequeath to Russell Lemmon, the Executive named, all the residue of my estate, free from trust." By reason of such provision respondents maintain that there is no factual basis for applying section 231 of the Probate Code because the testatrix disposed of all her estate and the state is therefore not aggrieved. Respondents thereby ignored the condition under which Lemmon was to receive any portion of the residue. Again, the language of the will must govern. The last quoted provision gives him a portion of the residue, only in the event that the three charitable bequests shall exceed the portion the testatrix might bequeath to charitable purposes. Since such bequests do not exceed the portion that testatrix might legally give to charity, the quoted provision did not become operative and no portion of the residue passed to executor Lemmon. It is elemental that a reviewing court is not bound by the conclusion of the trial court on questions of law. Hence, the construction necessitates the decision here derived. Estate of Pearson, 90 Cal.App.2d 436, 203 P.2d 52; Estate of Welch, 83 Cal.App.2d 391, 399, 188 P.2d 797.

No person having claimed to be entitled to share in decedent's estate under the laws of succession, the 25 per cent of the residue thereof escheated to the State and distribution should have been made accordingly. Therefore, the order is reversed with instructions to distribute the residue as follows:

25 per cent thereof to the Children's Home Society of California;

25 per cent to Mary Martha Home for Girls;

25 per cent to the Los Angeles Society for the Prevention of Cruelty to Animals;

25 per cent to the State of California as escheated property.

McCOMB and WILSON, JJ., concur.

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[1] Probate Code, section 231. "If the decedent leaves no one to take his estate or any portion thereof, under the laws of this state, the same escheats to the state as of the date of the death of the decedent. * * *"

92 Cal.App.2d 129

TALLEY v. GOODFELLOW.

Civ. 7651.

Sac. 6010.

District Court of Appeal, Third District, California.

May 27, 1949.

Appeal and error 🔑371, 787

Where trial clerk's certificate showed that on December 7, 1948, appellant's attorneys were notified of cost of preparing transcript on appeal, but that they made no arrangement for paying such cost, and no record had been filed in District Court of Appeal, and that appellant had not filed any request for relief from default, nor any objection to respondent's motion of January 13, 1949, to dismiss the appeal, and that on the hearing on such motion on March 4, 1949, appellant had made no appearance, the appeal was required to be dismissed for failure to arrange for payment of cost of the record, and because the appeal must be deemed to have been abandoned. Rules on Appeal, rules 41(c), 42(a).

◆

Appeal from Superior Court, San Joaquin County; Thomas B. Quinn, Judge.

Action by C. B. Talley against A. W. Goodfellow. From a judgment for defendant, the plaintiff appeals. On respondent's motion to dismiss appeal.

Motion granted.

Joseph A. Brown, Reed M. Clarke, San Francisco, for appellant.

Wild, Carlson & Reeve, Fresno, Lafayette J. Smallpage, Stockton, for respondent.

ADAMS, Presiding Justice.

On January 13, 1949, respondent filed in this court a notice of motion to dismiss this appeal, which notice was accompanied by a certificate of the clerk of the trial court in conformity with Rule 42(a) of the Rules on Appeal, and an affidavit of due service upon appellant's counsel. The clerk's certificate shows that on December 7, 1948, appellant's attorneys were notified of the cost of preparing the transcript on appeal and that they made no arrangement for paying such cost. No record has been filed in this court nor has appellant filed any request for relief from default, nor any objection to this motion. On the hearing date before us, March 4, 1949, appellant made no appearance.

Under these circumstances the appeal must be dismissed, not only for failure of appellant to arrange for payment of the cost of the record, but also because, under Rule 41(c) of the Rules on Appeal, such appeal may be deemed abandoned. See Cunningham v. Taylor, 87 Cal.App.2d 701, 197 P.2d 565, and authorities there cited.

The appeal is dismissed.

PEEK and THOMPSON JJ., concur.

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92 Cal.App.2d 85

STEVENS v. STEVENS.

Civ. 16789.

District Court of Appeal, Second District, Division 1, California.

May 26, 1949.

Rehearing Denied June 15, 1949.

Hearing Denied July 21, 1949.

1. Divorce 🔑116

In divorce action, proof of extreme mental cruelty may be made by testimony of cruel remarks made by one spouse to the other. Civ.Code, § 130.

2. Divorce 🔑124

In weighing testimony in divorce cases, much must be left to sound judicial discretion of trial court.

3. Divorce 🔑130

Judgment denying wife a divorce on ground of extreme mental cruelty was not an abuse of discretion under evidence. Civ.Code, § 130; Code Civ.Proc. § 2079.

◆

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action for divorce by Charlotte Jeane Stevens against Thomas R. Stevens. From a judgment denying prayer for divorce, plaintiff appeals.

Affirmed.

Powers & Bernard, Los Angeles, for appellant.

No appearance, for respondent.

DRAPEAU, Justice.

This action for divorce was tried as a default. At the close of plaintiff's case, the trial judge stated that there was not sufficient evidence to sustain a finding of extreme mental cruelty. Judgment followed denying plaintiff's prayer for a divorce.

The plaintiff testified that her husband was in the military service, stationed in Hawaii; that when the minor child of the parties was born in 1947 defendant came to Los Angeles from Hawaii and stayed with her for about two weeks; he then left for Minnesota, looking for a job, and after a few months returned to Los Angeles and stayed with her for another two weeks.

On this last occasion the defendant received a telephone call from Honolulu. Plaintiff did not overhear the conversation, but she knew that the party calling was a woman, so she asked the defendant who she was. To this inquiry he replied that he had been living with this person, and that he cared more for her than he did for the plaintiff. On the same night the defendant again left for Minnesota, and never came back. The plaintiff further testified that this conduct of the defendant made her sick, upset and nervous.

The mother of the plaintiff testified that she was not at home when the telephone call came in, but that she overheard the conversation between plaintiff and defendant, as testified to by the plaintiff; that the defendant said that the person in Honolulu was someone he met there and was living with, and that he preferred living with this girl more than he did with the plaintiff; "that he was happier with her." And this witness testified that this conduct of the defendant upset the plaintiff; that she cried and was sick for a while over it.

Sec. 130 of the Civil Code provides: "No divorce can be granted upon the default of the defendant or upon the uncorroborated statement, admission, or testimony of the parties * * *." The provisions of this code section, and of Sec. 2079, Code of Civil Procedure, relating to statements and admissions of parties to divorce actions have been uniformly approved and enforced by the California courts. Flynn v. Flynn, 171 Cal. 746, 154 P. 837; Grannis v. Superior Court, 146 Cal. 245, 252, 79 P. 891, 106 Am.St.Rep. 23; Lemberger v. Lemberger, 55 Cal.App. 231, 203 P. 786.

Eliminating the statements and admissions of the defendant, the only facts left are that he was with the plaintiff for a short time on two different occasions, that the last time he was with her he talked on the telephone with some woman in Hawaii, that he said certain things to his wife, left her and never came back.

The record indicates that the trial judge may have stopped short in his consideration of plaintiff's case with his application of Sec. 130, Civil Code to the facts.

[1] Proof of extreme mental cruelty may be made by testimony of cruel remarks made by one spouse to the other. Maloof v. Maloof, 175 Cal. 571, 166 P. 330. There was a theory upon which plaintiff in this case could have been granted a divorce: i.e., that the conduct of the defendant in telling his wife that he had lived with another woman, and cared more for that other woman than he did for the plaintiff, coupled with the fact that he left and never came back, was grievous mental cruelty.

Having in view the effect of Sec. 130, Civil Code, still the language itself which the offending spouse addresses to the other may prove mental cruelty. What he says, not what he says he did, may be the index of the marital offense.

[2] However, in weighing the effect of testimony in divorce cases, much of necessity must be left to the sound judicial discretion of the trial court.

"From the very nature of the question it results that in its determination the trial judge, who has the parties before him for observation in the light of the evidence, must be invested with a wide range of discretion. It is settled that the finding of the trial court on this question will not be disturbed on appeal unless the evidence in support thereof is so slight as to indicate a want of ordinary good judgment and an abuse of discretion by the trial court." MacDonald v. MacDonald, 155 Cal. 665, 670, 102 P. 927, 930, 25 L.R.A.,N.S., 45.

[3] In the circumstances of this case the finding against the plaintiff was not an abuse of discretion.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

92 Cal.App.2d 6

In re HYDE'S ESTATE.

JOHNS HOPKINS UNIVERSITY et al. v. KUCHEL.

Civ. 13896.

District Court of Appeal, First District,
Division 1, California.
May 23, 1949.

Hearing Denied July 21, 1949.

1. Taxation ⚷856

The purpose of inheritance tax statute is to tax successions occurring as the result of death of transferor, where such transferor, regardless of the form of the transaction, has enjoyed some of the economic benefits of the property until his death. Revenue and Taxation Code, §§ 13401–13403, 13641, 13643–13645, 13648.

2. Taxation ⚷879(1)

Liability for tax imposed on transfers intended to take effect in possession or enjoyment at or after death of transferor does not depend upon the intention of transferor but upon the character of the interests created by the transfer. Revenue and Taxation Code, §§ 13401–13403, 13641, 13643–13645, 13648.

3. Taxation ⚷878(1)

Where transferor retains, directly or indirectly, expressly or impliedly, the economic benefits of transferred property, transaction is subject to inheritance tax and courts will look through any device by which transferor secures such benefits for himself. Revenue and Taxation Code, §§ 13401–13403, 13641, 13643–13645, 13648.

4. Taxation ⚷879(1)

Whether inter vivos transfer of property is subject to inheritance tax depends upon whether the unlimited right of possession or enjoyment of property transferred has been postponed until death of transferor. Revenue and Taxation Code, §§ 13401–13403, 13641, 13643–13645, 13648.

5. Taxation ⚷876(3), 878(1)

The general informality surrounding transactions by which property was transferred to a university in consideration of its promises to pay an annuity to transferor during her lifetime and frequent changes in agreement with respect to amount of such annuity, none of which provided for an annuity comparable in amount to that which could have been purchased from an insurance company for property transferred, demonstrated that transfers were donative in purpose and were not exempt from inheritance tax as amounting to purchase of an "annuity." Revenue and Taxation Code, §§ 13401–13403, 13641, 13643, 13644, 13648.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Annuity".

6. Taxation ⚷879(1)

Where transactions by which property was transferred to a university in consideration of its promise, as modified, to pay an annuity in various specified amounts or at various specified rates to transferor for life amounted in substance to reservation by transferor of net income from transferred property for life, such transfers were subject to inheritance tax as "transfers made without a valuable and adequate consideration with intention that they take effect in possession or enjoyment at or after death of transferor." Revenue and Taxation Code, §§ 13401–13403, 13641, 13643, 13644, 13648.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Transfers Intended to Take Effect at or after Death of Transferor".

7. Taxation ⟹879(1)

Where property is transferred to a charitable institution subject to an agreement to pay yearly to donor for life a specific sum approximating the income earned by such fund, the transfer is subject to inheritance tax, since full enjoyment of fund cannot be realized by donee until death of donor and donee must either use donated funds or tie up an equivalent sum from other sources in order to realize the income to pay donor. Revenue and Taxation Code, §§ 13401–13403, 13641, 13643, 13644, 13648.

8. Taxation ⟹856

An "estate tax" is levied on the right to transmit property, while an "inheritance tax" is levied on the right to receive property.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Estate Tax" and "Inheritance Tax".

9. Taxation ⟹861

Statute making transfers of property without valuable and adequate consideration subject to transferee's promise to make payments to or care for transferor subject to inheritance tax is not retroactive and would apply only to property transferred after statute became effective. Revenue and Taxation Code, § 13645.

10. Taxation ⟹879(1)

Where transferee's promise to pay specified annuity to transferor was not equal in money or money's worth to the full value of property transferred, the entire value of property transferred was subject to inheritance tax without deducting the value of promise to pay annuity, since statute makes no provision for partial exemption on account of partial consideration. Revenue and Taxation Code, §§ 13401–13403, 13641, 13643, 13644, 13648.

11. Taxation ⟹860

Subject only to constitutional limitations, a tax statute is the measure of the tax and general principles of equity have no application thereto.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Proceeding in the matter of the estate of Ida Henrietta Hyde, also known as Ida H. Hyde, also known as I. H. Hyde, deceased, wherein Thomas H. Kuchel, as Controller of the State of California, contended that property transferred to the Johns Hopkins University by decedent during her lifetime was subject to inheritance tax. From that portion of an order of the probate court imposing an inheritance tax on such property, the Johns Hopkins University and others appeal.

Order affirmed.

Clark, Nichols & Morton, Berkeley, for appellants.

James W. Hickey, Sacramento, Richard C. O'Connor, Charles J. Barry, San Francisco, for respondent.

PETERS, Presiding Justice.

The Johns Hopkins University of Maryland, and the executor and executrix of the will of Ida H. Hyde, appeal from that portion of the order of the probate court imposing, over their objections, an inheritance tax on certain properties transferred to the University by decedent during her lifetime. Admittedly, no trusts were created by the transfers, inasmuch as Maryland prohibits charitable trusts. The agreements provided that the complete title to the transferred funds was conveyed to the University. The parties concede that the transfers cannot be exempted from tax on the ground that the University is a nonprofit educational and charitable corporation, because such exemption is granted only where the laws of the sister state are reciprocal, and the laws of Maryland are not.

The position of respondent, upheld by the lower court, is that the inter vivos transfers in question were gifts made either to take effect in possession or enjoyment at or after death of the donor, or in which she reserved to herself a life interest or income, and were, therefore, taxable. The appellants contend that the donor reserved no interest in the funds transferred, that the agreements by which the transfers were made not only transferred title to the University but gave it immediate possession and enjoyment of the funds involved, and that they were, therefore, not taxable. It is their theory that the agreements involved amounted to contracts based upon an inadequate consideration to pay the donor an annuity, and that the inheritance tax statute has no application to such contracts.

Statement of Facts:

Ida H. Hyde died in August, 1945, a resident of Alameda County. By her will she left the residue of her estate (such residue being appraised at $14,725.80) to The Johns Hopkins University to be added to the "Ida H. Hyde Fellowship Fund," which she had established by five inter vivos transfers. It is the taxability of these transfers that is here involved. Admittedly, an inheritance tax is payable on the right to receive the residue, and no contention is made to the contrary.

The total value of the five transfers is $40,000. The first transfer was made on July 16, 1924, and consisted of mortgages valued at $20,000. An agreement was entered into on that date signed by decedent and by the proper officials of the University. The "whereas" clause recites that Ida H. Hyde, desires "to make a gift or donation" of $20,000 to the University, and that the University "in consideration of said gift" has agreed "to make the semi-annual payments hereinafter agreed to be made to the said party of the second part for and during her life; and after her death to apply the income from said fund as hereinafter provided."

So far as here is pertinent, the agreement then provided:

"* * * in consideration * * * of the payment to it * * * Johns Hopkins University hereby covenants and agrees as follows:

"1. That it will pay to the said Ida H. Hyde, for and during the residue of her life, in semi-annual installments accounting from the date of this agreement, an amount in each year equal to interest at six per cent upon the said principal amount of Twenty Thousand Dollars ($20,000.00) or whatever principal amount is produced from the mortgages herein so donated to it by the said party of the second part.

"2. That from and after the death of the said party of the second part it will use the net income from the fund created by this donation for the purpose of establishing and maintaining one or more Graduate Medical Research Fellowships for the investigation of the cause and cure of human diseases that await their solution, to be known as the 'Ida H. Hyde Medical Research Fellowship,' or Fellowships.

"3. The party of the first part agrees that it will hold said fund as a permanent endowment fund and keep the same invested in the same class of securities in which similar funds held by it shall be invested; that in no event will it use said fund, or the income therefrom after the death of the party of the second part, for its general purposes or for any purposes other than the purposes hereby agreed."

Paragraph 4 states that it is the wish of Ida that the holders of such fellowships first study the cause and remedy of Parkinson's Disease, but that the particular purpose for which the fund shall be used "must necessarily be left largely to the discretion of the authorities" of the University. Qualifications for holders of the fellowships are set forth, and provisions made for the disposition of the fund if the University should ever be abandoned. The agreement then contained this paragraph, admittedly included on the advice of the University attorneys in order to avoid the Maryland law prohibiting the setting up of charitable trusts: "Nothing in this agreement shall limit or qualify the rights of the party of the first part as the owner of the fund hereby donated, it not being intended by any of the provisions of this agreement to create a trust or to impose conditions upon the title conferred by said donation, but it being intended that the provisions of this agreement shall be construed as covenants or a contract merely, and that in no event shall any possible invalidity of such covenants or contract have the effect of impairing the absolute estate in said fund conferred by said donation; it being the intention of the donor that there shall be no resulting trust in favor of herself, her personal representatives or assigns, because of any such failure, invalidity or unenforceability of any of said provisions, so that the entire beneficial interest shall in such case be in the party of the first part."

On April 26, 1927, Ida made an additional gift of $5,000 to the University, and a supplementary agreement was executed. The supplementary agreement provided that the covenants of the first agreement were made a part of the supplementary agreement, and, in addition, the University covenanted and agreed: "1. That it will pay to the said Ida H. Hyde for and during the residue of her life in semi-annual installments accounting from the date of this agreement an annuity of Two Hundred Fifty Dollars ($250.00) per annum, this annuity being in addition to the annuity of Twelve Hundred Dollars ($1200.00) hereinbefore referred to and payable under the agreement dated July 16, 1924."

It was also provided that after the death of Ida the University should add the income from this fund to the 1924 fund for the purposes stated in the 1924 agreement.

On July 26, 1929, without the addition of any further funds, a "supplemental agreement" was executed between the parties modifying the 1924 and 1927 agreements to the extent that, after the death of Ida, the University, in any year, was empowered to use 5% of the original principal of the fund to be added to the income for the purposes of the fellowship. The agreement also "suggested" that but one fellowship be created.

On January 6, 1931, Ida increased her gift by an additional $5,000, and a supplemental agreement was executed whereby the University agreed to pay to Ida in consideration of receiving this amount an additional "annuity of Two Hundred and Fifty Dollars ($250.00) per annum." The previous covenants were incorporated into this supplemental agreement.

On August 10, 1935, Ida made another gift to the University of $5,000, and another agreement resulted. This agreement seems to supersede the preceding agreements and is not merely supplemental thereto. Among other things, it provides that by a three-fourths' vote of the governing body of the University, 1% of the principal of the fund may be added to the income and paid to the holder of the fellowship. It also contains this paragraph: "1. That it will continue to pay to the said Ida H. Hyde for and during the residue of her life, in semi-annual installments, beginning July 16, 1935, an amount in each year equal to interest at the rate of six per cent upon the sum of twenty-thousand dollars, and an amount in each year, in semi-annual installments, beginning October 27, 1935, equal to interest at the rate of five per cent on the sum of five thousand dollars, and an amount in each year, in semi-annual installments beginning July 6, 1935, equal to interest at the rate of five per cent per annum on the sum of five thousand dollars; and, in addition thereto, accounting from the date of this agreement, an amount in each year, in semi-annual installments, equal to interest at the rate of four per cent on the principal sum of five thousand dollars."

On February 1, 1938, another gift of $5,000 was made by Ida and a further agreement was executed. It provides that Ida "will hereafter receive the net income earned by the fund given by her, provided that such amount received by her is not less than four per cent on forty thousand dollars, or sixteen hundred dollars per year." It also provided that clause 1 of the agreement of August 10, 1935, should be modified to read as follows:

"(1) That The Johns Hopkins University will pay to the said Ida H. Hyde:

"(a) Upon execution of this document by both parties, the sum of $233.61, representing unpaid balances accrued to Feb. 1, 1938 on the semi-annual installments stipulated in the Aug. 10, 1935 agreement, after applying the $600.00 installment due Jan. 16, 1938 to provide a part of the last $5,000 gift.

"(b) On May 1, 1938, $400.00, representing accruals from Feb. 1, 1938, to May 1, 1938, at the rate of $1,600.00 a year.

"(c) On Nov. 1, 1938, $800.00, plus any net income in excess of that at the rate of $1,600 a year earned by the fund for the period from Feb. 1, 1938 to June 30, 1938.

"(d) On May 1, 1939 and on each subsequent May 1, during the residue of her life, $800.00.

"(e) On November 1, 1939 and on each subsequent Nov. 1 during the residue of her life, $800.00 plus any net income in excess of $1,600 earned by the fund for the fiscal year ended on the previous June 30."

The final agreement between the parties was executed on October 13, 1941, for the purpose "of modifying the provisions with respect to the payment of an annuity" to Ida. It recites that the University has invested the $40,000 "given to it by the said Ida H. Hyde in its consolidated investment account," and that it is the intention of the parties that "beginning with the payment due May 1, 1942, the annuity payable to the said Ida H. Hyde shall be equal to the net income received by the University on the said fellowship fund as invested."

The parties have entered into a stipulation showing what would have been the cost of an annuity purchased from a life insurance company on each of the dates a transfer was made. The figures show that the cost of an annuity that would have paid Ida the sums required under the various agreements would have been much less than the amounts paid to the University. The State Inheritance Tax Department joined in the stipulation, but objected to its relevancy.

The stipulated facts show that the funds contributed by Ida to the University were not kept separate from other similar funds but were added to the endowment investment fund of the University called a "consolidated investment account," a practice followed by other universities. In order to determine the yield of a particular transfer within the fund, the income of the entire fund is ascertained, and then the proportion which the particular transfer bears to the entire fund is applied to the entire net income. The following chart shows the income actually earned by the money transferred to the University by Ida, from and after 1935, computed according to the above-described method of calculation, and the amounts actually paid to her. Some of this "income" was never paid to Ida but was applied by the University to Ida's later gifts:

Year	Income Earned	Amounts Paid Ida
(July 1—June 30)		
1935–1936	$1453.84	$1744.46
1936–1937	1627.86	1900.00
1937–1938	1550.59	2033.61
1938–1939	1470.69	1600.00
1939–1940	1512.99	1600.00
1940–1941	1527.92	1600.00
1941–1942	1621.38	1621.38
1942–1943	1556.07	1556.07
1943–1944	1495.68	1495.68
1944–1945	1485.37	*800.00

For the ten years preceding the times covered by the above chart the payments made to Ida were more than the net earnings from the invested funds, both in every year and in toto. In practice, the payments to Ida prior to the agreement of February 1, 1938, were not dependent upon the receipt of any earnings by the consolidated fellowship fund. This is also true as to the minimum fixed payments required to be made under the agreement of February 1, 1938, and to the May 1st payment called for by the agreement of October 13, 1941.

The trial court found the facts as stipulated to by the parties and concluded, first, that Maryland is not reciprocal with California with respect to charities, and second, that the inter vivos transfers here involved are subject to an inheritance tax payable by the transferee, the University. It also fixed the market value of the transferred property at $40,000, and found that the tax on the transfers added to the tax on the residue of the estate valued at $14,725.80 (the tax on the residue is not here challenged) totaled $4,813.60.

Statutes Pertinent to this Appeal:

The main statutory provisions involved are §§ 13641, 13643, 13644, 13645 and 13648 of the Revenue and Taxation Code. These sections are found in Part 8, entitled "Inheritance Tax"; Chapter Four, entitled

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* Ida died August 22, 1945, before the November payment was due.

"Transfers Subject to Part"; Article 3, entitled "Inter Vivos Transfers." They read as follows:

"§ 13641. Transfers without consideration. Any transfer specified in this article made during lifetime by a resident or, if the property transferred is within this State, by a nonresident, by deed, grant, bargain, sale, assignment, or gift, without a valuable and adequate consideration, is a transfer subject to this part.

"[Consideration defined.] 'Valuable and adequate consideration' is a consideration equal in money or in money's worth to the full value of the property transferred.

"§ 13643. Same: Transfers to take effect at or after death. A transfer conforming to Section 13641 and made with the intention that it take effect in possession or enjoyment at or after the death of the transferor is a transfer subject to this part.

"§ 13644. Same: Transfers with reservation to transferor of life income or interest. A transfer conforming to Section 13641 and under which the transferor expressly or impliedly reserves for his life an income or interest in the property transferred is a transfer subject to this part.

"§ 13645. Same: Promises to make payments to or care for transferor. A transfer conforming to Section 13641 and under which the transferee promises to make payments to or care for the transferor is a transfer subject to this part.

"§ 13648. Declared purpose of act. It is hereby declared to be the intent and purpose of this part to tax every transfer made in lieu of or to avoid the passing of property by will or the laws of succession."

General Principles:

[1-4] Certain general principles are reasonably clear. The purpose of the inheritance tax statute is to tax successions occurring as the result of the death of the transferor, where such transferor, regardless of the form of the transaction, has enjoyed some of the economic benefits of the property until his death. Practically every state has statutes generally similar to those above-quoted which impose a tax on transfers intended to take effect in possession or enjoyment at or after the death of the transferor. Liability in such cases does not turn upon the intention of the grantor, but upon the character of the interests created by the transfer. It can be safely said that where the grantor retains, directly or indirectly, expressly or impliedly, the economic benefits of the transferred property, the transaction is taxable, and that the courts will look through any device by which the grantor secures those benefits for himself. The question as to whether there has been a transfer of title is not necessarily involved. The question is, has the unlimited and unrestricted right of possession or enjoyment of the property transferred been postponed until the death of the transferor? Thus, in Estate of Madison, 26 Cal.2d 453, 159 P.2d 630, the Court held that a gift of income for the trustor's life with remainder at the trustor's death, with no reservation of any interest by the trustor, was taxable. The basis of the decision was that the death of the transferor changed, to some material degree, the rights of the donee of the property by removing certain shackles in the use and enjoyment of the property that had theretofore existed.

General Principles Applied to the Instant Case:

The general principles above set forth are not seriously in dispute. Nearly every state court in the land approves those principles, but there is no unanimity of application of them to particular transactions. It would unduly prolong this opinion to quote from, or attempt to analyze, the many apparently conflicting cases on this subject. Most of them are collected and commented upon in an article by Henry Rottschaefer entitled "Taxation of Transfers Taking Effect in Possession at Grantor's Death" appearing in 26 Iowa Law Review 514. Most of the cases cited by both parties to the present appeal are discussed and commented upon in that article, and a quotation from it will later be set forth herein.

[5] The first contention of appellant is that the transfers here involved were commercial in nature, amounting to the purchase of an annuity by Ida from the Uni-

versity for an inadequate consideration; that they were commercial transactions and not gifts, and that there is no tax imposed by the statute on annuities. These contentions are unsound. While it is, of course, true that the money paid over for the purchase of an annuity is not taxable under an inheritance tax statute such as ours, for the obvious reason that such a transfer is not intended to take effect in possession or enjoyment at or after death, for this rule to apply, the transfer must involve the purchase of an annuity and not the making of a gift. Moreover, in the purchase of an annuity the consideration paid the annuitant is adequate. The transactions here involved were undoubtedly primarily donative in purpose. Ida made various gifts to the University but attempted to and did retain some of the economic benefits of the donated property. She reserved to herself, in effect, a life income. That the primary purpose of Ida was donative and was not to purchase an annuity, in the commercial sense, is made crystal clear by the various amendments to the original agreement which decreased the amount of the payments to be made to Ida. These various reductions also indicate that, so far as the payments to be made to her were concerned, all she desired was to realize the actual income produced from the fund. Thus, by the agreement of February 1, 1938, Ida gave up her right to the various rates of interest agreed upon, and agreed to take only the net income earned by the fund, with a guaranteed minimum of $1,600. By the agreement of October 13, 1941, she agreed to a further reduction. The agreements constantly refer to the transfers as "donations" or "gifts." The general informality surrounding these transactions, and the frequent changes in the basic agreement, demonstrate that the transactions were not commercial but donative in purpose.

It should be mentioned that Ida could have purchased annuities from an insurance company that would have given her the payments required for much less than she gave the University. Thus, for the initial $20,000 she received an agreement to pay her $1,200 annually. An equivalent annuity could have been purchased by her, at her then age, for $12,519. As the basic agreement was subsequently amended, and the amount of payments reduced, and as she grew older, the disparity became much larger.

[6] The real question in this case is not whether these transactions were gifts or amounted to the purchase of an annuity, but whether the full possession or enjoyment of the funds by the University did not occur until at or after the death of Ida. If the original agreement had reserved the net income of the fund to Ida, there would be no doubt that the transaction would be taxable inasmuch as the full enjoyment of the fund by the University would then clearly have been postponed until the death of the donor. Nearly all of the decided cases so hold. But, does it make any difference that in form the transaction is a transfer of the fund to the donee, and the agreement is to pay a fixed sum for life to the donor which in fact is measured by a fixed rate of interest on the fund? The original agreement was to pay 6% on the donated fund; the agreement of April 26, 1927, provided for 5% interest on the $5,000 new gift, and 6% on the old one; the agreement of January 6, 1931, provided for 5% on the new gift; on August 10, 1935, the parties reaffirmed the 6% agreement as to the first $20,000, 5% on the two $5,000 gifts, and 4% on the one then made; on February 1, 1938, it was agreed that she was to receive 4% on the $40,000. In form, the transaction was a complete transfer of the fund, with an independent agreement by the University to pay a fixed sum for life to the donor. If the form of the transactions be disregarded, and their substance be considered, it is apparent that the parties first expressly provided that the fund should be kept intact, and, secondly, that they intended that such fund should not be substantially diminished by any payments made to the donee. It is equally clear that, from a practical standpoint, the parties intended and expected that the donated fund would create the income to be paid to the donee. From a practical and realistic standpoint, the case is simply one where the donee has reserved the net in-

come to the fund for life. This being so, the transfers are taxable under the sections already mentioned.

This conclusion seems so clear that it would not be necessary to further discuss it were it not for the fact that some courts have emphasized the technical form of similar transfers and held them non-taxable, while others have emphasized the substance and held them taxable. There are many cases on this subject and they are in hopeless conflict. Many of them are cited and discussed by the parties hereto in their briefs. The following passage from the article by Professor Rottschaefer in 26 Iowa Law Review 514, 521, contains a reasonably accurate analysis of most of these cases: "The typical case of a transfer includable in the class of transfers intended, etc., because of the grantor's reservation of the income from the transferred property for his life is one in which the reservation is of the income earned by such property. The courts have frequently had to determine to what extent that relation between income and property is essential to the existence of such a taxable transfer. The problem has arisen because a grantor has made an outright transfer of property in exchange for an enforceable promise that the grantee will confer upon him for his life specified economic benefits of the kind that could have been obtained directly by retaining the property. A promise by the grantee to support the grantor for life, unaccompanied by any obligation to apply thereto the property or its income, is generally held to confer upon the grantee an unlimited present right of using and enjoying the transferred property, and this is held to render the transfer not taxable as one intended, etc. In re Thorne's Estate 44 App.Div. 8, 60 N.Y.S. 419. The same result has been reached where the grantee's promise is to pay the grantor an annual amount which was in fact equal to six per cent on the sum transferred. In re Honeyman's Estate, 98 N.J.Eq. 638, 129 A. 393. If, however, the promise is to pay interest as such, the transfer is held taxable on the theory that this effects a postponement of the grantee's actual enjoyment of the property until the grantor's death. Fidelity Union Trust Co. v. Thayer-Martin, 118 N.J.L. 277, 192 A. 74; In re Barber's Estate 304 Pa. 235, 155 A. 565; Todd's Estate. 237 Pa. 466, 85 A. 845, 43 L.R.A.,N.S., 869. *The distinction between these cases is purely formal, and it is questionable whether the mere difference in the forms of the promises therein involved should entail such different tax results.* A promise by the grantee to pay the grantor a definite annuity for life which is not required to be paid out of the property or its income and is payable whether or not there be any such income is also held to involve no reservation by the grantor of any economic benefits from the property, and the transfer of the property in exchange therefor is not deemed to make it taxable. People v. Union Christian Missionary Society, 341 Ill. 251, 173 N.E. 132; Fidelity Union Trust Co. v. Thayer-Martin, supra; In re Edgerton's Estate, 35 App.Div. 125, 54 N.Y.S. 700; In re Krause's Estate, 325 Pa. 479, 191 A. 162; In re Hamilton's Estate, 217 Wis. 491, 259 N.W. 433. If however, the transfer is expressly made subject to the agreement to pay the annuity, or the property is in effect made security for the performance of the promise, some courts hold the transfer to be taxable, Fidelity Union Trust Co. v. Thayer-Martin, supra, while others deny that this effects any postponement of the enjoyment of the property by the grantee until grantor's death. In re Edgerton's Estate, supra. All courts would agree that a promise to pay the annuity out of the income or, if necessary, the principal of the transferred property would render the transfer taxable. Estate of Schuh, 66 Mont. 50, 212 P. 516. It is undoubtedly technically correct to hold that the grantee's possession and enjoyment are not postponed when he is under no obligation to devote either the principal or interest to the discharge of his promise to pay the grantor the specified annuity. *However, it cannot be overlooked that the annuity is usually fixed at an amount bearing a close equivalence to the income expected to be realized from the transferred property, and that the grantee's capacity to meet his promise is frequently due to his acquisition of said property and is in any case enhanced by its acquisition.* On the other side is the consideration that he bears the risk of losses in the value of the property and may be called upon to make good his promise even after that has ceased to produce any income." (Italics added.)

The author concludes that most of the courts today are no longer using the technical and formal reasoning once employed, but are looking to see, from a realistic standpoint, what economic benefits are in fact shifted by the questioned transfer. If the shift of such benefits "is in any manner dependant upon the grantor's death, taxability is affirmed. * * * The change in emphasis is likely to mean that those courts which have not yet decided whether particular transfers are within the defined class will include some that earlier decisions have held not includable." (P. 547.)

[7] The leading cases relied upon by appellants are In re Honeyman's Estate, 98 N.J.Eq. 638, 129 A. 393, and In re Krause's Estate, 325 Pa. 479, 191 A. 162, which involved transfers substantially similar to those here involved, and where the courts held the transfers not taxable. See, also, Raymond v. Commissioner of Internal Revenue, 7 Cir., 114 F.2d 140, involving the federal income tax, but where a somewhat similar problem was involved. The reasoning employed in these cases is typical of the formal and technical distinctions employed by the courts that hold such transactions nontaxable. The respondent places great reliance on Fidelity Union Trust Co. v. Thayer-Martin, 118 N.J.L. 277, 192 A. 74, affirmed 119 N.J.L. 425, 197 A. 40, and claims that it indicates a change in attitude on the part of the New Jersey courts. No good purpose would be served by quoting from these cases at length. We think that the modern, proper, and realistic view is that where a transfer is made to a charitable institution subject to an agreement to pay yearly to the donor for life a specified sum approximating the income earned by such fund, the transfer is subject to the tax because it is appearent that the full enjoyment of the fund cannot be realized by the charity until the obligation to make the payments ceases—i. e., upon the death of the donor. Even though the transfer is in form absolute and the obligation to pay the yearly stipend in form is independent, the transfer is taxable. This is so because, even though the particular funds contributed may be expended for the general purposes of the charity (that is not so in the instant case), it is apparent that, from a practical standpoint, the charity must either use the donated funds or tie up an equivalent sum from other sources in order to realize the income to pay the donor. We think this rule has been adopted in this state in the Estate of Madison, 26 Cal.2d 453, 159 P.2d 630. In that case A crated three inter vivos trusts to last for the life of A. In two of them the income was to be paid to the named beneficiaries during A's life and they were to get the corpus upon his death. In the third trust the income was to be accumulated for the named beneficiary until A's death, and, upon his death, to be paid with the corpus to the beneficiary. The case is a much closer one than the instant case because there the grantor reserved no rights of any kind over the property and received, so far as the agreement is concerned, no benefits from the property or from the beneficiaries. Nevertheless, an inheritance tax on the balance remaining in the trusts at the time of A's death was imposed. It was held by a majority of the Supreme Court that, from a realistic standpoint, the gifts were intended to take effect in possession or enjoyment at or after the death of A within the meaning of the statute. It was held that the "shackles" of the trust which prevented enjoyment by the beneficiaries during A's life were that the beneficiary interests were contingent upon the beneficiaries surviving A—they were his children; the trusts contained spendthrift provisions; the beneficiaries could not dispose of their interests in the corpus during A's lifetime. In so holding, Mr. Justice Traynor, speaking for the majority, stated 26 Cal.2d at page 457, 159 P.2d at page 633 "The issue is not whether the donor retained some power or interest until his death, but rather whether he tied up the property with so many strings, which could not be loosened until his death, that the transfer may be regarded as having been intended to take effect in possession or enjoyment at his death within the meaning of

the statute. It should be noted at the outset that the statute speaks, not of title, but of possession and enjoyment."

That reasoning clearly indicates that in this state we have approved the modern, realistic view of such transfers, and abandoned the technical formalistic approach advocated by appellants and adopted by some courts.

[8] It is worthy of mention that the case of May v. Heiner, 281 U.S. 238, 50 S. Ct. 286, 74 L.Ed. 826, 67 A.L.R. 1244, so strongly relied upon in the dissenting opinion in the Madison case, was recently (January 17, 1949) expressly overruled by the United States Supreme Court in Commissioner of Int. Rev. v. Church, 335 U.S. 632, 69 S.Ct. 322, 93 L.Ed. 288. In the Heiner case it had been held that the corpus of a trust transfer need not be included in a grantor's estate for federal estate tax purposes even though the grantor had retained a life income from the corpus. This was reversed, even in an estate tax case where the tax is levied on the right to transmit property. An inheritance tax is, of course, levied on the right to receive. The Supreme Court of United States discusses, at length, the history of decisions interpreting the phrase "possession or enjoyment" and then declares that the states "with what appears to be complete unanimity" 335 U.S. 632, 69 S.Ct. at page 325, 93 L.Ed. at page 295, have agreed that, in interpreting the clause, the courts do not look merely at the passing of title, but look to see whether the transferor has in fact parted, during his lifetime, with his possession and enjoyment of the property. 335 U.S. 632, 69 S.Ct. at page 328, 93 L.Ed. at page 297, the Court reaffirmed the doctrine of Helvering v. Hallock, 309 U.S. 106, 60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368, in which it had stated: " 'In determining whether a taxable transfer becomes complete only at death we look to substance, not to form. * * * However we label the device [if] it is but a means by which the gift is rendered incomplete until the donor's death' the 'possession or enjoyment' provision applies." The Court also reaffirmed Goldstone v. United States, 325 U.S. 687, 65 S.Ct. 1323, 89 L.Ed. 1871, 159 A.L.R. 1330, and 335 U.S. 632, 69 S.Ct. at page 329, 93 L.Ed. at page 299 quoted, with approval, from that case the reference to the Hallock case as follows: "It thus sweeps into the gross estate all property the ultimate possession or enjoyment of which is held in suspense until the moment of the decedent's death or thereafter. * * * Testamentary dispositions of an inter vivos nature cannot escape the force of this section by hiding behind legal niceties contained in devices and forms created by conveyancers." In the Church case the Court stated 335 U.S. 632, 69 S.Ct. at page 329, 93 L.Ed. at page 298: "* * * passage of the mere technical legal title to a trustee is not necessarily crucial in determining whether and when a gift becomes 'complete' for estate tax purposes. Looking to substance and not merely to form, * * * the inescapable fact is that Church retained for himself until death a most valuable property right in these stocks —the right to get and to spend their income. * * * Even if the interest of Church was merely 'obliterated,' in May v. Heiner language, it is beyond all doubt that simultaneously with his death, Church no longer owned the right to the income; the beneficiaries did. It had then 'passed.' It never had before. For the first time, the gift had become 'complete.'"

[9] Under the reasoning of these cases, and particularly under the reasoning of the Madison case, even if Ida Hyde had relinquished all controls over the property, which, in view of the various modifications of the agreement she apparently had not, it is quite clear that complete enjoyment of the transferred funds did not pass to the University until Ida's death, inasmuch as the University assumed an obligation to pay her annual payments which constituted, from a realistic standpoint, a charge upon the property. The transfers are therefore taxable. This conclusion makes it unnecessary to pass on the question as to whether the transfers are taxable under § 13645 of the Revenue and Taxation Code above quoted. That section was first passed in 1935, Stats. of 1935, Chap. 358, pp. 1266, 1268, and, since such statutes are not retroactive, it could only apply to the two $5,000 gifts made subsequent thereto.

The other sections above quoted are sufficient without the necessity of relying on § 13645 at all.

At the oral argument the court suggested that if the transfers were taxable, perhaps they should be treated as partly gifts and partly purchases of annuities, and exempted from the tax to the extent that the transferor received consideration of actual value. Supplemental briefs were filed on this point. According to the computations of counsel, had Ida purchased annuities from insurance companies to pay her the amounts required by the various agreements, their total cost would have been $19,815.03, thus leaving $20,184.97 as the amount of the five gifts instead of $40,000.

[10] After carefully considering the question we are convinced that, under the statute, the entire value of all the transfers is taxable.

[11] While the suggested result would undoubtedly be equitable, and while many statutes imposing similar taxes recognize such an equitable principle, general principles of equity have no application to tax statutes. Subject only, to constitutional limitations, the statute is the measure of the tax.

New Jersey, in Fidelity Union Trust Co. v. Thayer-Martin, 118 N.J.L. 277, 192 A. 74, held, in a case similar to the instant one, that, where the transferor received some consideration for the transfer, the value of such consideration should be deducted in computing the tax. The New Jersey statute, Chap. 303, Public Laws of 1931, p. 749, N.J.S.A. 54:34-1 et seq., is far less specific than ours. The same can be said about Raymond v. Commissioner of Internal Revenue, 7 Cir., 114 F.2d 140, where the federal income tax was involved and where the equitable principle under discussion was applied. This was done because the language of the statute permitted it.

Our statute is clear on the point. Even appellant admits that, read "literally," no deduction can be permitted. Sections 13401-13403 of the Revenue and Taxation Code provide that the tax shall be computed upon the clear market value of the transferred property, less certain deductions, none of which here exists. Section 13641 provides that "Any transfer * * * without a valuable and adequate consideration, is a transfer subject to this part." "Valuable and adequate consideration" is defined as "a consideration equal in money or money's worth to the full value of the property transferred." No statutory exemption or reduction is allowed where the consideration is inadequate in the case of the inheritance tax, although it is in the case of the gift tax statute. Section 15106 of the Revenue and Taxation Code.

It will be noted that our present statute above quoted defines consideration in terms of full money's worth. Under the old inheritance statute, Stats. of 1911, p. 713 which required the consideration to be "valuable and adequate" but did not define consideration in terms of full money's worth, the courts nevertheless looked to see if the consideration was in fact adequate as well as valuable. In the case of Estate of Reynolds, 169 Cal. 600, 147 P. 268, the Court held that an agreement to assume $30,000 in debts and to pay the donor $600 a month for life, while valuable, was an inadequate consideration for a gift of over $100,000. The tax was levied on the full $100,000. The state of Massachusetts has a statute substantially similar to ours, and the courts of that state have held that where there is no provision in the statute for partial exemption on account of partial consideration, the total gift must be taxed. Worcester County Nat. Bank v. Commissioner of Corp., etc., 275 Mass. 216, 175 N.E. 726; Saltonstall v. Treasurer and Receiver General, 256 Mass. 519, 153 N.E. 4. Harsh though our statute may be, the remedy lies with the Legislature and not with the courts.

The portion of the order appealed from is affirmed.

WARD and BRAY, JJ., concur.

92 Cal.App.2d 143

RIZZUTO et al. v. NATIONAL RESERVE INS. CO.

Civ. 13882.

District Court of Appeal, First District, Division 2, California.

June 1, 1949.

Hearing Denied July 28, 1949.

1. Insurance 🔑319(1)

An insured could not recover on fire policy covering building "while occupied only for barber shop purposes," where about half of building was occupied by clothes pressing and altering establishment and agency for garment cleaners at time of fire.

2. Insurance 🔑327

An insurer may select character of risk to be assumed, and locality, as well as custody, of insured property and incidental care, which it will naturally receive because of such locality and custody, enter into consideration of such risk.

3. Insurance 🔑319(1)

Violation of condition of fire policy by use of insured building for another purpose than that specified therein does not render policy void ab initio, but simply suspends insurance for duration of violation.

4. Insurance 🔑377(1)

An insurer, without knowledge of occupancy of insured building for clothes pressing and altering, as well as barber shop, purposes, and under no duty to inquire respecting occupancy thereof under circumstances, did not waive violation of condition in policy that building be occupied only for barber shop purposes.

5. Insurance 🔑378(1)

Knowledge of broker, who was insured's agent in procurement of fire policy covering building while occupied only for barber shop purposes, that about half thereof was occupied by clothes pressing and altering establishment, was not attributable to insurer.

6. Insurance 🔑665(3)

Evidence that portion of store building, rented to one operating clothes pressing shop therein, contained a gas heater, with pilot light, a boiler, steam pressing apparatus, and hanging clothes which had been cleaned, supported trial court's finding that lessor effected material increase in fire hazard, so as to bar recovery on fire policy covering building while occupied only for "barber shop purposes."

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Barber Shop Purposes".

* * *

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by Louis Rizzuto and another against the National Reserve Insurance Company on a fire insurance policy. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Wm. R. Biaggi, San Jose, Campbell, Hayes & Custer, Austen D. Warburton, Alfred B. Britton Jr., and Daniel M. Feeley, San Jose, for appellant.

Long & Levit, San Francisco, Bert W. Levit, David C. Bogert, San Francisco, for respondent.

GOODELL, Justice.

Appellants sued to recover a fire loss of $1,839.48, on an insurance policy written by respondent. Judgment, entered on the findings, was in favor of the insurer for its costs, and this appeal was taken.

Appellants own a frame store building in San Jose. On July 4, 1945 respondent issued the policy in suit covering the property for $2600, "while occupied only for barber shop purposes". Appellant Louis Rizzuto is a barber and his shop is in the southerly half of the store. Appellants rented the northerly half to one Herman Yeager, who occupied it as a pick-up cleaning shop. At the time of the fire, May 6, 1946, the premises were occupied by both shops.

The court found that the building was damaged to the extent claimed, $1,839.48, and that proofs of loss were furnished.

In Yeager's half of the store no cleaning was done. It was simply an agency or depot to which patrons brought their clothes, whence they were sent out to be cleaned or dyed, and when returned "rumpled", they were pressed and hung up, to be called for on a "cash and carry" basis. The equipment therein was a gas heater (with a pilot light), a boiler, and steam pressing apparatus. It was this half of the store that was damaged by fire. The barber shop was damaged slightly by water.

Appellants' allegation of performance of all the conditions of the policy on their part to be performed was denied, and the court found in the negative on that issue.

[1] The court found that at the time of the fire the place "was not occupied only for barber shop purposes and that approximately one-half of said building was then occupied for other purposes as a pressing and altering establishment and agency for garment cleaners."

Appellants contend that there is no substantial evidence to support the finding of their non-performance. They argue that they paid the premium, that the policy was in effect at the time of the fire and had never been cancelled nor any part of the premium returned, and that they made due and timely proof of loss. All this is true, but *the condition precedent to their recovery which they did not and could not prove* was that the building was damaged "while occupied only for barber shop purposes."

[2] In Mawhinney v. Southern Ins. Co., 98 Cal. 184, 32 P. 945, 20 L.R.A. 87, the coverage was for loss or damage by fire to a harvesting outfit "* * * all while owned by assured * * * and operating in the grain fields, and in transit from place to place in connection with harvesting, in Fresno county * * *." When destroyed by fire it was in the yard of a blacksmith shop in Fresno, awaiting repairs. In deciding in favor of the insurer the court said: "An insurer is not liable except upon proof that the loss has occurred within the terms of the policy, and when making the policy he is at liberty to select the character of the risk he will assume. If the terms of this risk are distinct, and without ambiguity, the assured cannot complain if the risk assumed does not cover the loss. The locality of the property, as well as its custody, and the incidental care that, by reason of such locality and custody, the property will naturally receive, are elements which enter into a consideration of the risk to be assumed; and, if they are made a part of the conditions of the policy they must be observed by the assured, as fully as any other conditions, before the insurer can be made liable for a loss. In the present case the insurer would reasonably assume that the harvester would be under greater care and watchfulness while it was actually operating in the fields, or in transit from place to place for such purpose, than if left standing, unhoused and uncared for, in open grounds near a blacksmith shop. But, whatever may have been the motives for limiting the extent of his risk, he cannot be made liable for a loss that was not covered by the risk assumed in the policy."

An earlier case was Benicia Agricultural Works v. Germania Ins. Co., 97 Cal. 468, 32 P. 512, while a later one was Slinkard v. Manchester Fire Assur. Co., 122 Cal. 595, 55 P. 417, both involving harvesters and both holding as the Mawhinney case holds.

In Allen v. Home Ins. Co., 133 Cal. 29, 32, 65 P. 138, 139, the court said: "The policy was a contract to pay only in case of loss of the insured premises while occupied as a dwelling house. *The liability was limited by the terms of the contract, and such limitations are held valid.* It is the business of the insured, and the burden is upon him, to see that the premises are not used in such manner as to make void the policy. *The insurer is at liberty to select the character of risk he will assume,* and he is not liable except upon proof that the loss occurred within the terms of the policy. * * * [Citations including Mawhinney and Slinkard cases, supra.]" (Emphasis added.) With respect to the failure of the complaint to bring the case within the "while occupied" condition the court, 133 Cal. at pages 30–31, 65 P. at page 138, said: "It was essential for plaintiff to prove that the fire occurred while the premises were occupied as such dwelling house. * * * The allegation was not merely a condition precedent, as referred to in Code Civ.Proc. § 457. *It went to the very essence of plaintiff's right to recover.* Certain conditions subsequent to the right of recovery, matters of defense, the non-performance of conditions subsequent, and certain negative prohibited acts need not be pleaded by plaintiff; but the rule does not extend to *the essence of the cause of action.*" (Emphasis added.)

In Arnold v. American Ins. Co., 148 Cal. 660, 84 P. 182, 183, 25 L.R.A.,N.S., 6, the policy likewise covered a building "while occupied as a dwelling house." The Allen case was followed, the court holding that allegation and proof were essential that the premises were so occupied at the time of loss.

These cases have been repeatedly followed and their authority seems never to have been questioned.

In National Reserve Ins. Co. v. Ord, 9 Cir., 123 F.2d 73, 74, the court said: "Unless the provision that the insurance covered the building while occupied only for packing plant purposes is negatived by a rider on the policy * * * insured, under the controlling California law, was not entitled to recover." Citing Allen and Arnold cases, supra.

[3] It is settled by the case of Steil v. Sun Ins. Office et al., 171 Cal. 795, 155 P. 72, that a violation such as that in this case does not render the policy void ab initio. The insurance is simply suspended for the duration of such departure or violation. The Steil case holds that the insurance clause completely protects the insurer but does so without going to the extent of voiding the policy. Hargett v. Gulf Ins. Co., 12 Cal.App.2d 449, 455, 55 P.2d 1258, follows the rule of the Steil case and Gawecki v. General Ins. Co. et al., 9 Cir., 167 F.2d 894, follows both the Hargett and Steil cases. See, also, National Reserve Ins. Co. v. Ord, supra.

The finding that at the time of the fire the insured premises were occupied by Yeager's shop in addition to the barber shop, which finding is not challenged, is decisive of this case on the authorities already cited and for the reasons which are given therein. The risk which respondent assumed in writing the policy was such as attaches to a barber shop, with "all risks incident to the conduct of that business when carried on in the usual manner." O'Neill v. Caledonian Ins. Co., 166 Cal. 310, 314, 135 P. 1121, 1122, and nothing more.

What is said in the Mawhinney case with respect to the considerations which enter into and control the writing of a risk,—the elements of choice and selection and the weighing of safety factors—is singularly apposite since this record shows that the equipment in Yeager's shop was a gas heater (with a pilot light), a boiler and steam pressing apparatus, and that there were clothes hanging in the place, while respondent was contracting respecting a barber shop.

[4, 5] Appellants argue "that conditions in a policy of insurance which would render it void ab initio, under facts known or readily ascertainable by the insurer are waived by its issuance." The cases already cited show that a violation of a "while occupied" condition, or one akin to it, does not render the policy void ab initio, or at all void, it simply suspends the insurance while the violation continues. Moreover, there is nothing in the record to indicate that respondent knew of the dual occupancy hence there could have been no waiver. See Maryland Cas. Co. v. Ind. Acc. Comm., 179 Cal. 716, 720, 178 P. 858. Respondent was under no duty of inquiry respecting occupancy, under the peculiar circumstances of this case. An insurance broker had handled appellants' insurance for 24 years and he knew all about the existing physical condition of the store. He sent to respondent's general agents in San Francisco an earlier policy written by another company which policy was about to expire. The old policy covered appellants' building "while occupied only for barber shop purposes" and the general agents in San Francisco in writing the policy in suit followed the same formula. The broker's knowledge was in no way attributable to respondent. The court found that the broker was appellants' agent in the procurement of the policy.

Appellants rely on the case of Raulet v. Northwestern National Ins. Co., 157 Cal. 213, 107 P. 292. In that case the policy contained a "while contained" condition and it was claimed that the complaint did not allege with certainty that the property when destroyed was contained in the place designated. The Allen and Arnold cases, supra, were relied on, but the court held that the allegations were certain enough hence those cases had no application. Aside from that it is not at all clear that that case is at all similar to this. Here the question is not whether a particular provision (such as one against encumbrances) has been breached, but whether the insurer could and did limit its risk to property "while occupied only for barber shop purposes."

[6] Appellants' second contention is that there is no substantial evidence to support the finding that appellants had effected a material increase in hazard and a change of possession by renting one-half of the store as a cleaning shop, without endorsement.

The policy contained the provision: "Matters suspending insurance. Unless otherwise provided by agreement * * * this company shall not be liable for loss or damage occurring (a) while the hazard be materially increased by any means within the control of the insured * * *" The court found that such hazard had been materially increased by renting approximately one-half the place to Yeager. There is ample evidence to support this finding since the record shows that Yeager's store contained a gas heater (with pilot light), a boiler and steam pressing apparatus, plus clothes hanging up which had just gone through the cleaning process. It is self-evident that such combination produced a fire hazard materially higher than that attending a barber shop. At any rate the court so found. Moreover a battalion chief who took part in fighting the fire stated in his report that it was caused by "Clothes hanging over boiler in cleaning part" while the Chief of the San Jose Fire Prevention Bureau, when asked for his opinion, answered: "There's two questions there that I never fully decided upon, whether some of the clothes fell on top of the boiler, or whether they ignited from the pilot light." The fire could have started from either cause even though the place was entirely free from such solvents as are found in a fully equipped cleaning establishment.

While there was ample evidence to support the findings just discussed, the first point is alone really decisive of the case for the departure from the "while occupied" condition is admitted, and that worked a suspension of the insurance.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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92 Cal.App.2d 163

HILLMAN et al. v. KOCH.

Civ. 16625.

District Court of Appeal, Second District,
Division 3, California.

June 2, 1949.

Rehearing Denied June 22, 1949.

Hearing Denied July 28, 1949.

1. Brokers ⇨40, 43(3)

If a vendor, after services of a broker have been rendered, promises in writing to pay a commission, agreement meets requirements of statute of frauds requiring agreements authorizing a broker to sell realty for a commission to be in writing even though there was no previous employment of broker, and acceptance of benefits of broker's services creates a moral obligation sufficient to furnish a consideration for the promise. Civ.Code, § 1624, subd. 5.

2. Brokers ⇨43(3)

Agreement to pay realty broker's commission contained in contract of sale signed by vendor after purchaser had been procured by brokers met requirements of statute of frauds requiring an agreement authorizing a broker to sell realty for a commission to be in writing although original employment of brokers was oral. Civ.Code, § 1624, subd. 5.

3. Reformation of Instruments ⇨45(2)

Evidence of fraud or mistake between vendor and brokers in drafting agreement relating to payment of brokerage commissions for sale of realty was insufficient to justify reformation of agreement.

4. Brokers ⚷43(3), 71

Contract for sale of realty requiring brokers to pay escrow fee providing that brokers were to receive commission and that vendor would receive a certain net sum would be interpreted as requiring payment as brokerage commission of difference between net price stated in contract and sale price and was sufficiently definite to meet requirements of statute of frauds requiring an agreement authorizing a broker to sell realty for a commission to be in writing. Civ.Code, §§ 1624, subd. 5, 1647, 1649.

5. Frauds, statute of ⚷113(3)

While an essential element of an agreement may not be supplied by parol, usual rules of interpretation are to be applied to a writing to determine whether it is sufficiently definite to comply with statute of frauds, and agreement will not be held deficient for failure to express that which is clearly implied when writing is interpreted in accordance with intentions of parties. Civ.Code, § 1624, subd. 5.

6. Appeal and error ⚷1008(1)

In action by brokers for commission against vendor, question whether net price vendor was to receive for realty appeared in contract was for trial court.

7. Appeal and error ⚷1008(1)

In action by brokers for commission against vendor, question whether separate instruction to escrow signed by vendor and broker stating that no commission was to be paid in that escrow was intended as a waiver of brokers' claim to a commission was for trial court.

◆

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by A. M. Hillman and Charles Luksis against Joseph Koch for reformation of a contract and for damages. From a judgment for the plaintiffs, defendant appeals.

Affirmed.

Albert H. Allen and Hyman Goldman, Beverly Hills, for appellant.

Martin Goldman and Alvin P. Jackson, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiffs brought this action for the recovery of the sum of $2,362.05, designating their complaint as one for reformation of a contract and for damages. They were awarded the amount prayed for and the defendant appeals.

The cause of action is upon a written contract which the trial court found entitled plaintiffs to receive for their services as real estate brokers, the difference between $25,000 for which defendant's property was sold, and $22,500 which defendant agreed to accept for the property.

The controversy hinges upon the construction to be given to the agreement of sale between defendant and his purchaser, including a notation thereon with respect to the net selling price. Plaintiffs and defendant were real estate brokers. Defendant owned the real property in question, plaintiffs having no interest therein. On October 29, 1945, plaintiffs showed the property to Antoinette Cvirka. They had no written listing of the property, or agreement to act as defendant's brokers, although Hillman had been authorized orally by defendant to find a purchaser. Mrs. Cvirka, after inspecting the property, signed an agreement to purchase the same for $24,000, and she gave the brokers her check for $250 as a part of the purchase price, agreeing to pay $11,250 more and to take title subject to a mortgage or trust deed of record having an unpaid balance of $12,500. Both Luksis and Hillman signed the agreement as brokers. Hillman took the agreement to defendant and discussed with him the terms of the sale. Below the signatures that were already on the paper the following appeared in print: "I agree to sell the above described property to said buyer upon the terms and conditions above stated and agree to pay to above named broker a commission of $——— or 1/2 of buyer's deposit, if buyer shall default, but not to exceed the full amount of said commission." Defendant signed the agreement below this writing. Plaintiff Hillman and defendant testified that before defendant's signature was attached a pencil line had been drawn through the following words: "and agree to pay the above named broker a commission of". Upon the agreement, as it was introduced in evidence, there appeared immediately above the quoted printing the following: "22,500 net." Immediately below the printing appeared the following: "Brokers pay escrow fee." Hillman testified that he first wrote "$22000 net" as the net price defendant had previously given him and that at defendant's direction he changed this to "22,500" and added "Brokers pay escrow fee" in the presence and at the request of defendant, before defendant signed the agreement. Defendant denied on the stand that the writing in question was on the agreement when he signed it, denied that he ever agreed to pay either Hillman or Luksis a commission, and asserted that it was definitely understood between Hillman and himself that the asking price of $25,000 he had quoted was his net price. After defendant signed the agreement he informed Hillman he would not sell the property for less than $25,000. Hillman reported this fact to Luksis and defendant gave the same information to Mrs. Cvirka by telephone. Escrow instructions were signed by Mrs. Cvirka by which she agreed to pay $25,000 for the property. Defendant also signed the instructions. At first they contained a direction to the escrow holder to pay a commission of $625 to the broker, Charles Luksis. This direction was inked out and the alteration initialed by defendant before he signed the instructions. Defendant also signed a separate instruction that he was to pay no commission "in this escrow." Luksis later signed below defendant's signature under a sentence reading: "I have read the above." Hillman testified that when this was arranged defendant explained that Hillman was to pay Luksis.

The complaint alleged and the court found that the written agreement of sale did not fully and correctly embody the real terms of the agreement and that the provision respecting the compensation of plaintiff should be reformed to read: "I agree to pay to the above named brokers all sums in excess of $22,500, received by me from the above named buyer, less the escrow fee, and said escrow fee being payable by said brokers." It was found that the sale was completed January 9, 1946, and that the escrow charges, including the cost of title insurance policy were $137.95.

[1,2] The briefs of the parties are devoted to a discussion of the law applicable to reformation of instruments and the proof upon which the court decreed a reformation. Defendant contends that the agreement was insufficient to meet the requirements of the statute of frauds because it failed to show an employment of plaintiffs, and that the court was powerless to add anything to it by a judgment of reformation. In support of this contention he cites Egan v. Pacific Southwest Trust & Savings Bank, 92 Cal.App. 1, 267 P. 719; Kleinsorge & Heilbrun v. Liness, 17 Cal.App. 534, 120 P. 444, and Patterson v. Torrey, 18 Cal.App. 346, 123 P. 224. These were actions based upon writings executed before the services of the brokers had been rendered. They are not in point. The agreement we are considering was entered into after the services of plaintiffs had been fully performed. It is well settled that if the seller, after the services of the broker have been rendered, promises in writing to pay a commission, the agreement meets the requirements of the statute of frauds even though there was no previous employment of the broker. Acceptance of the benefits of the broker's services creates a moral obligation sufficient to furnish a consideration for the promise. Johnson v. Krier, 59 Cal.App. 330, 210 P. 966; Corvin v. Smead Investment Co., 115 Cal.App. 175, 1 P.2d 507; Coulter v. Howard, 203 Cal. 17, 262 P. 751.

Defendant also contends that there was not sufficient evidence of fraud or mistake in drafting the agreement to justify reformation of it. This point is well taken.

The complaint alleged that defendant represented to plaintiffs, "that said contract as executed would give plaintiffs all the proceeds of the sale of the property therein described in excess of the sum of $22,500.00, less the escrow fee. The plaintiffs and defendant thereupon agreed orally, in reliance upon said representations and upon said contract, that defendant would give to plaintiffs all the proceeds of the sale of said property to said buyer in excess of the sum of $22,500.00, less the escrow fee."

[3] It is unnecessary for us to decide whether the meager facts alleged, if they had been proved, would have furnished ground for reformation of the agreement. In the first place there was no evidence whatever of any discussion as to the meaning or effect of the added words or that defendant made any statement or representation concerning them. In the second place the agreement, as written, has the meaning which, according to the complaint, it was intended to have. Insofar as the judgment attempts to reform the agreement it only states formally the understanding of the parties that was to be inferred from the writing, under a proper interpretation. The findings and conclusions constitute an interpretation of the agreement under which a promise to pay a commission is clearly implied. The element of reformation may be disregarded.

[4] If there is uncertainty in the agreement it results from the absence of a specific statement that the plaintiffs were to receive as a commission the portion of the purchase price which defendant relinquished, namely, the difference between $22,500 and $24,000. In resolving the uncertainty consideration must be given to the circumstances under which the agreement was made and the matter to which it relates. Sec. 1647, Civ.Code. If it was determined from the evidence that defendant believed the writing was understood by Hillman to be a promise to pay the brokers a commission it would be the duty of the court to interpret the uncertain provisions in accordance with Hillman's understanding. Sec. 1649, Civ.Code. It is clear that the trial court did so find and that the finding was justified. It is not questioned that plaintiffs effected the sale. Upon conflicting evidence the court found that they did not agree to donate their services. The notations in Hillman's handwriting were added in the course of a discussion of the matter of a commission and immediately following the striking out with defendant's knowledge of a portion of the printed agreement for the payment of a commission. The additional words were clearly intended as a substitute for the printed ones. What remained, with what was added would reasonably be interpreted as an agreement by defendant to sell the property for the price and terms stated and to retain for himself only the sum of $22,500. Who, if not the brokers, was to receive the difference? Hillman and Luksis had signed the agreement as brokers, acknowledging the receipt of the deposit. The notation "Brokers pay escrow fee" obligated them to pay an uncertain sum, which they interpreted to mean the expenses of the sale in the amount of $137.95. The only reasonable inference from the facts found is that the parties understood the writing to be a promise of defendant to pay plaintiffs a commission, from which they would pay the expenses of the sale due to the escrow, so that defendant would receive the full sum of $22,500 from the escrow. The essentials of a complete agreement were stated: the parties were named, the insertion of the net selling price and the provision that the brokers would pay part of the expense clearly indicated that a commission would be paid, and the amount of the commission appeared on the face of the instrument.

[5] The statute requires only that a note or memorandum of the agreement be subscribed by the party to be charged. Civ. Code, sec. 1624(5). While an essential element of the agreement may not be supplied by parol, the usual rules of interpretation are to be applied and the agreement will not be held deficient for the failure to express that which is clearly implied when the writing is interpreted in accordance with the intentions of the parties. Moore v. Borgfeldt, 96 Cal.App. 306, 273 P. 1114; Carrington v. Smither, 26 Cal.App. 460, 147 P. 225; Toomey v. Dunphy, 86 Cal. 639, 25 P. 130; Needham v. Abbot Kinney Co., 217 Cal. 72, 17 P.2d 109; Curran v. Hubbard, 14 Cal.App. 733, 114 P. 81, 83.

[6, 7] Defendant insists that his act of raising the price of the property to $25,000 should have been regarded by the trial court as conclusive proof that he had not previously signed an agreement to accept $22,-

500. It does seem strange that he would have insisted upon the higher price when he would gain nothing by it. Upon the other hand his testimony that plaintiffs were donating their services in his behalf was somewhat less than convincing. Although the result of adding one thousand dollars to the selling price was to increase the compensation of plaintiffs in that amount it did not otherwise affect their contract. Instead of seeking some modification of the agreement, in view of the higher price asked, defendant chose to deny all liability to pay a commission. These were problems for the trial court and do not present questions of law on the appeal. It was also a question of fact for the trial court whether the writing signed by Luksis in the escrow was intended as a waiver of plaintiffs' claim to a commission.

Plaintiffs were properly awarded the sum of $2,362.05, with interest.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

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92 Cal.App.2d 102

PFEIFFER v. ASH et al.

Civ. 7499.

District Court of Appeal, Third District,
California.

May 26, 1949.

Hearing Denied July 21, 1949.

1. Appearance 🔑19(1)

Although a defendant has a right to demand that process be issued against him in strict compliance with law, he may, by his own act, place himself within jurisdiction of court as effectively as though he were duly and regularly served with process.

2. Appearance 🔑9(1)

Generally, if an appearance is for any purpose other than to question jurisdiction of the court, it is "general."

3. Appearance 🔑9(1)

Party whose attorney prepared and entered into a stipulation with opposing attorney requesting a continuance made a "general appearance" and was subject to jurisdiction of court irrespective of validity of service of process.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "General Appearance".

◆

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Action by Katherine J. Pfeiffer against Kenneth K. Ash and Ada G. Ash and others to foreclose a mortgage on realty, wherein Emil Pianka filed a cross-complaint. From an order denying their motion to quash a writ of execution issued after entry of judgment on the cross-complaint, Kenneth K. Ash and Ada G. Ash appeal.

Affirmed.

J. Everett Barr, Harry A. Hammond, Yreka, for appellants.

Mark M. Brawman, Samuel R. Friedman, Yreka, for respondent.

PEEK, Justice.

This is an appeal from an order denying the motion of appellants Ash to quash a writ of execution issued after entry of judgment upon a cross-complaint in favor of the appellants' codefendant, the respondent Pianka, in an original action brought by Pfeiffer to foreclose a mortgage on real property executed by appellants to secure their promissory note.

The pertinent portions of the record reveal that on May 12, 1942, one day prior to his appearance by way of answer to the complaint, the appellants' counsel admitted and accepted service of the cross-complaint of the respondent herein, which cross-complaint was not filed until May 13, 1942. Said cross-complaint was predicated upon a laborer's lien previously filed by Pianka against the same real property sought to be foreclosed by plaintiff. The following month plaintiff filed her notice of motion to strike the answer of appellants to her complaint on the ground it set forth no defense. Plaintiff's motion was granted on October

13, 1942 and a summary judgment directing the foreclosure of the mortgage was entered. On April 9, 1943, after the cause had been set for trial appellants' counsel prepared a stipulation which he signed as "Attorney for defendants" and in which counsel for plaintiff and counsel for respondent joined in requesting that the trial of the cause be postponed to June 8, 1943, and "that two certain gasoline engines now removed from the real property which is the subject matter of this litigation, may be deemed attached to the realty." Said request was granted and the trial continued in accordance therewith. The minutes of the court further show that on June 3, 1943 "Pursuant to stipulation of respective counsel" the previous setting was vacated and the cause reset for trial on June 30, 1943. When the case came on for hearing on that date appellants were present in court with their counsel. The record further shows that on that date upon application of counsel for respondent the defaults of appellants were entered. Thereafter judgment was entered and a writ of execution issued against them. Four years after the entry of said default judgment counsel for appellants filed a notice of motion to quash, recall and vacate the execution on the ground that the purported judgment upon which the execution was issued was void. In denying said motion the trial judge stated in a memorandum opinion that although the attorney for appellants had not been legally served with said cross-complaint nevertheless as said attorney had prepared and entered into a stipulation with opposing counsel requesting a continuance of the trial he had therefore made a general appearance, and his motion to quash was denied. The present appeal is from that order.

[1] Since it is our conclusion that such a stipulation constituted a general appearance in the case, necessitating approval of the order of the trial court, it is immaterial whether or not the purported service of the cross-complaint upon appellants' counsel was valid. It is the well established rule in this state that although a defendant has a right to demand that process be issued against him in strict compliance with the manner provided by law, he may by his own act place himself within the jurisdiction of the court as effectively as though he were duly and regularly served with process.

[2] As stated in Zobel v. Zobel, 151 Cal. 98, 90 P. 191, it is the general rule that if an appearance is for any purpose other than to question the jurisdiction of the court it is general. In that case counsel for defendant appeared in open court and orally moved for a continuance which motion was denied and a judgment entered for the plaintiff. Thereafter defendant moved to set aside the decree on the ground that summons had not been personally served on him. His motion was granted but was reversed on appeal, the Supreme Court holding that his action in requesting a continuance constituted a general appearance. See also Judson v. Superior Court, 21 Cal.2d 11, 13, 129 P.2d 361, wherein the Zobel case is cited with approval.

[3] Applying such rule to the present case it appears that the order of the trial court sought by the quoted stipulation was such an order as would be available only to one who was a party subject to the jurisdiction of the court from which the order is sought.

Paraphrasing the opinion in the Zobel case, appellants were invoking the action of the trial court in their behalf for relief which could not be asked for on any other theory than that they were submitting themselves to the general jurisdiction of the court. And while the motion there made was oral the court observed that such fact [151 Cal. 98, 90 P. 192] "* * * could not affect the question of its constituting an appearance. *Had a written motion in that behalf been made based on affidavits, no question could possibly arise, but that it constituted a personal appearance in the action* * * *." (Italics ours.) In conclusion the court therein quoted with approval from Honeycutt v. Nyquist, Petersen & Co., 12 Wyo. 183, 74 P. 90, 109 Am.St.Rep. 975, that "a request for a continuance of a cause or an agreement to that effect either orally in open court or by a writing filed in the cause operates as a voluntary appearance." See also Ex parte Cullinan, 224 Ala. 263, 139 So. 255, 81 A.L.R. 166; 3 Am.Jur. sec. 20, p. 794; 6 C.J.S., Appearances, § 12, p. 37; Jones v. Wolverton, 15 Wash. 590, 47 P. 36; Trojan Drilling Co. v. Morrison, 83 Okl. 187, 201 P. 239.

Since appellants voluntarily made a general appearance in the action there was no error committed by the trial court in denying their motion to quash the execution issued upon the judgment previously entered.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

92 Cal.App.2d 114

POMERANTZ v. BRYAN MOTORS, Inc.

Civ. 16777.

District Court of Appeal, Second District,
Division 2, California.
May 27, 1949.

1. Appeal and error 🔑1056(1)

In action for injuries sustained when mechanic, who repaired plaintiff's automobile dropped fuel pump on plaintiff's toe while talking to plaintiff in repair area of defendant's garage, exclusion of evidence of defendant's maintenance of waiting room for customers was immaterial, in absence of proof that garage custom for business visitors to remain in waiting room was brought to plaintiff's attention.

2. Appeal and error 🔑1058(3)

Exclusion of testimony as to fact testified to by other witnesses for party proffering such testimony was not prejudicial to such party.

3. Appeal and error 🔑907(5)

The appellate court must presume that blackboard diagrams, not included in record on appeal, and marks made thereon by witnesses to indicate locations of happenings testified to, were favorable to respondent's thesis and substantially supported judgment appealed from.

4. Appeal and error 🔑1067

Refusal to instruct jury that plaintiff ceased to be a business visitor at garage, if he went beyond limits of his invitation, instead of remaining in waiting room maintained by defendant for customers, was not prejudicial to defendant, in view of evidence reasonably justifying jury's finding of mechanic's active negligence in dropping object on plaintiff's foot, since landowner may be liable for failure to exercise ordinary care toward a licensee or invitee.

5. Appeal and error 🔑1170(9)

An instruction that either plaintiff or defendant's witness willfully committed perjury and that jury should give close consideration to question of witnesses' veracity before taking first ballot was not prejudicial error as invading jury's province, presenting false issue, and preventing jury from reconciling witnesses' testimony, in absence of showing that it resulted in miscarriage of justice. Const. art. 6, §§ 4½, 19.

6. Trial 🔑236(1)

The trial court's comment to jury on witnesses' credibility is not confined to colorless summation of facts so long as jurors are directed to determine every witness' credibility and weight of his testimony notwithstanding such comment. Const. art. 6, § 19.

7. Trial 🔑236(1)

Where there is direct conflict in testimony of only two witnesses to paramount fact at issue, trial court may advise jury that one of witnesses has committed perjury so long as determination of guilty witness is left to jury. Const. art. 6, § 19.

8. Appeal and error 🔑882(12)

Appellant cannot complain of instructions given jury by trial court at appellant's request.

9. Appeal and error 🔑1033(5)

An instruction, on court's own motion, that jurors were sole judges of witnesses' credibility and weight of their testimony, was favorable to defendant, even if it was in conflict with instruction that either plaintiff or defendant's witness was guilty of perjury.

Appeal from Superior Court, Los Angeles County; Thurlow T. Taft, Judge of the Municipal Court of the City of Santa Monica.

Action by Paul Pomerantz against Bryan Motors, Inc., for personal injuries sustained when defendant's employee dropped an automobile fuel pump on plaintiff's great toe. Judgment for plaintiff, and defendant appeals.

Affirmed.

Tripp & Callaway, Los Angeles, Hulen C. Callaway, Los Angeles, for appellant.

Joseph Henry Wolf, Los Angeles, Henry E. Kappler, Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff's automobile having need of mechanical improvement, he left it with defendant's service department. Upon his return several hours later he engaged in conversation with the mechanic who had made the repairs. While the workman was explaining that he had installed a new fuel pump he dropped the old one upon plaintiff's great toe. Judgment was entered upon the verdict for plaintiff from which comes this appeal.

[1-3] Appellant assigns as error the court's ruling which excluded evidence of appellant's maintenance of a waiting room for customers in order that it might argue that respondent as a business visitor should have remained in a position of safety instead of proceeding to the hazardous area of the garage where repairs are made. There are two answers to this contention: (1) it was immaterial because proof of a custom in the garage had not been brought to the attention of respondent, State Compensation Insurance Fund v. Allen, 104 Cal. App. 400, 413, 285 P. 1053; (2) its exclusion was harmless since appellant's witness Cobb had testified to the very fact to be proved by the proffered testimony and Wilson who repaired respondent's car had testified that it was not customary for patrons to visit the section of the garage where mechanics were at work on automobiles. Under such circumstances no prejudice could have been suffered by appellant. In addition there is no evidence in the record that respondent knew that patrons were not permitted in the division of the garage used by the mechanics. Indeed, a contrary inference may readily be drawn from the testimony of Wilson that upon respondent's return for his car they engaged in considerable conversation relating to the necessity for installing the fuel pump which according to the witness was extended by a discussion of the need of new spark plugs. This conversation occurred in that part of the room devoted to repairs only. If respondent was unaware of the general custom of excluding patrons from the garage proper and if appellant failed to apprise him of the rule, his presence there could not have been in an area beyond the scope of his invitation. Also, respondent was a frequenter of the garage. Wilson testified that he had seen respondent in the garage from six to twelve times prior to the accident. Such common use of the area by customers in general and by respondent in particular demonstrates the futility of the assertion that the area was not open to patrons. State Compensation Insurance Fund v. Allen, supra. But the contention is rendered unfounded by the witness Terry, service salesman, who deposed that at the time of the accident there were "three men on the floor who might have waited on any customer." Moreover, relative to the maintenance of a waiting room and of respondent's asserted trespass, the entirety of the evidence was not included in the record before this court. Diagrams were drawn on the blackboard, witnesses made their marks upon such diagrams indicating the locations of the happenings referred to in the testimony. All diagrams and the marks upon them must be presumed to have been favorable to respondent's thesis and furnishes substantial support to the judgment. Lesser v. McCullough, 90 Cal.App.2d 586, 203 P.2d 832.

[4] Appellant contends that the court erred in refusing to instruct the jury to the effect that if respondent went beyond the limits of his invitation he ceased to be a business visitor. If this was error, appellant was not prejudiced thereby since a landowner may be liable for failure to

exercise ordinary care toward a licensee or an invitee. Newman v. Fox West Coast Theatres, 86 Cal.App.2d 428, 432, 194 P.2d 706. Regardless of appellant's contentions that respondent was negligent in not having remained in the "waiting room" and that it was prejudiced by the rejection of its offered proof, the finding of the mechanic's active negligence is reasonably justified. He certainly knew of respondent's presence at the time he held the pump and conversed concerning it. Consequently, whether the customer's waiting room was maintained and respondent should have remained therein, whether he was a licensee or invitee, the pump struck respondent's foot as the result of the negligence of appellant's agent and for the damages suffered the principal is liable. Oettinger v. Stewart, 24 Cal.2d 133, 139–140, 148 P.2d 19, 156 A.L.R. 1221; Demmon v. Smith, 58 Cal.App.2d 425, 432, 136 P.2d 660.

[5-7] The following instruction is assigned as error:

"It is, of course, as evident to you jurors as it is to the court that in this case either the plaintiff, Pomerantz, or the defendant's witness, Wilson, has wilfully committed perjury of the grossest nature.

"One who commits perjury deliberately seeks to thwart justice and the orderly administration of the law—and to the extent that perjury succeeds, to that extent courts of justice are brought into disrepute.

"Frequently jurors have the responsibility of deciding between conflicting but honest statements of different witnesses. In such cases it is possible to consider the testimony of the different witnesses without reaching the conclusion that any one of them has intentionally perjured himself by giving false testimony upon the witness stand. However, in this case you jurors must commence your deliberations, knowing that one of the two vital witnesses has deliberately lied and has done so with the undoubted purpose of deceiving you as to whether or not the alleged accident actually happened.

"You have a greater responsibility than most juries in deciding this case, since it is entirely possible that the verdict you render may be considered as practically amounting to an informal accusation of perjury against either Mr. Pomerantz or Mr. Wilson. However, I am confident you will not permit such realization to deter you to any extent from fearlessly considering the issues which it is your duty to determine and then reaching a decision as to the facts that will be based wholly upon the evidence you find worthy of credence.

"In your consideration of this case, keep in mind that perjury strikes at the very foundations of justice and that your verdict, based upon the credible evidence and the law given you in these instructions, will have effect not only in upholding the dignity of the courts but also in reflecting credit upon the American jury system in which we all believe.

"Finally, in this connection, let me urge that before taking your first ballot in the jury room you give long, close and prayerful consideration to this most important question as to the veracity of witnesses."

It is contended that such instruction was prejudicial in that it "invaded the province of the jury, presented a false issue, and prevented the jury from reconciling the testimony of the witnesses." Under the guidance of the constitution, art. VI. sec. 4½, a reviewing court must abstain from reversing a judgment "on the ground of misdirection of the jury * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." It is not suggested that the court in the instant cause erred in stating the substantive law. The assignment pertains primarily to the diction of the court, used to clothe its thought.[1]

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[1] The authorities cited by appellant as condemnatory of the criticized instruction, People v. Brow, 90 Hun. 509, 35 N.Y.S. 1009; State v. Chavez, 19 N.M. 325, 329–330, 142 P. 922, Ann.Cas. 1917B, 127; Smith v. Lehigh Valley R. Co., 170 N.Y. 394, 63 N.E. 338; Hunt v. Becker, 173 App.Div. 9, 160 N.Y.S. 45; Beers v. Metropolitan St. Ry. Co., 88 App.Div. 9, 84 N.Y.S. 785; Breslin v. Donnelly, 81 N.J.L. 691, 80 A. 474, Ann.Cas.1912D, 278, are from jurisdic-

Not only is affirmance required by section 4½ but the criticized instruction gains a status of high respectability by the application of another constitutional provision adopted in 1934. In that year the people added section 19[2] to Article VI of the organic law. By that enactment the ancient prerogative of the trial court was reestablished whereby it is permitted to comment on "the credibility of the witnesses" as well as upon their "testimony." By that section a greater latitude of discretion was restored to the trial courts of which they had been deprived by the constitutions of 1849 and subsequently. Southern California Law Review, Vol. VI, No. 1, p. 57. No formula can be derived by which such comment may be cast. The facts of each case must determine the nature and extent of the court's observations and the diction and phraseology appropriate thereto. It is not confined to a colorless summation of facts, People v. Patubo, 9 Cal.2d 537, 542, 71 P.2d 270, 113 A.L.R. 1303, so long as the jury are directed that notwithstanding such comment, they must determine the credibility of every witness and the weight to be accorded to his testimony. Under section 19 the court may even comment upon the guilt or innocence of one accused of crime without exceeding the limits of discretion, People v. Ottey, 5 Cal.2d 714, 729, 56 P.2d 193, and without prejudicing the rights of the accused. Since the court's privilege of commenting is no less restricted in civil than in criminal actions, Rivera v. Goodenough, 71 Cal.App.2d 223, 234, 162 P.2d 498, where there is a direct conflict in the testimony of the only two witnesses to the paramount fact at issue, sound logic and correct reasoning compel such construction of the section as will permit the trial court by virtue of its intimate and peculiar knowledge of the witnesses to advise the jury that one of the witnesses has committed perjury so long as it is left to the jury to determine the guilty party.

[8, 9] Appellant's final assignment of error is that certain other instructions, though not complained of as erroneous, are in conflict with the instruction on perjury. Two of them were given at appellant's request and it cannot therefore complain as to them. People v. Weston, 169 Cal. 393, 398, 146 P. 871. The other, given on the court's own motion, was as follows: "You are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony." This is a traditional, stock instruction, clearly free from error, is favorable to appellant and therefore is not ground for reversal.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

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LOVELAND v. PETERS et al.

Civ. 16660.

District Court of Appeal, Second District, Division 1, California.
May 25, 1949.

1. Novation 🔑12

Evidence sustained finding that when obligor of purchase order accepted its assignment, assignor's signature did not appear thereon so that such acceptance did not constitute a novation and render obligor directly liable to assignee.

2. Pledges 🔑16(3)

Evidence sustained finding that alleged assignment of purchase order and obligor's written acceptance thereof was only collateral security for a loan by as-

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tions where the California constitution is not operative.

[2] "Sec. 19. The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."

signor to assignee and constituted a pledge which when paid in full, released assignment as security.

3. Assignments 🔑137

Evidence that when obligor of purchase order accepted its assignment, assignor's signature did not appear thereon, was not sufficient to give obligor constructive notice of subsequent assignment to assignee so as to render obligor liable directly to assignee after having made payments to assignor.

4. Estoppel 🔑118

Evidence that obligor of purchase order accepted its assignment before it was signed by assignor, did not estop obligor from asserting he had no knowledge of subsequent assignment prior to making payments to assignor nor from asserting invalidity of new contract.

5. Appeal and error 🔑994(3), 1011(1)

Weight to be accorded to conflicting testimony and credibility of witnesses are questions for trial court.

◆

Appeal from Superior Court, Los Angeles County; Byron J. Walters, Judge.

Action by Richard W. Loveland against Fred Peters and another on an assignment of a purchase order. From a judgment for the defendants, plaintiff appeals.

Affirmed.

Robert L. Moore, Los Angeles, for appellant.

George Bouchard, Los Angeles, for respondents.

DORAN, Justice.

The appellant's amended complaint seeks recovery based upon an alleged assignment to appellant by one Robert L. Neville, doing business as Neville Industries, of all moneys to come due by virtue of a purchase order under which the respondent Peters, doing business as Peters Metal Products Company, ordered certain aluminum castings from Neville. In the language of appellant's brief, recovery is sought first, "upon the assignment effectuated orally, by manual delivery of the purchase order and by written instrument and, secondly, upon respondents' written agreement creating a new contract under which respondents became directly liable to pay appellants all moneys due under the purchase order, rather than to Neville."

The record discloses that appellant Loveland, a practicing attorney, became acquainted with Robert L. Neville in September or October, 1945; that Neville consulted Loveland professionally, and on November 25, 1945, the two entered into a five-year contract under which Loveland was to act as a business consultant. Under this contract Attorney Loveland was to receive 7½% of the gross sales of Neville's business with a minimum of $215.00 per month for a maximum of 10 hours work per month as such business consultant. In November and December of 1945 and January, 1946, Appellant Loveland loaned to Neville a total sum of $2,300.00, this money being advanced by Mrs. Loveland.

The trial court found that "On or About February 11, 1946, under a Purchase Order designated as No. 1117, the defendants (Peters) ordered from said Robert L. Neville 5,000 5-piece 'Mother's Helper's Sets', aluminum castings; that said Neville advised plaintiff (Loveland) that he needed to borrow an additional $500.00, and plaintiff advised Neville he would personally loan him $500.00 if he, Neville, would give plaintiff an assignment upon the monies to become due under Said Purchase Order No. 1117 as security * * *; that Neville agreed to give such assignment and plaintiff prepared the same, requesting Neville to have defendant Peters, sign it".

The assignment here in question reads as follows:

"ASSIGNMENT OF MONEY TO BECOME DUE UNDER CONTRACT

"Know all men by these presents, that I, Robert L. Neville, Los Angeles, California, in the county of Los Angeles, State of California, in consideration of the sum of Five Hundred Dollars ($500.00), and other good and valuable consideration, receipt of which, is hereby acknowledge, assign, transfer and set over to Richard W. Loveland, of Beverly Hills, county of Los Angeles, State of California, All of my right, title and interest in and to all moneys due and/or to become due by virtue of Purchase Order No. 1117 executed by the Peters Metal Products Company, dated February 11, 1946 and accepted hereby by me, and I do hereby give the assignee, his executors, administrators, and assigns, full power to collect and receive the same, and to prosecute any suit or proceedings at law or in equity therefor.

"In witness whereof, have set by hand hereto, this 14th day of February, 1946.

Robert L. Neville

"The Peters Metal Products Company hereby accepts receipt of the above Notice of Assignment, consents to said assignment, and agrees to pay Richard W. Loveland when due the moneys payable by virture of the acceptance of Purchase Order No. 1117.

Peters Metal Products Company
by ————
Fred Peters"

There is also a finding of fact that when Neville took the foregoing assignment to Peters for the latter's signature, Neville advised Peters "that he (Neville) did not intend to make or deliver the assignment, but if it was made and delivered the defendant Peters, would be notified of said execution and delivery, and Peters could then pay any money due under the Purchase Order to plaintiff; at the time Peters signed the document * * *, it was not then signed by Neville, nor was it signed by Neville in Peters' presence". Thereafter, the trial court found, Neville "returned said document to plaintiff, receiving from plaintiff a check for $500.00" and executed a promissory note to plaintiff for such loan. Other loans were made by plaintiff to Neville as follows: April 22, 1946, $200.00; April 27, 1946, $500.00; represented by a promissory note. The court also found that "On February 14, 1946, when plaintiff loaned $500.00 to Neville, it was understood * * * that Neville would repay (this amount) to plaintiff out of the first monies collected under Purchase Order No. 1117".

The defendants were found to have paid Neville $1,221.81, the amount then due on the said purchase order, on May 21, 1946; on May 22, 1946, Neville paid plaintiff the $500.00 borrowed on February 14 and for which amount the alleged assignment had been given as security. "On June 5, 1946, defendants again paid Neville $500.00 * * * and on June 21, 1946 paid the balance due under said Purchase Order", less an adjustment made for defective castings. After these payments had been made by defendants to Neville, according to the findings, "On July 20, 1946 plaintiff wrote defendants a letter advising that he held an assignment dated February 14, 1946 to all monies to become due Neville under said Purchase Order No. 1117 and making demand for payment of $3,854.78; that this was the first notice plaintiff ever gave to the defendants * * * that he was the owner of said assignment, or that said assignment had been made". On July 26, 1946, Neville filed a bankruptcy petition, in which proceeding plaintiff filed a claim for the amount mentioned above.

Directing judgment dismissing plaintiff's amended complaint, the trial court concluded "That the document dated February 14th, 1946 had not become effective as an assignment at the time it was signed by defendant Peters and his signing of the same is at most notice of an intended assignment; that defendants having paid in full all monies due under said Purchase Order No. 1117 before notice to them by plaintiff that he was the owner of said assignment, constitutes a good defense against the plaintiff's present claim". A further conclusion of law was "That said assignment having been given as security for a loan of $500.00, the same constitutes, not an assignment, but a pledge for a loan which was paid in full and released the assignment as security".

It is appellant's contention that "Peters' Agreement to pay appellant all moneys due under Purchase Order No. 1117 assented to by Neville created a new contract under which respondents became directly liable to appellant"; that this direct obligation to pay appellant Loveland "could not be satisfied by payment to or settlement with, Neville". The appellant argues that "under the doctrine of constructive notice (respondents were) chargeable with notice of assignment to appellant prior to payment to assignor"; also that the assignment "had been accomplished orally and by manual delivery of the purchase order at the time respondent Peters executed the assignment instrument". It is further insisted that "Respondents are estopped from asserting any invalidity in the new contract under which respondents (became) directly liable to pay appellant or from denying valid notice of the assignment." The appellant also complains that the trial court committed reversible error in failing to find upon the issue of constructive notice; that the findings made are unsupported by any substantial evidence, and are contrary to both evidence and law.

[1] Appellant's contention that by Peters' written acceptance of the alleged assignment to Loveland, a novation resulted making Peters directly liable to Loveland, is predicated upon the holding in H. D. Roosen Co. v. Pacific Radio Pub. Co., 123 Cal.App. 525, 531, 11 P.2d 873, 875, that "Acceptance of a draft or order, whether negotiable or not, by one from whom moneys are to become payable, is not a collateral, but an original, direct and immediate contract between the acceptor and the payee"; that "Such contract constitutes a novation". As stated in respondents' brief, there is no quarrel with the rule of law there laid down, but "A careful analysis of that case shows that the facts therein were entirely different from the facts of the case at bar". In this connection the respondent refers to C. I. T. Corp. v. Glennan, 137 Cal.App. 636, 638, 31 P.2d 430, 431, holding that "A notice of intended assignment is not notice of a subsequent assignment." The latter case also observes that "The duty to protect one's interest does not alone devolve upon the maker of a non-negotiable instrument, but an assignee, in order to protect himself, cannot remain silent."

It appears from the record herein, as respondents' brief points out, that "Both respondent Peters and Neville testified that when the document was presented to respondent it had not been signed by Neville", the alleged assignor. Peters testified on several different occasions that when the document was brought for signature, Neville "stated that he might never have to use that, and if he did, he would notify me". The reason for the transaction, as stated by Neville to Peters, was that a "certain party, Pistell, * * * was bringing suit against him, and * * * the reason for this (assignment) was only a protection so that it wouldn't tie up his plant and his partners". Neville also stated, according to Peters, "that in case that suit materialized and certain things would have to be attached * * * that then he would notify me and the money could be paid to Mr. Loveland, his partner, who in turn would refund him the money so he could operate".

[2] Under this view of the evidence, accepted by the trial court, the alleged assignment and Peters' written acceptance thereof constituted no more than collateral "security for a loan of $500.00", which loan, as found by the trial judge, "was paid in full on or about May 22nd, 1946; that no notice of said assignment as collateral, or otherwise, was given to defendants until after defendants had paid (Neville) in full all monies due under said Purchase Order No. 1117". In this connection it will be recalled that appellant did not give said notice until July 20, 1946, six days before Neville filed a petition in bankruptcy; also that in the Neville bankruptcy proceedings appellant filed a claim for the same amount demanded from Peters. The practical effect of the present action is that Peters is asked to pay twice for the castings manufactured by Neville under the purchase order in question. Under the circumstances disclosed by the record there is no merit in appellant's claim.

[3-5] The appellant's other contentions are likewise untenable. Neither the doctrine of constructive notice nor that of estoppel will suffice to justify a reversal under the evidence here presented. While it is true that a certain amount of conflict appears in the testimony adduced from the various witnesses, the weight to be accorded such evidence, and the credibility of the witnesses which is assailed by appellant, are questions for the determination of the trial court rather than for an appel-

late tribunal. That there is substantial evidence to support the findings and judgment appealed from, cannot be doubted. No reversible error has been pointed out.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

In re ALDRICH'S ESTATE.

ALDRICH v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 13694.

District Court of Appeal, First District, Division 1, California.

May 24, 1949.

Rehearing Denied June 23, 1949.

Hearing Granted July 21, 1949.*

1. Bankruptcy 🔑143(10)

Rights of trust beneficiary in trust estate, whether vested or contingent, passed to his trustee in bankruptcy after he was adjudicated a bankrupt.

2. Assignments 🔑7

Future interests whether vested or contingent are assignable. Civ.Code, §§ 693, 699.

3. Bankruptcy 🔑390

Generally, a bankrupt has no right to maintain an action in regard to property passing to trustee in bankruptcy, but where a suit is pending by or against a person at time of adjudication and trustee does not elect to intervene, bankrupt may continue as a party.

4. Bankruptcy 🔑390

If a trustee in bankruptcy abandons a cause of action or other legal right owned by bankrupt at time of filing petition in bankruptcy by refusing or neglecting to take action thereon, bankrupt may prosecute such right in his own name.

5. Judgment 🔑951(1)

Party relying on doctrine of res judicata has burden of establishing that defense.

6. Bankruptcy 🔑390

Where trustee in bankruptcy refused to contest claim of trustee of trust estate in estate under an assignment of debtor beneficiary's interest therein in proceeding to settle the trustee's final account, trustee in bankruptcy abandoned the asset so that debtor had legal capacity to appear as a party and contest the claim. Civ.Code, §§ 693, 699; Bankr. Act, § 70, sub. a(5), 11 U.S.C.A. § 110, sub. a(5).

7. Trusts 🔑237, 324

Trust beneficiary could not object to final account of trustee on ground that trustee acted improperly in paying itself as creditor of trust beneficiary under assignment of beneficiary's interest in trust before determination by probate court that it was so entitled, where trustee made full disclosure of all facts and probate court ratified acts of trustee. Probate Code, § 1120.

8. Trusts 🔑329

Where trust beneficiary objected to payment by trustee of all sums due other beneficiaries, approval of trustee's final account would not be reversed on ground that trustee gained advantage over other beneficiaries of trust by paying itself first under assignment of objecting beneficiary's interest in trust.

9. Trusts 🔑324

In proceeding to settle final trust account, trust beneficiary could not raise points that could only be raised by other beneficiaries when such other beneficiaries did not object.

10. Trusts 🔑324

Where trust beneficiary knew that trustee claimed an interest in estate by virtue of acquisition of beneficiary's assignment therein at time trustee filed its claim in beneficiary's bankruptcy proceedings, beneficiary, 10 years thereafter, was estopped from objecting in proceeding to settle final account of trustee on ground that when it became trustee it failed to inform

* Subsequent opinion 215 P.2d 724.

probate court of existing interest in trust as required by statute. Civ.Code, § 2233.

11. Trusts ⚷159

Bank which acquired interest in trust estate consisting of several beneficiaries could thereafter become trustee thereof.

12. Trusts ⚷298

In proceeding to settle final account of trustee, probate court had jurisdiction to determine right of trustee in trust by virtue of assignment to it of interest of one of trust beneficiaries.

13. Appeal and error ⚷1008(3)

Where an interpretation of a written instrument is based upon instruments alone or upon uncontradicted evidence, question becomes one of law and appellate court is not bound by trial court's interpretation of documents, even though reasonable, if it believes another interpretation is more reasonable, but where trial court properly admits extrinsic evidence, question of construction is one of fact and trial court's determination is conclusive if extrinsic evidence is conflicting and determination is supported by evidence.

14. Trusts ⚷147(1)

Assignment executed by trust beneficiary to secure a debt was interpreted as a matter of law as an assignment of interest in one trust as against contention that interests in two trusts were assigned, and contrary interpretation by probate court would be reversed. Civ.Code, § 1654.

◆

Appeal from Superior Court, Alameda County; Ezra W. Decoto, Judge.

Proceeding in the matter of the trust estate of William A. Aldrich, wherein Claude Rees, trustee in bankruptcy of William Arnold Aldrich, a bankrupt, was a party. From a decree settling the final account of the Bank of America National Trust & Savings Association, trustee of the trust estate of William A. Aldrich, deceased, William Arnold Aldrich appeals.

Reversed.

Augustin C. Keane, San Francisco, for appellant.

Donahue, Richards & Hamlin, Oakland, Donahue, Richards, Rowell & Gallagher, Oakland, Leicester & Leicester, San Francisco, Samuel B. Stewart, Jr., San Francisco, Geo. D. Schilling, San Francisco, Orlando J. Bowman, Oakland, for respondent.

Ernest J. Torregano, San Francisco, for Rees.

PETERS, Presiding Justice.

This is an appeal from a decree settling the thirty-sixth and final account and supplement thereto of the Bank of America as successor trustee of a portion of the trust created by the will of William A. Aldrich, determining to whom the trust estate passed upon termination of the trust, overruling appellant's objections to the account, and ratifying, approving and confirming the various acts of the trustee as set forth in its petition. The appellant is William Arnold Aldrich, grandson of the testator. The bank, and Claude Rees, trustee in bankruptcy of appellant, are respondents.

William A. Aldrich died in 1892 and his estate was distributed in 1893. The decree of final distribution established two trusts. One-fourth of the residue of the estate was distributed in trust for William Holt Aldrich, son of the testator and father of appellant, and another one-fourth of the residue was distributed in trust for another son of the testator, George Albert Aldrich.

The trust now directly before the court is the one created for William Holt Aldrich. It provided that the income of the trust estate should go to William Holt Aldrich for life, and then to his wife, Minnie C. Aldrich, if she survived him and remained unmarried. The trust was to terminate when there was no longer any one designated to receive the income. Upon termination, the trust estate was to be divided equally among the children of William Holt Aldrich, descendants of any deceased child to take their deceased parents' share. William Holt Aldrich died in 1897. He was survived by his wife Minnie, and by their five children, one of whom is appellant. Minnie C. Aldrich remained unmarried until her death in May of 1946, and until that date received the income of the Holt trust. She was survived by three of the five children, and by some issue of the two deceased children. Admittedly, upon her death, the corpus of the trust became distributable in five equal shares. Among the three surviving children of Minnie were appellant and Swinton D. Aldrich, who was once a partner of William Arnold Aldrich, the appellant.

The other trust established by William A. Aldrich in 1892 was for another of his sons, George Albert Aldrich, and it is also involved in the present controversy. This trust directed that the income should be paid to George for life, and upon his death that the remainder should go to the heirs of William A. Aldrich then living, according to the succession laws of California then in force. George died November 17, 1918, without issue. He was the last survivor of the five children of William A. and Minnie Aldrich. There were then living eight grandchildren of William A. Aldrich, including appellant. A dispute arose as to whether these grandchildren succeeded per stirpes or per capita. Appellant claimed a one-eighth interest in the property. In June of 1920 the property in this trust was distributed in eight equal shares.

In 1919 the appellant and his brother Swinton became partners in a company dealing in steel and known as The United American Trading Company. During that year they borrowed certain sums from the Banca Popolare Fugazi in San Francisco and gave to that bank an assigment, the proper interpretation of which is one of the focal points on this appeal. It was written on the letterhead of The United American Trading Company, and reads as follows:

"In the Matter of the Trust Estate
of
William A. Aldrich,
Deceased.

"For and as security and credit for The United American Trading Co., (having its principal place of business in the City and County of San Francisco, State of California), we the undersigned William A. Aldrich and Swinton D. Aldrich, beneficiaries in the Trust Estate above mentioned to the extent of an equal one-eighth part each, (Said Estate being assessed and valued at $310,000.00) do hereby assign and set over to The Banca Popolare Fugazi all our right title and interest in and to said Estate. We hereby give The Banca Popolare Fugazi the right, should The United American Trading Co. fail at any time to meet the obligations or payments due from it to said Bank, to collect any money due directly from The Oakland Bank of Savings, in which Bank the Trust Funds are now held, awaiting final distribution. Further we will instruct The Oakland Bank of Savings to pay any sums due from said Estate directly to the Banca Popolare Fugazi, that the Banca Popolare Fugazi will be secured at all times for credits given The United American Trading Co.

"Wm. Arnold Aldrich
"S. D. Aldrich"

At the same time the two brothers signed a letter dated November 21, 1919, and written on the letterhead of the Fugazi Bank addressed to the Oakland Bank of Savings, trustee of the trust, which reads, in part, as follows:

"We hereby direct you to pay to Banca Popolare Fugazi * * * any sum or sums due or to become due and payable to us or either of us, as beneficiaries In the Matter of the Trust Estate of William A. Aldrich, deceased, as said funds are or shall become available for distribution.

"You may take the receipt of said Banca Popolare Fugazi as a full acquittance for all sums so paid on account of this authority, * * *"

Appellant testified, and there was no testimony to the contrary, that both of these documents were drafted by officers of the Fugazi Bank. He also testified that the Fugazi Bank had full knowledge of all of the facts relating to the two trusts, and that the assignment was intended to cover only the existing loan, no future loans being contemplated. The problem of interpetation involved is whether this November, 1919, assignment covered appellant's interest in both the George Albert trust, the funds of which were awaiting distribution at the time of the assignment, and the Holt trust, in which appellant acquired no distributable interest until the death of his mother in May, 1946, or whether it only included appellant's interest in the George Albert trust. Appellant contends that the parties intended, and that the assignment properly interpreted only provided, that the then distributable interest in the George Albert trust was assigned. The bank, as successor assignee, contends that the interests in both trusts were covered by the assignment, and the probate court so found.

In 1920 and 1921 The United American Trading Company got into financial difficulties, and in 1921 the appellant was declared a bankrupt. Although appellant has been discharged, the administration of his bankrupt estate is still pending, and Claude Rees, one of the respondents, is the trustee in bankruptcy. The bankruptcy records are admittedly quite incomplete, and it is difficult to ascertain just what, if anything, has ever been decided by the bankruptcy court in relation to the present controversy. Many of the pertinent records have been lost or misplaced. We do know that the Fugazi Bank filed a claim in the bankruptcy proceedings in 1921 and that the records pertaining thereto were lost, and that the Bank of America had the record restored in 1937, but the records introduced into evidence fail to disclose that the bankruptcy court ever determined that the assignment covered the interests of appellant in both trusts, although that court has, apparently, determined that the bank's claim is a "secured" claim.

In November, 1930, by a series of sales and consolidation, the Bank of America became the owner of the business and assets of the Fugazi Bank. Admittedly, the Fugazi Bank, while still in existence, and in 1922 or 1923, and apparently at the direction of the bank examiners, and after it had collected its portion of the George Albert trust under the 1919 assignment, had "written off" as "bad and doubtful" a material portion of the balance of the debt due from appellant.

In February, 1933, the Bank of America purchased the assets of the trust department of the Oakland Bank of Savings, that bank, at the time of the purchase, being the trustee of the trusts created by William A. Aldrich. In this fashion, the respondent bank became trustee of that trust, which in 1933 consisted only of the property in the Holt trust. Thus, by these transactions, respondent bank became the holder of the 1919 assignment, of the debt owed by appellant, and became trustee of the Holt trust in which appellant was named as one of the beneficiaries if he survived his mother, the life tenant. In July of 1946, after the Holt trust had terminated, Minnie Aldrich having died in May of that year, the respondent bank set aside for itself two-fifths of the Holt trust property, claiming as successor pledgee of the Fugazi Bank. Then, in November, 1946, it filed its petition and report as trustee fully disclosing all the facts, and, among other things, requesting approval of its act in setting two-fifths of the Holt trust aside for itself. This was the first official notice that the probate court had, so far as the record discloses, that the bank was both trustee of the Holt trust and a beneficiary, by assignment, of a portion of that trust. As already pointed out, the probate court confirmed and approved all of the acts of the bank as trustee as disclosed in its petition and report.

[1-3] At the threshold of this appeal we are met with the contention made by respondents that appellant has not the legal capacity to maintain this action because, in July of 1921, he was adjudicated a bankrupt and, therefore, on that date, his entire interest in his then estate, vested or contingent, passed to his trustee in bankruptcy. There can be no doubt that, under the terms of the Bankruptcy Act, 11 U.S.C.A. § 110, sub. a(5), the entire assignable estate of a bankrupt passes to the trustee. There can be no doubt that appellant's interests in both the Holt and George Albert trusts passed to the assignee in bankruptcy in 1921, and this is so whether or not his interest in the Holt trust was then vested, subject to being divested if he did not survive his mother, or contingent. In this state future interests, vested or contingent, are assignable. Sections 693 and 699, Civil Code; Sinclair v. Crabtree, 211 Cal. 524, 296 P. 79; Gray v. Union Trust Co.,

171 Cal. 637, 154 P. 306. It is, of course, the general rule that a bankrupt has no legal right to maintain an action in regard to property passing to the trustee. See, for example, Meyer v. Fleming, 327 U.S. 161, 66 S.Ct. 382, 90 L.Ed. 595; Porter v. Sabin, 149 U.S. 473, 13 S.Ct. 1008, 37 L.Ed. 815; Simpson v. Miller, 7 Cal.App. 248, 94 P. 252; Heffron v. Rosenberg, 51 Cal.App.2d 156, 124 P.2d 74; Dean v. Shingle, 198 Cal. 652, 246 P. 1049, 46 A.L.R. 1156; see cases collected 6 Am.Jur. p. 733, § 342. There also can be no doubt that there are certain exceptions to this general rule. Thus, where a suit is pending by or against a person at the time of the adjudication, and the trustee does not elect to intervene, the bankrupt may continue as a party. 6 Am. Jur. p. 732, § 341. The rule, amply supported by authority, is thus stated in 8 C.J.S., Bankruptcy, § 489 page 1362: "* * * where the trustee renounces the claim or fails or declines to take it up and proceed with it," the bankrupt may do so. A good case on this subject, typical of many that could be cited, is Lancey v. Foss, 88 Me. 215, 33 A. 1071. There plaintiff brought an action against certain of his debtors. He was then adjudicated a bankrupt. After his discharge he attempted to continue these actions, the trustee having failed to do so. The defendants raised the defense that the causes of action were the property of the trustee and not of the plaintiff bankrupt. The Court, in disposing of the defense, stated 33 A. at page 1072:

> "* * * But all such property of a bankrupt is not cast upon the assignee [trustee in bankruptcy] nolens volens, like the personal property of a deceased intestate upon the administrator. In the latter case the title cannot remain with the deceased, but must fall on his successor. The assignee of a living bankrupt, however, may decline to take or interfere with such property as he deems onerous or worthless. The property so rejected by the assignee does not thereby become derelict, to vest in the first appropriator. The rights and obligations which the assignee declines to enforce or notice do not thereby vanish into nothingness.
>
> "Such items of estate, corporeal or incorporeal, as the assignee declines to appropriate or utilize, remain the property of the bankrupt, subject, always, to the superior right and title of the assignee. Notwithstanding the adjudications and assignment under the bankrupt act, there is left in the bankrupt a right which makes a title good against all the world except his assignee and creditors. These may appropriate the entire title and interest, and so divest the bankrupt completely; but what they decline to appropriate remains with the bankrupt. The title does not fall to the ground between the two. If the assignee or creditors will not take it, no one else can appropriate it. The bankrupt can defend or enforce it against all others."

See, also, Woods v. Berry, 111 Cal.App. 675, 296 P. 332; Fahlstrom v. Denk, 143 Or. 514, 21 P.2d 1093, 23 P.2d 325.

[4] Respondents contend that the exception only applies where suits are pending at the time of the adjudication in bankruptcy, and has no application to causes of action that arise thereafter. The exception, however, is not so limited but extends to cases of abandonment by the trustee. In the nature of things, this must be so. If the trustee refuses to pursue an asset of the bankrupt, or refuses to oppose questionable claims, certainly the bankrupt is not required to step aside and see this asset lost. The proper rule is thus stated in 4 Remington on Bankruptcy, p. 95, § 1407: "It is also the law that, if a trustee 'abandons' a cause of action or other legal right that the bankrupt owned at the time of the filing of the petition, by refusing or neglecting to take action thereon, the bankrupt may prosecute such right, etc., in his own name."

In Dushane v. Beall, 161 U.S. 513, at page 516, 16 S.Ct. 637, at page 639, 40 L.Ed. 791, it is said: "If with knowledge of the facts, or being so situated as to be chargeable with such knowledge, an assignee [in bankruptcy], by definite declaration or distinct action, or forbearance to act, indicates, in view of the particular circumstances, his choice not to take certain property or if, in the language of Ware, J., in Smith v. Gordon, [22 Fed.Cas. No. 13,052], he, with such knowledge, 'stands by without asserting his claim for a lapse of time, and allows third persons, in the prosecution of their legal rights, to acquire an interest in the property,' then he may be held to have waived the assertion of his claim thereto." See, also, In re Malcom, D.C., 48 F.Supp. 675.

[5, 6] Now how do these principles apply to the present case? No express finding on the issue of abandonment was made. The court did find that "by reason of said bankruptcy proceeding all of the interest of William Arnold Aldrich in and to all of the trust estate of William A. Aldrich, deceased, vested in said trustee in bankruptcy," subject to the rights of respondent bank, as assignee, and that "the interest of the said William Arnold Aldrich in said trust estate is subordinate to the right, title and interest of Claude Rees, trustee in bankruptcy." If these findings were intended to be findings to the effect that the asset here involved has not been "abandoned" by the trustee they are totally unsupported. The attorney for the trustee has consistently taken the position that the assignment owned by respondent bank covers appellant's interest in the Holt trust. He has appeared to protect the bankrupt's estate only in any residual interest appellant may have after the bank is fully paid. At no time during this proceeding has he ever contended that the assignment did not cover appellant's interest in the Holt trust. It seems to be his view that because the bankruptcy court decided that the bank's claim was secured, that such finding is conclusive upon him. On the records before us we cannot say that the bankruptcy court ever determined that the assignment involved covered appellant's interest in the Holt trust. This is conceded by the attorney for respondent bank. At the oral argument held on August 23, 1948, the court asked Mr. Stewart, counsel for respondent bank, if the record showed that the bankruptcy court had ever decided that the bank's claim was even a "secured claim," and counsel replied that: "It is in the record inferentially only, as I read the transcript of the proceedings which recites the Order of the Bankruptcy Court. I was not able to find it in the record." If the bank or the trustee is relying on the doctrine of res judicata, or upon any such similar doctrine, the burden is on one of them to establish that defense. This, neither has done. So far as the record is concerned, we are presented with a case where the attorney for the trustee, in utmost good faith, contends that the assignment, as a matter of law, covers appellant's interest in the Holt trust, while the bankrupt, equally sincerely, contends that it does not. The problem has arisen in a probate court where it must be decided. If the determination of the trustee, even though made in the utmost good faith, were binding on the bankrupt, a grave miscarriage of justice would occur. Certainly, if neither the trustee nor the creditors raise a debatable legal or factual question that directly affects the bankrupt, he should be permitted to do so. Any other rule would be logically and legally indefensible. We, therefore, hold that, in view of the fact that the trustee has refused to contest the claim of the respondent bank, and has in fact acquiesced in it, the trustee has sufficiently abandoned this asset so that the bankrupt has the legal capacity to appear as a party and contest the claim.

[7] This brings us to the points raised by appellant on the merits of this appeal. Most of his points may be disposed of quickly. He first contends that the petition, report and final account of the respondent bank as trustee show, on their face, that the trustee improperly usurped the jurisdiction of the court in paying itself as assignee two-fifths of the estate before the probate court had determined that it was so entitled. Such actions, it is claimed, violated § 1120 of the Probate Code. This question as to the proper procedure to be followed by a trustee in such cases need not be decided in this case. If it be assumed that the trustee acted improperly (and on this question we express no opinion), appellant was not prejudiced. After a full disclosure of all the facts the probate court ratified and confirmed the acts of the trustee. If the probate court properly so held, appellant was not prejudiced by the trustee's failure to ask for an order prior to the division. If the probate court acted improperly, we will correct it in this opinion.

[8, 9] Equally unsound is appellant's contention that we should reverse the action of the probate court in approving the

petition of respondent bank and in confirming its prior actions because, so it is claimed, the trustee's account discloses, on its face, that the trustee violated its obligations in that, by paying itself first, it gained an advantage over the other beneficiaries of the Holt trust who have not yet been paid. This was largely the fault of appellant. The bank as trustee wanted to pay all sums due the other beneficiaries of the Holt trust, but appellant objected. Moreover, appellant is in no legal position to raise points that could only be raised by other beneficiaries, when such other beneficiaries do not object.

[10] A more serious contention of appellant is that the record shows a violation of the trustee's obligations in that it did not notify the probate court in 1933, when it became trustee, that it claimed an interest in the trust. In this connection he quotes Civil Code, § 2233, which provides that if a trustee gains an interest adverse to the beneficiary of a trust, he must inform the beneficiary at once, and may be removed. That is undoubtedly a sound rule. It undoubtedly would have been better practice for the trustee bank to have taken the steps set forth in § 2233. But its failure to do so does not deprive it of its claim, if valid. Appellant knew of his debt owed to the Fugazi Bank, probably knew of the 1930 consolidation, but at any rate knew in 1937, when the bank filed its claim in the bankruptcy proceedings, that the assets of the Fugazi Bank were now owned by respondent bank. Appellant, nevertheless, made no objection until the present proceeding was filed. He is clearly estopped at this late date from now objecting.

[11] Moreover, if the assignment covered appellant's interest in the Holt trust, respondent bank became a beneficiary of that trust in 1930. It became trustee in 1933. Thus, it would seem to be in the position (if its claim is sound) of one who is trustee and one of several beneficiaries. According to the majority rule, approved in this state, such is permissible. Nellis v. Rickard, 133 Cal. 617, 66 P. 32, 85 Am.St.Rep. 227; Tyler v. Mayre, 95 Cal. 160, 27 P. 160, 30 P. 196; Colton v. Stanford, 82 Cal. 351, 23 P. 16, 16 Am.St.Rep. 137.

[12] The contention that the probate court had no jurisdiction to determine this type of controversy was determined adversely to appellant in Re Estate of Henshaw, 68 Cal.App.2d 627, 157 P.2d 390. See, also, In re Estate of Cazaurang, 75 Cal.App.2d 217, 170 P.2d 694, and In re Estate of Butler, 29 Cal.2d 644, 177 P.2d 16, 171 A.L.R. 343.

The only other point necessary to consider is appellant's contention that the assignment and letter of 1919 only assigned appellant's interest in the George Albert trust, and did not cover his interest in the Holt trust. This is the pivotal question involved.

[13] Of course, the trial court has interpreted the assignment to cover appellant's interests in both trusts. If this interpretation was based upon the instruments alone, or upon uncontradicted evidence, the question becomes one of law and the appellate court is not bound by the trial court's interpretation of the documents, even though reasonable, if it believes another interpretation is more reasonable. In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; Moore v. Wood, 26 Cal.2d 621, 160 P.2d 772; Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 167 P.2d 719, 164 A.L.R. 685; In re Estate of Wunderle, 30 Cal.2d 274, 181 P.2d 874; Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 182 P.2d 182; In re Estate of Fleming, 31 Cal.2d 514, 190 P.2d 611. Many of the same cases establish the rule to be that, where the trial court properly admits extrinsic evidence, the question of construction is one of fact and the trial court's determination is conclusive if the extrinsic evidence is conflicting and the determination is supported by the evidence. In addition to the cases cited, supra, see Woodbine v. Van Horn, 29 Cal.2d 95, 173 P.2d 17; Stevenson v. County of San Diego, 26 Cal.2d 842, 161 P.2d 553.

It first must be determined whether the assignment and letter are ambiguous. We think, read alone, they must be construed to cover only appellant's interest in the George Albert trust. The assignment describes appellant and his brother as beneficiaries in the William A. Aldrich trust "to the extent of an equal one-eighth part each." The authorization conferred upon the Fugazi Bank was to collect from the trustee, the Oakland Bank of Savings, "the trust funds * * * now held, awaiting final distribution." At that time (1919) the only funds held awaiting distribution were those from the George Albert trust. George Albert had died in 1918. In 1919, when the assignment was executed, appellant was contending for a one-eighth interest in that trust, and in 1920 his view prevailed and a one-eighth interest was distributed to him. In 1919 there was no way at all to ascertain what appellant's interest might be in the Holt trust. He would receive nothing if he did not survive his mother, and, if he did survive her, his share would depend upon the number of grandchildren then alive. The statement in the assignment that it applied to the one-eighth interest of appellant could only apply to appellant's interest in the George Albert trust.

Respondents rely upon the fact that the assignment was entitled "In the Matter of the Trust Estate of William A. Aldrich." This title is not helpful on the issue of interpretation. The title would be the same whether one or both interests were being assigned, because both trusts were set up in the trust estate of William A. Aldrich. Respondent bank places great reliance upon the phrase "do hereby assign * * all our right title and interest in and to said Estate," but, although that phrase would cover both interests if it stood alone, it does not stand alone. It was immediately preceded by a description of what "right title and interest" was intended—i. e., a one-eighth interest—and was followed by the further designation of the interest, i. e., "awaiting final distribution." These could only refer to the George Albert trust.

Thus, if the instrument and the surrounding facts admitted by both parties be considered, it, as a matter of law, would have to be interpreted as assigning only appellant's interest in the George Albert trust. The real question is, whether the evidence introduced supports the trial court's contrary interpretation.

It will be noted that immediately after describing the brothers as owners of a one-eighth interest in the trust, there is a phrase in the assignment in parenthesis which states "(Said Estate being assessed and valued at $310,000.00.)" This was apparently an exaggeration in any event. An assistant trust officer of the respondent bank testified that in May, 1919, the total value of the properties in the William A. Aldrich trusts was $380,000 and that in that month a partial distribution of $88,000 was had, leaving a balance of $292,000. Thus, the figure set forth in the assignment is of little value in ascertaining just what was intended to be assigned. Respondent bank also introduced evidence that in 1917 appellant had assigned his interests in both trusts, then both contingent, to secure a small loan, which he subsequently repaid. Although this demonstrates that appellant must have known in 1919 that he could assign interests that were contingent, it is of little help in ascertaining what was in fact assigned by the agreement of 1919.

Appellant's own testimony was clear on the point. He testified that he intended to assign, and the Fugazi Bank knew it was getting, an assignment of his interest, then awaiting distribution, in the George Albert trust only; that a Mr. Furey was then trust officer of the Fugazi Bank with whom the deal was negotiated; that Furey communicated with the Oakland Bank of Savings, the trustee, before the assignment was executed and had full knowledge of the status of appellant's interests in the William A. Aldrich trusts; that Furey knew that appellant's then prospective interest in the Holt trust was not covered by the assignment; that Furey had prepared the form of assignment and the form for the covering letter. This last evidence is most important. The Fugazi Bank prepared the assignment and letter after having full knowledge of the existence of the two trusts, and of appellant's interests in them. With such knowledge, the bank prepared documents which, to say the least, are ambiguous. Under such circumstances, the salutary rule embodied in § 1654 of the Civil Code, that contracts are to be construed against the party who caused the uncertainty to exist, is clearly applicable.

[14] Of course, appellant's testimony, if true, determines that the parties did not

intend the assignment to cover appellant's interest in the Holt trust. In support of his testimony appellant offered a portion of the transcript of the bankruptcy proceeding purporting to show that Furey, while the Fugazi Bank still owned the assignment, had testified that the assignment did not cover appellant's interest in the Holt trust. This was excluded on respondent bank's objection that it was hearsay and not properly authenticated. We do not find it necessary to determine whether this was error or not. In our opinion, the construction of the instruments involved in this case was a question of law, and we are of the view that, as a matter of law, they were improperly interpreted by the trial court. This, of course, requires a reversal. It is our conclusion that, properly interpreted, the assignment does not cover appellant's interest in the Holt trust, and that appellant's interest therein should not have been distributed to the bank as a pledgee. Its debt is not secured by the assignment.

We intentionally refrain from determining whether appellant's interest in the Holt trust should be distributed to him or to respondent trustee in bankruptcy. That is a matter which should be passed upon by either the probate court or the bankruptcy court, and should not be determined on this appeal.

The decree appealed from is reversed.

WARD and BRAY, JJ., concur.

34 Cal.2d 6

EVARTS et al. v. JOHNSTON et al.

L. A. 20591.

Supreme Court of California, in Bank.

June 3, 1949.

Rehearing Denied June 30, 1949.

1. Specific performance ⚷87

A plaintiff may not obtain specific performance unless he has performed or offered to perform all of the conditions precedent required of him by terms of contract. Civ.Code, § 3392.

2. Specific performance ⚷121(11)

Evidence warranted denial of specific performance of contract for sale of realty on ground that prospective purchasers did not perform the obligations undertaken by them in respect to escrow payments. Civ. Code, § 3392.

◆

Appeal from Superior Court, Imperial County; Vaughn N. Thompson, Judge.

Action by E. F. Evarts and another against Samuel W. Johnston and another for specific performance of a contract for sale of realty, wherein defendants filed a cross-complaint against plaintiffs and R. S. Harrington. From the judgment, the plaintiffs appeal.

Affirmed.

Prior opinion 196 P.2d 950.

E. F. Evarts, in pro. per., for appellants.

Clarence B. Smith, El Centro, and H. L. Welch, Los Angeles, for respondents.

EDMONDS, Justice.

E. F. Evarts and his wife agreed to purchase a ranch owned by Samuel W. and Sarah Johnston. The Johnstons canceled an escrow agreement made by the parties for the purpose of closing the transaction, and were then sued for specific performance of the contract. The appeal of the Evarts from an adverse judgment presents for decision only the question of the sufficiency of the evidence to support the findings.

The sale price of the property as fixed by the contract was $25,000 with a first payment of $4,000. By the agreement, the Johnstons were to accept certain property, subject to an existing mortgage, for $2,750, of this amount, the balance of $1,250 to be paid in cash. For the additional $21,000, the Evarts were to execute a note secured by a deed of trust upon the ranch, with payments at the rate of $2,500 per year. Certain encumbrances upon the land were to be paid from these installments. The contract was made subject to existing leases, the purchasers "to have the rent unpaid" on them. It also acknowledged the receipt of $100 and provided "that buyers upon deposit in said escrow of said $1150.00 shall have and [are] hereby given possession of said land in order to go upon same and prepare the unleased portion for and plant to crop."

According to the record, the Johnstons told R. S. Harrington, the real estate agent who was handling the property for them, that they must have a cash payment of $4,000. However, when Harrington interested the Evarts as prospective purchasers, he drew the contract with the provision for the equity in the Long Beach house in lieu of $2750, but the Johnstons refused to sign it. Later, in reliance upon the representations of Harrington that he would dispose of the Long Beach property for cash, they executed the agreement. This adjustment of terms resulted from discussions between the Johnstons and Harrington and there were no direct negotiations between the sellers and the Evarts.

At the time the contract was executed by the parties, there were delinquent taxes to a considerable amount against the ranch. As time went on, Harrington was unable to sell the Long Beach house and the Evarts paid no money into the escrow. The sellers then leased a further section of the land for $1,400, of which $700 was paid in advance, and used this money for the payment of taxes. When Mr. Evarts learned of the lease, he demanded that the $700 be credited to the buyers and, at that time, paid $450 into escrow as the "balance" due on the down payment. Johnston refused to approve such a credit and stated, according to the escrow agent, that he would be "willing to put this money into escrow when [the Evarts] have deposited $4,000.00 in cash, which [they] had agreed to deposit." The demand for $4,000 instead of $1,150 was based upon the representations of Harrington as to the sale of the Long Beach house which should not be attributed to the Evarts.

From this evidence the trial court found that the parties had entered into the agreement but that: (1) "There was not a meeting of the minds of the parties * * * to this action, with respect to how or in what manner the initial or 'down' payment was to have been made under said contract"; (2) the terms of the agreement are not sufficiently certain to make ascertainable the amount of the trust deed to be given by the Evarts or the terms of the obligations assumed by the Johnstons upon the equity in the Long Beach house, and it cannot be determined from the contract whether the agreement for the sale of the Long Beach house was assignable; (3) the Johnstons received $700 from the lease but paid delinquent taxes with it; (4) the Evarts deposited in escrow only $450; (5) the Evarts were not able financially to perform the contract according to its terms; (6) the value of the premises was $30,000 and therefore the consideration of $25,000 was not adequate; and (7) Harrington, at the time of the agreement, was acting as real estate broker, or agent, for the Johnstons and at the same time was acting for the Evarts as an attorney at law in the negotiations and preparation of the contract. The judgment based upon these findings quieted title in the Johnstons and placed the parties in the position they occupied at the time of the making of the agreement, denying all other relief.

The Evarts, although represented by counsel in the trial court, have perfected this appeal in propria persona. Their sole contention is that the findings of the trial court are unsupported by the evidence. Regardless of the merits of this charge as directed to the first, second, sixth, and seventh findings, the record shows substantial basis for the determination that the Evarts did not perform the obligations undertaken by them.

[1, 2] A plaintiff may not obtain specific performance unless he has performed, or offered to perform, all of the conditions precedent required of him by the terms of the contract. Civ.Code, § 3392; Cockrill v. Boas, 213 Cal. 490, 2 P.2d 774; Boulenger v. Morison, 88 Cal.App. 664, 264 P. 256. It is admitted that only $450 was paid into the escrow. The Evarts have relied throughout upon the supposed "credit" of $700 from the rents received by Mr. Johnston. However, they have suggested no legal reason why this amount should have been credited to them. The contract of sale lists specific *existing* leases and gives the purchasers the right to "rent unpaid on said leases" but no provision was made for the application of rent payable upon a lease not mentioned by the parties. The Evarts had a right to possession of the land but it was contingent upon payment of $1150 into escrow and no claim to rents could be made until that right had accrued.

The judgment is affirmed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

SPENCE, Justice (concurring).

I concur in the judgment.

Regardless of the question of whether plaintiffs were entitled to the claimed credit of $700, the judgment in favor of defendants must be affirmed for the reason that plaintiffs failed to make out a case for specific performance.

It is well settled that a person is not entitled to specific performance in the absence of pleading and proof that the contract is just and reasonable, and that the consideration is adequate. Civ.Code, sec. 3391; Haddock v. Knapp, 171 Cal. 59, 62, 151 P. 1140; Dore v. Southern Pacific Company, 163 Cal. 182, 196, 124 P. 817; Quan v. Kraseman, 84 Cal.App.2d 550, 551, 191 P.2d 16; Foley v. Cowan, 80 Cal.App.2d 70, 74, 181 P.2d 410; Mayers v. Alexander, 73 Cal.App.2d 752, 762, 167 P.2d 818; Dessert Seed Company v. Garbus, 66 Cal.App.2d 838, 844, 153 P.2d 184; Eichholtz v. Nicoll, 66 Cal.App.2d 67, 69, 151 P.2d 664; Remmers v. Ciciliot, 59 Cal.App.2d 113, 116, 138 P.2d 306; Page v. Brown, 122 Cal.App. 12, 19, 9 P.2d 895.

Plaintiffs failed to meet the burden thus imposed upon them, as they introduced no evidence whatever to show the value of the property. The trial court, therefore, properly made findings in favor of the defendants on the above-mentioned material issues. Remmers v. Ciciliot, supra; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 543, 81 P.2d 533; Code Civ.Proc., sec. 1981. Since these findings alone support the judgment, it is unnecessary to discuss the question of the sufficiency of the evidence to support the remaining findings, Sands v. Eagle Oil & Refining Company, 83 Cal.App.2d 312, 321, 188 P.2d 782, or the question of the rights of plaintiffs to the claimed credit of $700.

CARTER and SCHAUER, JJ., concur.

Rehearing denied; CARTER, J., dissenting.

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33 Cal.2d 897

In re BUNN'S ESTATE.

BUNNELL et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

L. A. 20748.

Supreme Court of California, in Bank.

May 27, 1949.

1. Appeal and error ⇨141

Trustee may appeal from order or judgment affecting existence, modification, or termination of trust.

2. Appeal and error ⇨151(3)

Where bank was entitled to act as trustee if valid trust had been created, bank was entitled to appeal as aggrieved party from a decree determining that no valid trust had been created by will and ordering distribution according to rights of succession.

3. Charities ⇨4

Provision of will directing that residual estate be sold and proceeds given to a worthy charity selected by executors was not invalid as an attempt to delegate testamentary power or as a direct bequest to an unspecified charity, but provision was to be construed as intending to create a charitable trust, in determining its validity.

4. Wills ⇨671

Whether a direct bequest is made or a trust created by will is question of testator's intention as derived from language used.

5. Wills ⇨671

No particular words or phrases are necessary for creation of testamentary trust.

6. Wills ⇨672(2)

Will, which named bank as executor and directed that residual estate after death of husband be sold and proceeds given to a charity selected by executor, was construable as intending to create a charitable trust. Civ.Code, § 2221.

7. Wills ⇨13(3)

Under statutes restricting charitable bequests but providing that restriction shall not apply to bequests made by will executed at least six months prior to death of testator who leaves no spouse, child, grandchild, or parent, the right to contest a provision is purely personal and is narrowly restricted and cannot be asserted by heirs who are not members of the designated class or by the administrator of the estate of deceased member. Probate Code, §§ 41, 43.

8. Charities ⇨21(1)
Trusts ⇨21(2)

There must be certainty as to beneficiaries in case of a private trust, but indefiniteness as to individual beneficiaries is a characteristic of a charitable trust.

9. Charities ⇨31

Courts look with favor upon attempted charitable donations and will endeavor to carry them into effect if it can be done consistently with rules of law.

10. Charities ⇨21(2)

Bequest of residual estate to charity selected by executor was not too vague and indefinite in designation of beneficiary to prevent creation of valid charitable trust.

11. Charities ⇨4

Bequest to charity selected by trustee was not invalid because there was no class of persons particularly interested in trust and therefore no one to keep trustee honest, since trust was still within protection of equity, and enforcement of the will and accounting of corpus could be compelled by Attorney General.

Schauer, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Sallie H. Bunn, also known as Sally H. Bunn, Sarah Bunn, Sarah Hale Bunn, Sarah H. Cook Bunn, Mrs. H. Y. Cook, Sarah H. Cook and Sarah E. Cook, deceased, wherein Margaret Bunnell and another, petitioners, filed a petition to determine heirship. The petition was opposed by Fred Woodworth and others, legatees, and by the Bank of America National Trust & Savings Association, contestant. From a decree directing distribution according to rights of succession, the contestant appeals.

Reversed.

Prior opinion 200 P.2d 810.

McLaughlin, McGinley & Hanson and James A. McLaughlin, Los Angeles, for appellant.

Heller, Ehrman, White & McAuliffe and Lloyd W. Dinkelspiel, and Lawrence C. Baker, San Francisco, as amici curiae on behalf of appellant.

Laurence Phillips, Los Angeles, William N. Parker, Pasadena, and Fleming & Boyce-Smith, Los Angeles, for respondents.

EDMONDS, Justice.

The testamentary provisions made by Sallie H. Bunn specified that the residual estate should be "sold and given to a worthy charity selected by my executors." In a proceeding to establish heirship, it was determined that no valid charitable trust was thereby created and distribution of the property was ordered according to the rights of succession. The appeal by the executor presents for decision only the question as to the validity of the disposition to charity.

Harry Bunn, the husband of the testatrix, lived only about one month after her death and she left no lineal heirs. Her holographic will, with three codicils, was admitted to probate by an order which also appointed Bank of America National Trust & Savings Association executor.

In a proceeding to determine heirship, Mr. Bunn's administrator and 24 of his wife's collateral heirs claimed the residue of the estate, which amounts to about $35,000. The decree in their favor distributes one-half of the property to the husband's administrator and the remainder to the other claimants.

The will included the following: "At Harry's death, I want everything I have sold and given to a worthy charity, selected by my executors." The first codicil reiterates this provision by declaring: "As I have already stipulated, I want everything at Harry's death sold and given to a worthy charity." One of the other two codicils, both of which bear the same date, states: "I want my silver to be given my nieces and what is left given to charity by my Executor."

The appellant argues that these provisions are sufficient to create a valid charitable trust of which it is trustee. The respondents take the position that: (1) An executor is not entitled to appeal from a decree distributing property; (2) there was no intent to create a trust; (3) the attempted gift to charity is void under section 41 of the Probate Code; and (4) the designation of a beneficiary is too vague and indefinite to create a valid trust.

[1] The first point of the heirs is based upon the assumption that the bank is prosecuting the appeal in its capacity as executor and they rely on authorities holding that an executor may not attack a decree of distribution. However, throughout the proceedings in the probate court, the bank retained separate counsel and studiously distinguished between its capacities as executor and as trustee. The appeal was taken by the bank as "the party asserting the right to act as Trustee under such will", and a trustee has the right to appeal from an order or judgment affecting the existence, modification or termination of a trust. In re Estate of Ferrall, 33 Cal.2d 202, 200 P.2d 1; Fletcher v. Los Angeles Trust & Savings Bank, 182 Cal. 177, 187 P.

425. Such an attack "is not one involving the conflicting interest of beneficiaries or others, under the terms of the trust, but one going to the very existence of the trust itself. It is not only the right of the trustee to protect the trust estate, it is its duty as well. If the—[contestant of the dispositive provisions] be correct the entire plan of the deceased as declared in her will is destroyed." In re Estate of Hubbell, 121 Cal.App. 38, 40, 8 P.2d 530, 531.

[2] The respondents argue that as there has been no distribution of the corpus to the alleged trust, the bank does not come within this rule. But if there is a valid trust, it was created by the testator and not by any order of the probate court. If the decision of the probate court is correct, then there is no trust and the bank has no trust to administer. If, on the other hand, the will created a valid trust and the decree is erroneous, the bank is a party aggrieved by the adverse order and is entitled to appeal from it. The issue as to the bank's status, therefore, goes to the merits of the case and cannot be determined preliminarily upon a procedural point.

[3-6] It is next urged by the respondents, particularly the collateral heirs and distributees, that Mrs. Bunn had no intent to create a trust in this case and all that is involved is the validity of an attempted direct bequest to an unspecified charity. From this, it is argued, there was an invalid attempt to delegate testamentary power. The contention is without merit. Whether a direct bequest or a trust has been created by the provisions of a will is entirely a question of the intention of the testator as derived from the language used; no particular words or phrases are necessary for the creation of a trust. In re Estate of McDole, 215 Cal. 328, 10 P.2d 75; In re Estate of Shaw, 198 Cal. 352, 246 P. 48; Kornbau v. Evans, 66 Cal.App.2d 677, 152 P.2d 651; In re Estate of DeMars, 20 Cal.App.2d 514, 67 P.2d 374. Mrs. Bunn named the bank as executor and then provided that the residue of her estate, after the death of her husband, should be sold and the proceeds given to a charity to be selected by her executor. Thus, there is an express subject, purpose and beneficiary of the trust in addition to the existence of a trust intent which appears from the nature of the devise, Civ.Code, § 2221, and a specific designation of the bank as trustee.

[7] The respondents' third contention is that under the provisions of section 41 of the Probate Code, which restricts charitable bequests, the trust, if valid, may be sustained only as to one-third of the estate. In answer to this argument, the bank relies upon section 43 of the Probate Code which declares that "[n]othing in this article contained shall apply to bequests or devises made by will executed at least six months prior to the death of a testator who leaves no spouse, child, grandchild or parent * * *." and the undisputed evidence shows that the will and each of the codicils were executed well over six months before Mrs. Bunn's death.

Although the question as to who may assert the invalidity of a devise or bequest subject to the provisions of section 43 of the Probate Code has not been directly decided by the appellate courts of California, under the authorities in other jurisdictions the respondents cannot do so because they are not members of the designated class. "The prohibition contained in the statute is a limitation upon the right of a testator to dispose of his property in accordance with his own inclinations and desires. It should, therefore, be strictly construed against those seeking to invalidate testamentary provisions." In re Plaster's Will, 266 App.Div. 439, 43 N.Y.S.2d 1, 3. The Iowa Supreme Court considered hypothetically the situation here presented. "If such designated parties do not challenge the bequest to charity, it does not lie in the mouth of any other person to challenge it. It may often happen that a testator will make a bequest to charity * * * and leave a surviving spouse, and the spouse will fully acquiesce in such charitable bequest and wish that the will be carried out in its entirety. Could it be said that, under the statute, the mere fact of the existence of a surviving spouse would enable some other person, such as a distant collateral heir, to challenge the bequest to charity? We think not." Karolusson v. Paonessa, 207 Iowa 127, 222 N.W. 431, 433; see also

In re Korzeniewska's Estate, 163 Misc. 323, 297 N.Y.S. 997; Matter of Hills' Will, 264 N.Y. 349, 191 N.E. 12, 93 A.L.R. 1380. Nor is the administratrix of the estate of Mrs. Bunn's husband in any better situation, for the right to contest a will on this ground has been held to be purely personal, to be narrowly restricted, and one which does not pass to the representative of a decedent as a part of his estate. In re Webster's Estate, 178 Misc. 342, 33 N.Y.S. 2d 862.

[8] The basic legal question in the case is whether a bequest to charity in general, with a power in the trustee to select the beneficiary, is too vague and indefinite to be upheld. First, of course, it is essential to distinguish between private trusts and those having a charitable purpose. "In the case of a private trust there must be certainty as to the beneficiaries, but in charitable trusts individuals are not named, for the reason that, if named, the gift becomes a donation to individuals, and, losing the character of indefiniteness as to persons (which is of the essence of a charitable trust), it is no longer a charitable trust. Inherent in every charitable trust is the very characteristic against which [respondents'] argument points, namely, indefiniteness of beneficiaries." Fay v. Howe, 136 Cal. 599, 601, 69 P. 423, 424.

It is argued by the respondents, however, that "while indefiniteness as to *individual* beneficiaries is one of the characteristics of a charitable trust, it does not follow that *no degree* of certainty is required." No California case has been found which passes upon this proposition. In re Estate of Hanson, 3 Coff.Prob. 267, cited by the respondents, involved the invalidity of a proviso in a gift to the residuary beneficiary "to dispose of in charities as he thinks best." The court based its holding of invalidity upon the fact that "there was no trust attempted to be created," and, for that reason, the case is not here in point. The other California cases deal with charitable trusts in which there is some restriction upon the type of charity. In Estate of Peabody, 21 Cal.App.2d 690, 70 P.2d 249, 250 ["an institution for old people"]; In re Estate of DeMars', 20 Cal. App.2d 514, 67 P.2d 374, 375 ["to the poor soldiers Letterman Hospital"]; In re Estate of Bartlett, 122 Cal.App. 375, 10 P.2d 126 [to enable such young man or young woman to pursue his or her studies]; In re Estate of Hood, 57 Cal.App.2d 782, 135 P.2d 383, 384 ["sick, blind, and those in need of support"]; Collier v. Lindley, 203 Cal. 641, 266 P. 526 [to improve government; assist education; for employer employee relations; etc.]; Fay v. Howe, supra ["aid of deserving, aged native-born in the town of Southboro, Mass."]. However, in many jurisdictions, a gift to charity in general has been sustained. In re Jordan's Estate, 329 Pa. 427, 197 A. 150; In re Planck's Estate, 150 Wash. 301, 272 P. 972; Selleck v. Thompson, 28 R.I. 350, 67 A. 425; Kirwin v. Attorney General, 275 Mass. 34, 175 N.E. 164; Becker v. Fisher, 112 Ohio St. 284, 147 N.E. 744; Souhegan Nat. Bank v. Kenison, 92 N.H. 117, 26 A.2d 26.

Perhaps the best discussion of this point is found in Professor Bogert's work on "Trusts and Trustees" where it is said: "Not infrequently a donor leaves property to a trustee for charity in general, without specifying any particular type of charity or any details of administration. The question then arises whether such a gift creates a good charitable trust. Must the settlor name a definite kind of charity or fix upon a specific type of benefit which he desires to confer upon humanity? Must he prescribe religion, or education, or relief of the poor, or some kindred means of working social good, or may he include within the objects of his charitable trust all possible charitable purposes and give to his trustee authority to select one or more types of charity?

"Whenever objection has been made to such broad trusts the ground of criticism has usually been said to be that the trust is too vague, uncertain, and indefinite to be enforceable. Obviously, if any trust, private or public, is attempted to be created by such equivocal or meaningless language that the court cannot understand the settlor's intent with reasonable certainty, the court may decline to enforce the trust. * * * Is a trust for 'charity' vague or indefinite in this sense? Can a court understand what a settlor had in mind by such a term and know whether acts of a trustee alleged to be in performance of the trust are in fact in execution of it or in breach of it? Can a court practically supervise the administration of such a broad trust?

"Patently a trust for charity in general is extremely broad. The human beings to be aided may consist of all humanity, or any part of it in any country. There are thousands of acts which may be done which would be declared 'charitable' by a court of equity. Does the extremely wide choice and broad discretion vested in the trustee create a vice in the trust which makes it impossible or undesirable of enforcement by the court?

"It is believed that there is no objectionable uncertainty about such a general charitable trust. The trustee of it is under a duty to select any one of the hundreds or thousands of means open to him to benefit mankind in such a way as to bring about a charitable result * * *. The decisions of the courts in England and in this country can be studied and will guide the trustee to a decision as to what is and what is not charitable * * *. There need be no doubt or ambiguity in the trustee's mind as to his duty * * *.

"There are numerous cases supporting as sufficiently definite and otherwise valid gifts to a trustee for charity in general, with authority in the trustee to select particular objects, purposes, or institutions, but with no guide furnished him as to the particular type or class of charity which the settlor desired. In some of these cases there is no limitation whatever on the trustee's discretion, the whole world being open to him. * * * Undoutedly such a trust is harder for a trustee to carry out than a limited charitable trust for a stated charitable purpose; and probably the supervision of such a trust may be somewhat more onerous than that of watching the trustee of a narrowly defined charity; but there would seem to be no impossibility, and * * * nothing short of impossibility of execution and enforcement should cause a court to defeat the settlor's intent and to decline to support the trust." 2 Bogert, Trusts and Trustees, § 371.

[9-11] Applying the reasoning of Prof. Bogert, which rests upon sound principles of law and a proper regard for generous intentions to help persons in need of a practical expression of brotherhood, the trust established by Mrs. Bunn should be upheld. "'Courts look with favor upon all attempted charitable donations and will endeavor to carry them into effect if it can be done consistently with the rules of law. A bequest intended as a charity is not void, and there is no authority to construe it to be legally void if it can possibly be made good.' In re Estate of Hinckley, 58 Cal. 457; In re Estate of Willey, 128 Cal. 1, 60 P. 471; In re Estate of Merchant, 143 Cal. 537, 77 P. 475." Collier v. Lindley, 203 Cal. 641, 654, 266 P. 526, 531. The concern of the respondents that there is no one "to keep the trustee honest" has no substantial foundation. The fact that there is no class of persons particularly interested in such a trust does not place it beyond the protection of a court of equity, and the enforcement of the requirements of the testatrix and an accounting of the corpus may be compelled by the attorney general. People v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L.R.A. 269.

The order is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (concurring and dissenting).

I concur in the judgment of reversal solely because I think the Findings of Fact and Conclusions of Law do not adequately resolve all material issues.

It should be pointed out, however, that the majority opinion quotes only such excerpts from the documentary evidence as the majority deem support their conclusion. Actually the evidence before the trial court, taken in its entirety, admits of materially conflicting inferences: the testatrix may or may not have intended to create a trust; she may or may not have intended certain bequests to be gifts absolute; she may or may not have intended certain bequests to be not absolute or in trust, but of a life estate with remainder over. An inference to be drawn from an established fact is evidence. (Code of Civ.Proc., §§ 1957(1), 1958, 1960.) When established facts admit of opposing or inconsistent inferences the evidence, in that sense, is conflicting and the resolution of the conflicts should be left with the jury or trial judge.

I do not agree with the majority's disposition of the effect of section 43 of the Probate Code. That section by its express terms is applicable and operative only upon one of two specified contingencies: 1. When the testator "leaves no spouse, child, grandchild or parent"; or, 2. "[W]hen all of such heirs, by a writing executed at least six months prior to * * * [the testator's] death, shall have waived the restriction." Neither contingency is shown to exist here; the testatrix left her spouse surviving and there is no suggestion that he had "at least six months prior to" the testatrix's death (or at any other time) "by a writing * * * waived the restriction." Since section 43 is not operative section 41 is operative.

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34 Cal.2d 1

LA HUE et al. v. DOUGHERTY et al.

L. A. 20533.

Supreme Court of California, in Bank.

June 3, 1949.

1. Vendor and purchaser 🔑251

In order for a vendor's lien to exist, it is essential that there remain unpaid and unsecured a portion of consideration for purchase of land; that right to lien be founded on inequity of permitting purchaser to have both land and money, and on justice of allowing vendor to subject property with which he has parted to satisfaction of debt which constitutes consideration for transfer; and that unpaid portion of price be some fixed or ascertainable consideration, either of money or its equivalent.

2. Declaratory judgment 🔑318

Complaint, alleging dissolution of partnership and settlement of accounts, which involved conveyance of plaintiffs' interest in realty and improvements to defendants on payment by defendants of a specified price represented by a cash payment and a five-year nonnegotiable note for the balance, alleging that realty was only asset of partnership, and that defendants had sold part of realty and were negotiating to sell the remainder, stated a cause of action for the declaration of a vendor's lien on realty. Civ.Code, §§ 3046–3048.

3. Declaratory judgment 🔑325

Where subject matter was within contemplation of declaratory judgment act and complaint stated sufficient facts showing existence of subject matter and controversy in relation thereto upon which court could exercise declaratory power, fact that ultimate result might not be favorable to plaintiffs was immaterial on demurrer to complaint. Code Civ.Proc. § 1061.

4. Declaratory judgment 🔑325

Where complaint disclosed a justiciable controversy regarding which declaratory relief could be granted either affirmatively or negatively, court could not ascertain respective rights and duties of parties prior to trial and determination on merits of the issues of fact. Code Civ.Proc. § 1061.

5. Declaratory judgment 🔑188

Where plaintiffs, on dissolution of partnership, conveyed their interest in partnership property to defendants and in return received a five year nonnegotiable note for the price, and defendants commenced selling the property, plaintiffs were entitled to a declaratory judgment action to preserve their vendors' lien. Code Civ.Proc. §§ 1060, 1061, 1962, subd. 2; Civ.Code, §§ 3046–3048.

◆

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action for declaratory relief by Marvin E. La Hue and Helen La Hue against Seymour R. Dougherty and Evelyn N. Dougherty. From a judgment entered on an order sustaining a demurrer to the complaint without leave to amend, plaintiffs appeal.

Reversed with directions.

Prior opinion 199 P.2d 369.

Gibson, Dunn & Crutcher, Bert A. Lewis, and Samuel O. Pruitt, Jr., Los Angeles, for appellants.

John K. Ford, Los Angeles, for respondents.

SHENK, Justice.

This is an appeal by the plaintiffs from a judgment entered on an order sustaining a demurrer to their complaint without leave to amend.

The complaint is for declaratory relief and alleges the following facts:

Prior to February 1, 1947, the plaintiffs and defendants owned in common and operated as copartners a ranch consisting of approximately one section of land near Lancaster, California. On that date an agreement of dissolution of the partnership and settlement of accounts was executed by the parties. In addition to the dissolution and settlement the agreement provided for a transfer to the defendants of the plaintiffs' interest in the real property and improvements, payment by the defendants to the plaintiffs of $1500 in cash, and the execution and delivery to the plaintiffs of the defendants' non-negotiable promissory note in the principal sum of $3500 payable in five years bearing annual interest of 5%. A copy of the agreement and note is attached to the complaint. The reason alleged for the deferred due date on the note is the defendants' representation that they had incurred considerable expense in remodeling the barn and procuring dairy equipment in pursuit of their intention to operate a dairy on the ranch, and that because of these facts they required postponement on the payment of the principal of the note for the five year period.

It is also alleged that the only asset of the partnership was the real property and that the $1500 cash payment and the amount of the note were intended to compensate the plaintiffs for their interest therein; that the obligations of the agreement were performed including the execution by the plaintiffs to the defendants of a quitclaim deed to the premises, and the delivery of the cash payment and the note by the defendants to the plaintiffs.

The complaint and the agreement show that during the partnership period and thereafter a $12,000 note and mortgage was held by a bank against the property. It is alleged that shortly after the settlement of these matters between the parties and the execution and delivery of the deed the defendants sold a substantial portion of the real property for $8500 which they applied on the mortgage indebtedness.

The plaintiffs allege that the defendants refuse to recognize that the foregoing facts give rise to a vendor's lien on the property for the alleged unpaid balance of $3500 on the purchase price, and that an actual controversy exists between them relating to the existence of the lien; that the defendants are negotiating for the sale of the remainder of the property and if successful in transferring or encumbering their remaining interest without the prospective transferee's knowledge of the alleged lien. the plaintiffs will be deprived of their right to subject the proceeds of sale or loans to the payment of the $3500 unpaid on the note. They seek a judicial declaration that they have a vendor's lien against the property to secure the payment of the alleged unpaid portion of the purchase price.

Section 1060 of the Code of Civil Procedure provides that a person interested under a contract or who desires a declaration of his rights or duties with respect to another in regard to property in cases of actual controversy may ask for declaratory relief and that the court may make a binding declaration of the parties' respective rights and duties with the force of a final judgment.

Under section 1061 the court has discretion to refuse the relief in any case where the declaration or determination is not necessary or proper at the time under all the circumstances.

By section 3046 of the Civil Code the seller of real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer, and which by section 3048 is valid against everyone claiming under the debtor except a purchaser or encumbrancer in good faith and for value. Section 3047 states that an absolute transfer by the seller of the buyer's contract, if there is one, amounts to a waiver of the lien.

It is not contended that the complaint and agreement show a waiver of the alleged lien, or that the plaintiffs have a remedy by foreclosure or otherwise until a cause of action accrues by non-payment of the note after it becomes due. The trial court's order was predicated on the conclusion that the alleged facts and the provisions of the agreement did not create a vendor's lien. The defendants seek to sustain the judgment by reliance on Womble v. Womble, 14 Cal.App. 739, 113 P. 353.

[1] In the Womble case the plaintiff sought to cancel a deed of a one-half interest in 480 acres or to foreclose an alleged vendor's lien thereon. A contract showed the consideration for the deed to be assumption of a $3000 mortgage on the property and the promise by the defendant to build a ten room house on the premises, construct a windmill with a tank and force pump to convey water thereto, pay the expense of sowing, harvesting and baling 250 acres of wheat hay, and erect hoisting works on, sink shafts to, and develop a quartz vein or lode trending through the land. The plaintiff alleged performance of all promises except that relating to the quartz vein. A judgment entered on the sustaining of a demurrer was affirmed. It was held that no vendor's lien was disclosed by the complaint because it appeared therefrom that no part of the purchase money remained unpaid; that it must appear that there remains unpaid a portion of the consideration for the purchase of the land which was otherwise unsecured; that the right to the lien was founded on the inequality of permitting the purchaser to have both the land and the money and on the natural justice of allowing the vendor to subject the property with which he has parted to the satisfaction of the debt which constitutes the consideration for the transfer; that the unpaid portion of the price must be some fixed or ascertainable consideration either of money or its equivalent and for the purposes of the lien cannot be extended to cover mere collateral obligations or duties. The foregoing are generally recognized precepts which established an ancient rule independent of codification. Borchard, Declaratory Judgments, 2d ed., pp. 279 et seq.; Doty v. Deposit Bldg. & Loan Ass'n, 103 Ky. 710, 46 S.W. 219, 47 S.W. 433, 43 L.R.A. 551; Gerstell v. Shirk, 7 Cir., 210 F. 223, 227; Old First Nat. Bank & Trust Co. v. Scheuman, 214 Ind. 652, 13 N.E. 2d 551, 19 A.L.R. 1165; Avery v. Clark, 87 Cal. 619, 623, 25 P. 919, 22 Am.St.Rep. 272; Finnell v. Finnell, 156 Cal. 589, 105 P. 740, 134 Am.St.Rep. 143; Rogers etc. Co. v. Southern California etc. Co., 159 Cal. 735, 115 P. 934, 35 L.R.A., N.S., 543; Maltby v. Conklin, 50 Cal.App. 201, 195 P. 280.

The portion of the opinion in the Womble case on which the defendants place their main reliance is the court's quotation of a rule stated in two cited decisions from sister states to the effect that the debt may be either for money, or the rendition of services if equivalent to the amount of a stipulated purchase price; but that where the agreement is complicated and the buyer covenanted to do other things such as build a house and the like, and the total of all his promises represents the consideration, there is confusion so that it is difficult to separate the purchase money, and the lien will not attach.

[2] Assuming the validity of the rule thereby approved it may be said to have been properly applied in the Womble case. But there is no analogy between the facts of that case and those alleged in the complaint here. There the only unperformed part of the consideration was the agreement to render specified personal services of an unestimated and probably unascertainable value. Here the plaintiffs allege the performance by the parties of all the agreements affecting the settlement of their accounts, and that there remains unpaid as the balance of the consideration for the transfer of the real property the principal sum of the promissory note which is not yet

due. To that extent only is it sought to have the vendor's lien declared. The provisions of the dissolution agreement do not necessarily conflict with the truth of the allegations. In any event unlike the Womble case it does not appear that the plaintiffs seek to impose a lien on account of unperformed personal services of an unestimated or unascertainable value which may have been a portion of the consideration for the transfer. Thus a case is sufficiently alleged for the creation of the lien in accordance with the code provisions and the tests approved in the decisions.

[3-5] Since the subject matter is within the contemplation of the relief afforded by section 1061 of the Code of Civil Procedure, and the complaint states sufficient facts showing the existence of the subject matter and a controversy in relation thereto upon which the court may exercise the declaratory power, it is immaterial that the ultimate result may not be favorable to the plaintiffs. The provisions of section 1061 expressly recognize that the judicial declaration may be either affirmative or negative in form and effect. This is therefore not a case where the court may ascertain the respective rights and duties of the parties prior to trial and determination on the merits of the issues of fact. Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062; Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 161 P.2d 217, 162 A.L.R. 747; Lord v. Garland, 27 Cal.2d 840, 168 P.2d 5. Upon the trial the plaintiffs would be entitled to present evidence supporting their allegations as to the consideration for the transfer of the real property. Field v. Austin, 131 Cal. 379, 63 P. 692; Code Civ.Proc. 1962(2). They should be afforded the opportunity to obtain the only means by which at this stage the alleged vendor's lien may be preserved.

The judgment is reversed with directions to the court to overrule the demurrer and thereupon to proceed in accordance with the views herein expressed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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92 Cal.App.2d 257

WESTERN GULF OIL CO. v. TITLE INS. & TRUST CO.

Civ. 3784.

District Court of Appeal, Fourth District, California.

June 7, 1949.

Rehearing Denied July 1, 1949.

Hearing Denied Aug. 4, 1949.

1. Mines and minerals 🔑79(3)

Where oil and gas lease provided that lessee should pay lessor as royalty one-eighth of value of all oil removed, after making deduction for temperature, water, and base sediment, at posted market price, or, at lessor's option, one-eighth part of the oil, and lessor elected to take one-eighth of the cash value of oil produced, lessor was required to bear its proportionate share of cost of dehydration of oil produced.

2. Mines and minerals 🔑79(7)

Fact that lessee, in paying lessor one-eighth of cash value of oil produced, did not charge lessor for proportionate share of cost of dehydration of oil during first 10 years of production, did not bar lessee by laches from thereafter compelling lessor to pay its proportionate share, where during first 10 years no accurate charge could have been made by lessee.

3. Customs and usages 🔑19(3)

In action by lessee under oil and gas lease against lessor for declaratory relief to determine whether lessor was required to pay its proportionate share of cost of dehydrating wet oil, evidence sustained finding that there was no prevailing custom at time of execution of lease that no charge should be made against lessor for dehydrating oil.

4. Appeal and error 🔑1010(1)

Where trial court's finding was supported by evidence, it could not be disturbed on appeal.

5. Payment 🔑87(1)

Payments of illegal claims enforced by duress, coercion or compulsion, when the payor has no other adequate remedy to avoid it, will be deemed to have been made involuntarily and may be recovered.

6. Payment ⚷87(2)

Where lessee under oil and gas lease deducted from royalties payable to lessor the lessor's proportionate share of cost of dehydrating wet oil, and lessor threatened a forfeiture of lease because of such deductions, and lessee then paid lessor amount deducted without conditions, and lessee delayed commencement of action asking for temporary relief against forfeiture for some 208 days, lessee could not recover amount of payment when it was determined that lessor was liable for its proportionate share of cost of dehydration of oil. Code Civ.Proc. § 1060.

7. Payment ⚷82(1)

Payments voluntarily made, with knowledge of the facts, cannot be recovered.

8. Payment ⚷87(2)

Generally, where, by reason of peculiar facts, a reasonably prudent man finds that in order to preserve his property or protect his business interests it is necessary to make a payment of money which he does not owe and which in equity and good conscience the receiver should not retain, the payor may recover the payments.

9. Appeal and error ⚷1008(1)

Whether lessee under oil and gas lease, through its agent or representatives, acted as a reasonably prudent person in paying lessor money to which lessor was not entitled was a question for trial court.

◆

Appeals from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Western Gulf Oil Company, a corporation, against the Title Insurance and Trust Company, a corporation, for declaratory relief under an oil and gas lease and to require the defendant to pay the cost of dehydrating oil. From a judgment holding that defendant was required to pay cost of dehydrating oil but that plaintiff could not recover from defendant the cost of dehydrating oil for certain period during which such cost was voluntarily paid by plaintiff, both parties appeal.

Judgment affirmed.

J. G. Leovy, P. O. Broxon, Los Angeles, Borton, Petrini, Conron & Borton, Bakersfield, for plaintiff.

Robert Wanamaker, John W. Holmes, Pasadena, Jack W. Bradley, Bakersfield, for defendant.

MUSSELL, Justice.

This is an action for declaratory relief under an oil and gas lease and to require lessor to pay the cost of dehydrating oil.

In this proceeding plaintiff seeks declaratory relief to determine the rights and duties of the lessor and lessee with respect to the dehydration or cleaning of the oil produced under an oil and gas lease executed by plaintiff's predecessor, as lessee, with the predecessor of defendant as lessor of premises in the Fruitvale Oil Field in Kern County, and to recover from defendant lessor the cost of dehydrating lessor's royalty share of said oil.

The lease provides in part that, "Lessee shall pay Lessor as royalty the equal one-eighth part of the value of all oil removed from the leased premises, after making the customary deduction for temperature, water and b. s., at the posted market price in the district in which the premises are located for oil of like gravity the day the oil is run into pipe line or storage tanks, * * *; or at Lessor's option exercised not oftener than once in any one calendar year upon sixty (60) days' previous written notice, deliver unto Lessor's tanks on the leased premises or at mouth of well to pipe line designated by Lessor, free of cost, Lessor's one-eighth part of said oil." At all times since the execution of the lease defendant elected to take its one-eighth royalty share of the oil produced from the premises in cash rather than in kind.

The lease does not contain any covenant referring to the cost of dehydration or the burden of dehydrating the lessor's royalty share of the oil, and the only prices posted for oil in the field in which the leased land is situated are, and have been, prices for "clean" oil, that is, oil containing a 3% or less by volume of water and base sediment. Production of oil from the leased premises commenced in 1934, and all oil so produced was "wet" oil, that is oil containing in excess of 3% by volume, of water and base sediment.

Prior to July, 1943, the wet oil produced from the leased land was transported therefrom by plaintiff by means of pipe lines to field storage tanks of plaintiff on other property where it was commingled with other oil produced by plaintiff in the same field, and such of the commingled oil as required cleaning was thereafter dehydrated at a central dehydrator. No record was kept of the amount of lessor's oil which was dehydrated prior to July 1, 1943, as it was mixed with oil from other leases before dehydration and the resultant mixture was only dehydrated when necessary to reduce it to clean oil. Dehydration of wet oil in the instant case was accomplished by settling, and heat treatment to "break out" the water and base sediment to reduce the water content and base sediment to 3% or less. From 1934, to July 1, 1943, the amount of net oil content, of oil for the purpose of accounting to the defendant for royalty interests was determined by means of tests of samples of wet oil taken from the tanks. These samples were taken from the top, middle, and bottom of each tank, mixed together, put with solvent in centrifuges and broken down to determine the precentage of water and base sediment, or amount of cut. When the amount of cut was thus determined a deduction was made from the gauges of the tank after a correction for temperature and the result was the net quantity of oil.

On November 12, 1942, Mr. Robert Wanamaker, as attorney for certain beneficiaries under the trust involved, sent to plaintiff a copy of a report of engineers retained by him, in which report it was recommended that the oil from the leased premises be first cleaned and dehydrated thereon, prior to being gauged, sampled and tested for the final royalty accounting. Plaintiff then erected and constructed on the leased property a plant designed to dehydrate or clean exclusively the oil produced therefrom.

This plant was put in operation July 1, 1943, and substantially all oil produced from defendant's land was thereafter dehydrated or cleaned in the plant and plaintiff accounted to defendant for its royalty share on the basis of the actual quantity of clean oil produced from the property and cleaned in the plant.

In the month of January, 1944, plaintiff deducted from royalties payable to defendant the sum of $674.11 as plaintiff's share of the cost of dehydrating oil produced from the premises from July 1, 1943, to December 31, 1943. During the first four months of 1944, plaintiff deducted from royalty payments to defendant sums aggregating $537.48 as the cost to plaintiff of dehydrating defendant's royalty share of oil removed from the leased premises and dehydrated during that time.

On April 11, 1944, plaintiff received from defendant a written notice wherein it was stated that the lease had been violated and breached by plaintiff by reason of the withholding of cleaning charges from the royalty payments for the period beginning July, 1943, to and including February, 1944. Plaintiff was required by the notice to "cease the violation and breach within 60 days."

On June 2, 1944, plaintiff sent a check to defendant for the sum of $1,211.59, representing the total deductions made during the period July 1, 1943, to April 30, 1944, inclusive, for lessor's portion of the cost of dehydrating and cleaning the oil produced under the lease. Defendant was notified by plaintiff in the letter which accompanied the check that the payment was made solely to avoid a possible forfeiture of the lease by reason of the service of the notice of breach and "to cease violation", and that payment was made without any admission that the lessor's royalty oil was not properly chargeable with its proportion of the cost of dehydrating or cleaning the oil produced from the leased property.

On June 9, 1944, defendant wrote plaintiff advising it that defendant could not accept the tender if it was made subject to assent or acquiescence in the provisions of the letter accompanying the tender, and under date of June 10, 1944, plaintiff replied that the tender was not subject to assent or acquiescence in the deductions or statements in plaintiff's letter. Thereupon the check was accepted and payment thereon was received by defendant. In the royalty statements for the month of May, June and July, 1944, which statements and checks were submitted the month following the statement period, no deduction was in fact made from royalty payable during each of these months, although each of the statements sets forth a "cleaning charge" at the rate of three cents per barrel, and one-eighth thereof is shown as a charge, viz., for the month of May $179.54, June $183.70, and July $231.84. The July statement and check in payment thereof was accompanied by plaintiff's letter of August, 1944, in which letter, among other things, plaintiff advised defendant that it was about to file an action against defendant and that the payments "will be made without prejudice to Western Gulf Company's right to make deductions of such costs from said royalties * * *" On August 21, 1944, defendant refused to accept the tender and so advised plaintiff, and on August 23, 1944, plaintiff advised defendant that the tender was not subject to any conditions or acquiescence referred to in plaintiff's letter of tender and defendant thereupon accepted the payment.

It was stipulated that the total cost of dehydrating one-eighth of the oil produced on the leased premises from July 1, 1943, to July 31, 1944, was the sum of $1,806.67 and the recovery of that sum is sought by plaintiff.

Pursuant to a stipulation of the parties there was first submitted to the trial court the question of whether, under the terms of the lease, defendant was obligated to pay a proportionate share of the costs of dehydration, which question was decided in favor of plaintiff. Upon a further hearing of the cause upon the question as to whether plaintiff was entitled to recover such costs during the period July 1, 1943, to July 31, 1944, the court determined that said costs were voluntarily paid by plaintiff to defendant and could not be recovered.

The judgment decrees that during such time as the defendant elects or has elected to be paid in cash for its royalty share of the oil produced from the leased premises, plaintiff has the right to charge lessor one-eighth of the cost of dehydrating oil produced on the leased premises; that such cost, during the period July 1, 1943, to July 31, 1944, was voluntarily paid by plaintiff and was not recoverable; that the lessee is not estopped or barred by laches and is entitled to its costs.

Plaintiff appeals from that part of the judgment holding that the dehydrating charges for the period stated were voluntarily paid and not recoverable, and defendant appeals from the remaining provisions of the judgment.

The principal question for our consideration is whether, under the circumstances present in the instant case, the lessor, or the lessee, is obligated to pay the cost of dehydration of the lessor's oil produced from the leased premises.

The matter involved here was passed upon by this court in Vedder Petroleum Corp. v. Lambert Lands Co., 50 Cal.App.2d 102, 122 P.2d 600, 604, which was an action for declaratory relief, brought by the lessee to determine the rights and duties of the parties under an oil and gas lease almost identical in terms with the one here in question. This court held "that the value of all oil produced and saved from wells", etc., as used in the royalty clause of the lease, was the value of the crude oil as it was produced from the mouth of the wells and in that connection we said, 50 Cal.App.2d page 109, 122 P.2d at page 604, "If there were a posted available market price of the district where the premises are located for oil of like gravity, the day the oil is run into the purchaser's pipe line or storage tanks, that would be its value for the purpose of determining the amount of cash royalty to be paid but where, as in this case, there is no posted price in the district where the premises are located, then the value must necessarily be its actual market value or, in other words, its selling price in the market."

In discussing the meaning of the provision, "the day the oil is run into the purchaser's pipe line or storage tanks", as used in the royalty clause of the lease, this court held that the quoted provision was intended to fix the time as of which the value of the oil should be determined and was not intended to refer to the condition of the oil. In the instant case the lessor had an option to require the lessee to "deliver into Lessor's tanks on the leased premises or at the mouth of well to pipe line designated by Lessor, free of cost, Lessor's one-eighth part of said oil." This provision clearly indicates that the parties did not intend that the lessee should be required to dehydrate lessor's share of the oil before delivering it, in the event that lessor chose to exercise the option to have its royalty share in oil delivered at lessor's tanks or at the "mouth of well to pipe line designated by lessor". Under the terms of the lease, lessor could not require lessee to dehydrate or clean the oil before delivery of its royalty share in kind. As we held in the Vedder case, supra, 50 Cal. App.2d page 110, 122 P.2d page 604, the lessor should either pay its proportionate share of the dehydrating expense or should elect to receive its royalty share of the oil in kind, in its crude state, as produced from the wells. Since lessee is not bound to dehydrate lessor's royalty oil when delivered in kind, there is no duty upon lessee to dehydrate or clean it when the lessor's proportionate share of the value thereof is to be paid in cash.

[1] We conclude that since lessor has elected to receive its royalty share in cash it must bear its proportionate share of the cost of dehydration of the oil produced. In Alamitos Land Co. v. Shell Oil Co., 3 Cal. 2d 396, at page 402, 44 P.2d 573, at page 576, the court, when considering the duty of parties to a lease to clean wet oil, said:

"It will be noted that the lease is silent both as to how the quality and how the quantity tests shall be made. Likewise, the lease fails to require defendant to prepare the royalty oil for pipe line shipment in the event it is delivered in kind. To provide tanks for the storage of plaintiff's royalty oil is the only express obligation imposed. If delivery in kind is made, it is to be as produced and saved or as produced and stored in tanks on the premises. If this means a delivery of the gross fluid as produced, it certainly follows that, if required to purchase it, defendant must pay its own current price for the same substance. If the duty to theoretically clean is absent when the royalty oil is delivered in kind, it is absent when the royalty oil is to be purchased."

Defendant, in comparing the case at bar with the Vedder case, supra, admits that the royalty clauses in the leases in both cases are substantially the same and states that in the Vedder case there was no posted price for oil in the field in which the leased property was situated, while in the case at bar there was a posted price in the Fruitvale District. The statement is correct, but the evidence before us indicates that the oil as produced from the wells in question was wet oil and not marketable, except at occasionable intervals, and then only in small quantities and at a discount substantially in excess of the cost of dehydration. The only prices in the Fruitvale District were prices for clean oil, and dehydration was necessary to prepare the oil for sale. The testimony is that the gravity of the oil produced from the leased premises has never been of any consequence in estimating its value for marketability because of the market price structure, which, except for a short time, about three months in 1941, was all one price for all gravities. As in the Vedder case there is no posted market price for the oil as it is produced from the premises and the lessee is entitled to deduct the cost of preparing lessor's share of oil for the market. Such services are for the benefit of lessor.

[2] Defendant insists that lessee is barred by its laches by reason of the fact that no charge for dehydration was made by lessee for the first ten years of production. We can see no merit in this contention. During this ten year period wet oil was accounted for as it was removed from the premises, the net quantity was determined by sampling. The oil was commingled with that from other premises and lost its identity. It was impossible to determine the quantity of lessor's oil which was dehydrated. It follows that no accurate charge for cleaning it could have been made by plaintiff. After the dehydration plant was

put in operation the method of accounting was changed and, as suggested in the engineer's report, inaccuracies in sampling and accounting were eliminated. The trial court found that the parties to the lease, or other respective successors in interest, did not construe or interpret the terms or provisions of said lease as requiring the payment of royalty without any charge or deduction for dehydration. There is substantial evidence to support this finding.

[3, 4] It is argued by defendant that custom existing at the time of the execution of the lease is determinative of the question as to who should bear the cost of dehydration where the lease is ambiguous in that respect. In this connection the trial court found, on conflicting evidence, that no custom or practice with reference to dehydration of royalty oil by the lessee or oil operators, without charge therefor, existed in the area involved. This finding finds support in the evidence and cannot be here disturbed.

Plaintiff contends in its appeal that the court erred in finding that "the said sum of $1,211.59 paid by plaintiff to defendant on or about June 2, 1944, was freely and voluntarily paid by plaintiff and constituted a voluntary payment and plaintiff waived all right to recover any part thereof."

[5] From an examination of the letters accompanying the payments, commencing with plaintiff's letter of June 2, 1944, together with the replies sent by defendant, it is apparent that plaintiff was endeavoring to make its payments subject to conditions and reservations which were not acceptable to defendant. The payments were finally made and accepted without any conditions or reservations, and the trial court's finding was sufficiently supported by the evidence. Payments of illegal claims enforced by duress, coercion or compulsion, when the payor has no other adequate remedy to avoid it, will be deemed to have been made involuntarily and may be recovered, but the payment must have been enforced by coercion and there must have been no other adequate means available to prevent the loss. Texas Company v. Todd, 19 Cal.App.2d 174, 188, 64 P.2d 1180.

[6-8] Plaintiff could have commenced action immediately under the provisions of 1060 of the Code of Civil Procedure, asking for temporary relief from forfeiture of the lease until the matter was finally determined. Instead, plaintiff chose to pay the disputed amount, thus removing the grounds for possible forfeiture of the lease, and delayed commencement of the action some 208 days. Moreover there was evidence from which the trial court could infer that the payments were made to avoid litigation until such time as plaintiff elected to commence action. Payments voluntarily made, with knowledge of the facts, cannot be recovered. Holt v. Thomas, 105 Cal. 273, 38 P. 891. The general rule as to payments made under duress is stated in Young v. Hoagland, 212 Cal. 426, 431, 298 P. 996, 998, 75 A.L.R. 654, in the following language:

"'It has been stated that the general rule with regard to duress of this character is that where, by reason of the peculiar facts a reasonably prudent man finds that in order to preserve his property or protect his business interests it is necessary to make a payment of money which he does not owe and which in equity and good conscience the receiver should not retain, he may recover it.' 21 R.C.L., pp. 154, 155."

[9] Whether the plaintiff, through its agents or representatives, acted as a reasonably prudent person, depends upon the facts and circumstances and is a question for the trial court's determination. Young v. Hoagland, supra, 212 Cal. pages 431, 432, 298 P. 996.

The judgment is affirmed. Each party to pay its own costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

92 Cal.App.2d 219

In re GALVIN'S ESTATE.

NELSON v. GALVIN.

No. 13929.

District Court of Appeal, First District,
Division 1, California.
June 7, 1949.

1. Courts ⚷**475(2)**

Probate court may exercise jurisdiction to determine amount of interest of a former wife in community property of a decedent when former wife takes as an heir and may determine if a property settlement was made or approved by court, but probate court may not retry issue of community property if it has been finally determined in another action.

2. Divorce ⚷**255**

Provisions of a divorce decree are conclusive so far as doctrine of res judicata is concerned on issue of community property in probate of former husband's will.

3. Partnership ⚷**313, 315**

An executor who is also a surviving partner may be forced, for good cause, to render an account of settlement of partnership affairs, but such an account would not be required where it was shown that former wife was not entitled to community property interest in estate of former husband.

4. Divorce ⚷**255**

Interlocutory divorce decree, from which time for appeal had expired, disposing of former wife's community property was binding on probate court precluding wife's participation in former husband's estate.

◆

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Albert E. Galvin, wherein Neva Nelson contested probate of the will and was opposed by James M. Galvin, as executor of the last will of Albert E. Galvin, deceased. From a decree ordering final account and distribution of the estate, contestant appeals.

Affirmed.

G. I. Hoffman, Albert D. Elledge, San Francisco, for appellant.

James C. Purcell, S. Lee Vavuris, San Francisco, for respondent.

WARD, Justice.

Neva Nelson, formerly the wife of Albert E. Galvin, as contestant to the probate of his will appeals from the "Decree First and Final Account Distribution of the Estate" of Albert E. Galvin, filed February 18, 1948 and from an amendment thereto filed April 2, 1948.

Albert E. Galvin's will, dated April 30, 1946, named his brother as executor. He bequeathed his "home & furniture" to a sister, nephew and two nieces; his share of the business of "Galvin Bros. & any of the monies under that name" to his brother and partner, James M. Galvin, and his wife; "To my exwife Neva A. Galvin I leave a policy for Government life insurance in her name until maturity which will more than cover the amount of alimony that I agreed to give her. I do not wish her to share in anything else that I now have or may hereafter possess." On June 3, 1946 a codicil was attached which reads: "I am transfering my life policy to be paid to my brother Jas. M. Galvin; in the event of my death any money that I owe my ex wife Neva Galvin will be paid to her by Jas. M. Galvin."

Written objections to the final account were filed praying that the executor be ordered to settle the affairs of the partnership; to pay, "as surviving partner, to himself as executor" the assets of the partnership and to render an account "as surviving partner to himself as executor" the assets of the partnership. Attached was a petition for final distribution setting forth that contestant as the "surviving spouse" was the owner of one half of the community property and that the whole of the estate was community property.

[1, 2] The probate court may exercise jurisdiction to determine the amount of interest of a former wife in the community property of a decedent when the former wife takes as an heir, In re Estate of Kurt, 83 Cal.App.2d 681, 189 P.2d 528, and cases cited therein, and may determine if a prop-

erty settlement was made or approved by the court, but the probate court may not retry the issue of community property if it has been finally determined in another action. The provisions of the divorce decree are conclusive so far as the doctrine of res judicata is concerned. Bennett v. Forrest, 24 Cal.2d 485, 150 P.2d 416.

[3] An executor who is also a surviving partner may be forced, for good cause, to render an account of the settlement of partnership affairs, but in the present case the presentation of such itemized account would be without purpose as it was demonstrated that appellant was not entitled to a community property interest in the estate.

The last mentioned objection, that the estate was community property, is the vital issue raised by appellant. The decree and the amended decree settling the first and final account set forth that the petition for distribution was heard "and the objections of Neva Nelson, formerly Neva Galvin, widow of the above-named decedent, having been heard by said Court and after due hearing of said objections the Court having overruled said objections" the court ordered distribution in accordance with the terms of the will.

Appellant testified that she and decedent, who had been previously married, were married May 2, 1936. Subsequently divorce proceedings were instituted and appellant filed an interlocutory divorce decree on January 22, 1946. Galvin died six months later and appellant remarried in December of the same year.

During the probate hearing counsel for the executor stated that the complaint in the divorce action and the interlocutory decree set forth that there was a property settlement agreement entered into between the parties without advice of counsel. The attorney for appellant stated, "The exact wording is, 'A division of the community property has been agreed on without the advice of counsel.'" Appellant explained how she and the husband had agreed upon a disposition of the property interest between themselves without the assistance of an attorney. Appellant's version was a matter to be passed upon by the probate court. The evidence shows that amounts to cover alimony were paid. The last payment, $1300, dated June 8, 1946, forty days before Galvin's death, was marked "Final Payment".

[4] The community property rights of decedent and appellant were disposed of during decedent's life as alleged in appellant's complaint in the divorce action and followed by her interlocutory decree. Time for appeal from the interlocutory decree had expired. The decree was final except provisions as to the marital position of the parties. This is not an equitable action to set aside the decree upon the ground of fraud or mistake. Jorgensen v. Jorgensen, 32 Cal.2d 13, 193 P.2d 728; In re Estate of Teel, Cal.App., 200 P.2d 201. The interlocutory decree relating that the parties had agreed upon the disposition of the community property was binding on the probate court.

The decree and the amended decree settling the final account and ordering distribution under the terms of the will are and each of them is affirmed.

PETERS, P. J., and BRAY, J., concur.

92 Cal.App.2d 274

PERDICALIS v. PERDICALIS.

No. 14031.

District Court of Appeal, First District,
Division 1, California.

June 8, 1949.

Hearing Denied Aug. 4, 1949.

1. Divorce 🔑252

In divorce action, whether property of spouses is a joint estate or community property the trial court has the power to divide the property equally.

2. Husband and wife 🔑264

In divorce action, evidence sustained finding that despite fact that property of spouses was held in form of joint tenancy with right of survivorship, it was acquired and intended to be held as community property and was treated as such by the parties since its acquisition, so as to authorize trial court on granting divorce, to set aside the entire real property to both spouses as community property.

3. Divorce ⚷286

In divorce action, where evidence appears to be sufficient to support finding of trial court setting aside realty of the parties as community property and there is an absence of proof of an abuse of discretion, the appellate court will not interfere.

◆

Appeal from Superior Court, San Francisco County; Thomas F. Foley, Judge.

Action for divorce by Esther Perdicalis against James Perdicalis wherein defendant filed a cross complaint. From the judgment, defendant appeals.

Part of judgment appealed from affirmed.

Edw. J. Lynch, San Francisco, for appellant.

Jos. G. Gallagher, San Francisco, for respondent.

WARD, Justice.

Defendant and cross complainant in a divorce action in which each party alleged cruelty appeals from a "particular part of the judgment * * * awarding and alloting to the plaintiff and cross defendant the real property standing in the joint names of the parties and consisting of a certain lot of land * * * together with the improvements thereon."

The only question involved on appeal is whether the court erred in setting aside the entire real property to plaintiff and cross defendant as community property when the property was obtained by the husband and wife "in joint tenancy."

The appellant husband contends that "The cases all hold that a community estate and a joint tenancy estate cannot exist at the same time in the same property" and that when the parties take as joint tenants each takes a one half interest therein. In support of this contention appellant cites Taylor v. Talbert, 134 Cal.App. 595, 25 P.2d 888; Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003; Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513; In re Kessler, 217 Cal. 32, 17 P.2d 117; Chamberlain v. Chamberlain, 2 Cal.App.2d 684, 38 P.2d 790; Fox v. Fox, 18 Cal.2d 645, 117 P.2d 325, and In re Rauer's Collection Co., 87 Cal.App.2d 248, 196 P.2d 803.

In Fox v. Fox, supra, the husband was awarded certain separate property on the ground of extreme cruelty. It was held that only community property may be awarded under such circumstances. Taylor v. Talbert, supra, was decided on the theory advanced in Siberell v. Siberell, supra. In Chamberlain v. Chamberlain, supra, it was held that where there is evidence that title is held in joint tenancy and also evidence that the property was intended to be community property it is for the trial court to determine which line of evidence controls. In re Rauer's Collection Co., supra, pertains to a declaration of homestead signed and recorded by a husband and wife containing the following: "That the said real property is the Community property in Joint-Tenancy of the Declarants." 87 Cal. App.2d at page 251, 196 P.2d at page 805. In that case the husband testified that they intended the property to be held in joint tenancy rather than as community property. There was other evidence indicating the intent of the parties. The form of conveyance may be considered as some evidence of intent, but it only creates a presumption that may be rebutted by other facts and circumstances. In the Rauer's case the court stated, 87 Cal.App.2d at page 257, 196 P.2d at page 809: "The question of whether the property remains community property depends upon the intention of the parties when they acquired it."

[1] Siberell v. Siberell, supra, standing alone, is of assistance to appellant, but when the holding therein is considered with all that was said in Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905, a different conclusion must be reached. At page 758 of 23 Cal., at page 907 of 146 P.2d in the Tomaier case the following appears: "If the evidence establishes that the property is held as community property, however, it cannot also be held in joint tenancy, for certain incidents of the latter would be

inconsistent with incidents of community property." Subsequently in the Tomaier decision there is reference to the Siberell, Delanoy and Kessler cases. In discussing the Siberell case the court said, 23 Cal.2d at pages 758 and 759, 146 P.2d at page 907, "The statement that 'The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property * * *' should be understood as stating the applicable rule, only 'in the absence of any evidence of an intent to the contrary.' Delanoy v. Delanoy, 216 Cal. 23, 26, 13 P.2d 513, 514. In its holding, as distinguished from its language, the Siberell case established only that whether such property is a joint estate or community property the trial court in a divorce proceeding has the power to divide the property equally. In re Kessler, 217 Cal. 32, 17 P.2d 117, was likewise a case where there was no evidence that the property was taken by the spouses as joint tenants with the intention that it remain community property." In accord, La Mar v. La Mar, 30 Cal.2d 898, 186 P.2d 678; Tompkins v. Tompkins, 83 Cal.App.2d 71, 187 P.2d 840.

[2] In the present case the court found "that despite the fact that said property was held in the form of joint tenancy with the right of survivorship that in truth and in fact it was acquired and intended to be held as community property, and was treated as such by the parties since its acquisition." There remains only the question of the sufficiency of the evidence to sustain the finding.

Mrs. Perdicalis testified that she married defendant in May of 1916; that four adult children are living; that up to 1932 her husband was in the grocery business, but in that year he lost his business. The Home Owners' Loan Corporation forclosed a mortgage in 1938 on their former home without equity interest to the Perdicalis'. Mrs. Perdicalis succeeded in buying another home and secured a position for her husband as a porter in a hospital. The wife worked several days a week and the children contributed to the general house fund. There is no evidence that any separate funds of either husband or wife were used in the purchase of the home.

[3] "The typical method of acquiring community property is by the earnings of either the husband or the wife." (2 Witkin, Summary of California Law (6th Ed.1946) p. 1433.) The evidence appears to be sufficient to support the finding and in the absence of proof of abuse of discretion an appellate court should not interfere.

The part of the judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

91 Cal.App.2d 677

Ex parte PERRY.

Cr. 2594.

District Court of Appeal, First District, Division 1, California.

May 5, 1949.

Habeas corpus 🔑87

Writ of habeas corpus issued on averment that prisoner was being held without a commitment justified by facts then in knowledge of his attorney would be discharged where record showed that in fact a valid commitment had been issued.

Proceeding in the matter of Bernice Perry on habeas corpus.

Writ discharged.

John P. Doran, San Francisco, for petitioner.

A. P. O'Neill, San Francisco, for real party in interest.

PETERS, Presiding Judge.

The writ of habeas corpus was issued on a petition averring that the prisoner was being held without a commitment. According to the record that has been filed, that averment, when made, was justified by the facts then in the knowledge of the attorney for the petitioner, but the record shows that in fact a commitment had been issued.

It appearing to the court that the trial court had jurisdiction of the person and the subject matter, and that a valid commitment had been issued, it is the order of the court that the writ of habeas corpus be discharged and the prisoner is remanded to custody.

WARD and BRAY, JJ., concur.

92 Cal.App.2d 130

ZENTZ v. COCA COLA BOTTLING CO. OF FRESNO.

Civ. 3787.

District Court of Appeal, Fourth District, California.
May 27, 1949.

Rehearing Denied June 17, 1949.
Hearing Denied July 21, 1949.

Negligence 🔑138(3)
Trial 🔑296(7)

Where there were other bottles beside defendant's bottles in container and defendant denied that its bottle exploded and there was evidence that defendant's bottles had been properly inspected, instruction that from the "happening of the accident involved there arises an inference that proximate cause" of explosion was some negligence on defendant's part, was error, and was not cured by instruction setting forth elements of res ipsa loquitur which omitted finding by jury that the bottle had not suffered damage at the hands of persons other than the defendant.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Mary E. Zentz against Coca Cola Bottling Company of Fresno, for personal injury sustained when a bottle of Coca Cola allegedly exploded and injured plaintiff. From a judgment for plaintiff for $5000, the defendant appeals.

Judgment reversed.

Ray W. Hays, William M. Miles, Fresno, for appellant.

L. Kenneth Say, Fresno, for respondent.

GRIFFIN, Justice.

Plaintiff owned a little restaurant in which she also dispensed soft drinks. On July 12, 1946, she had two coca cola refrigerated boxes which she purchased from the previous owner of the cafe. One was not in use. The top of the other was hinged across the center so that one-half could be lifted up and laid down on the other half. It was partially filled with water for cooling purposes.

Plaintiff testified that defendant's driver had delivered and had placed several cases of coca cola in the box that afternoon and that there were no bottles in there other than coca cola. Defendant's driver testified that there were other bottled beverages in the case at the time.

When the accident herein involved took place, plaintiff was alone in the cafe, except for a boy customer who ordered a coca cola. She testified she opened one lid of the case to get a bottle (That lid rested back on top of the other lid); that she reached in, but before she touched the bottle, one under the closed lid burst and the glass therefrom cut her left forearm. Men who were standing just outside the cafe came in, saw the cut, and identified pieces of glass bottle on the floor and pieces of glass on top of the opened lid. They identified the glass as being colored green and said that it was a coca cola bottle, as they recalled it. Plaintiff was taken to the Mercy Hospital and six stitches were taken in her forearm. The jury viewed the cafe premises and also the coca cola bottling plant and observed its operation. Testimony was produced by defendant as to the method adopted as to inspections and examinations made by the company and the care it took in reference to the possibility of defective glass bottles. It was shown that such coca cola bottles were charged with gas and sometimes burst in the delivery truck if handled roughly.

A physicist, employed by defendant, testified that he tested various bottles selected by him, manufactured between 1938 and 1947, to ascertain the internal pressure necessary to break them, and that when cooled off the pressure in them decreases; that in glass, if the temperature is changed suddenly, there are strains set up which causes it to break, whether there is any pressure in it or not; that the older the bottle the more likely it is to break.

Upon this evidence, after being given an instruction on the res ipsa loquitur rule, the jury returned a verdict in favor of plaintiff for $5000.

The general instruction given was as follows:

"From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff."

This general instruction was followed by an explanatory instruction as follows:

"The instruction just given may appear to constitute an exception to the general rule that the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on a special doctrine of the law which may be applied only under special circumstances, they being as follows:

"First: The fact that some certain instrumentality, by which injury to the plaintiff was proximately caused, was in the possession and under the exclusive control of the defendant at the time the cause of injury was set in motion, it appearing on the face of the event that the injury was caused by some act or omission incident to defendant's management.

"Second: The fact that the accident was one of such nature as does not happen in the ordinary course of things, if those who have control of the instrumentality use ordinary care.

"Third: The fact that the circumstances surrounding the causing of the accident were such that the plaintiff is not in a position to know what specific conduct was the cause, whereas the one in charge of the instrumentality may reasonably be expected to know, and be able to explain, the precise cause of the accident.

"When all these conditions are found to have existed, the inference of negligence to which they give birth will support a verdict for the plaintiff, in the absence of a showing by defendant that offsets the inference."

On this appeal it is argued first, that the evidence was in conflict as to whether the bottle which caused the injury was a bottle belonging to the defendant company; that the extent of liability under the rule above mentioned, is harsh and by the general instruction, as given, the trial court, in effect, instructed the jury that the exploded bottle was a coca cola bottle. Taken alone, this general instruction is susceptible of such an interpretation. However, the pleadings put in issue that very question. The complaint was read to the jury and states that the bottle that caused the injury was a coca cola bottle. Defendant's answer denied this allegation. Instructions that the burden of proof on this issue was upon the plaintiff were properly given. Standing alone, the complaint made may not be sufficient to disturb the judgment. However, it is further contended that the instruction here involved told the jury that the mere breaking of the bottle or the happening of the accident gave rise to an inference of negligence. In Honea v. City Dairy, Inc., 22 Cal.2d 614, 618, 140 P.2d 369, it was held that the mere breaking of a bottle *alone* cannot give rise to an inference that defendant was negligent in *failing to discover the defect*. The general instruction here criticized was considered in Gordon v. Aztec Brewing Co., 33 Cal. 2d 514, at page 519, 203 P.2d 522, at page 525, and after citing the case of Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, at page 495, 150 P.2d 436, it was said:

"Standing alone this instruction was erroneous for it omitted reference to the fact that *before* the *jury* may accord the plaintiff the *benefit* of the res ipsa loquitur inference *it must believe that the bottle did not suffer damage at the hands of persons other than the defendant.*" (Italics ours.)

The explanatory instruction here involved mentioned many of the elements necessary to be established before the doctrine could be applied, but specifically omitted the element above mentioned in the cited case, i. e., that before the jury may accord the plaintiff the benefit of the res ipsa loquitur inference it must believe that the bottle did not suffer damage at the hands of persons other than the defendant. It appears to us this was one of the most important elements for plaintiff to establish before the rule became operative and that therefore the error in giving the general instruction, as worded, was not cured by the explanatory instruction which followed. The court, in the Gordon case, specifically stated, quoting from syllabus 4, that:

> "* * * while evidence that the case containing the bottle suffered no damage at any stage of its transportation from defendant's plant, that it was in excellant condition on delivery, and that plaintiff handled the case and the bottle carefully was not conclusive, it was the jury's province to determine, *after being properly instructed,* whether plaintiff had sufficiently *proved* the *absence of intervening harmful forces* after defendant shipped the bottle to entitle him to rely on an inference inherent in the res ipsa loquitur doctrine that defendant's lack of care was the proximate cause of his injury." (Italics ours.)

In that case the trial court went much farther in the explanatory instruction and did inform the jury that:

> "A defendant is deemed to have control at the time of the alleged negligent act although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession. The defendant is not charged with the duty of showing that something happened to the bottle after it left its control and management. In order to be entitled to the benefit of the doctrine of res ipsa loquitur, the plaintiff must show that every person who moved or touched the bottle after it left the control of the defendant, did so with due care, and that during said time the bottle was not accessible to extraneous harmful forces."

It then held that under those circumstances the error in the general instruction was cured because the explanatory instruction explained the circumstances which must be present before the inference of negligence can arise, including the charge that the plaintiff must prove that all who dealt with the bottle besides the defendant did so with due care.

In the instant case the court gave no such explanatory instruction. Since there was evidence that there were bottles other than coca cola in the case and that all coca cola bottles were examined for defects and were properly inspected before leaving the bottling plant and were placed in plaintiff's coca cola box in good condition, and that plaintiff's employees had served about 15 bottles of soft drinks immediately preceding the explosion; that broken glass was on top of the lid that was opened and was also on the floor (It is defendant's contention that this could not result had the bottle exploded while in the position described by plaintiff), the question of the exercise of due care by plaintiff was a factual question and the jury was entitled to a proper instruction on the subject as to when the doctrine of res ipsa loquitur might apply.

In Escola v. Coca Cola Bottling Co., supra, 24 Cal.2d at page 458, 150 P.2d at page 439, Dunn v. Hoffman Beverage Co., 126 N.J.L. 556, 20 A.2d 352, 354, is quoted and it is said:

> "* * * 'defendant is not charged with the duty of showing affirmatively that something happened to the bottle after it left its control or management; * * * to get to the jury the plaintiff must show that there was due care during that period.' Plaintiff must also prove that she handled the bottle carefully. The reason for this prerequisite is set forth in Prosser on Torts, supra, at page 300 * * *."

The question, therefore, was not left to the jury, but under the instruction, as here given, the court told the jury that

"* * * from the happening of the accident involved * * * there arises an inference that the proximate cause * * * was some negligent conduct on the part of the defendant". Such is not the law. Honea v. City Dairy, Inc., supra. We must conclude, therefore, that the giving of the general instruction without a sufficient explanatory instruction, was prejudicially erroneous.

The evidence of plaintiff's claimed injury and loss sustained makes the award of $5000 appear to be excessive on its face. Since the case must be reversed and may be retried under proper instructions as to the res ipsa loquitur rule, no good reason appears why we should now discuss this question.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

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92 Cal.App.2d 248

GREENE v. SALISBURY et al.

Civ. 16939.

District Court of Appeal, Second District, Division 2, California.

June 7, 1949.

Landlord and tenant ⚷292

Tenant could not recover in action for trespass based on removal of his furniture from part of leased premises under writ of possession issued on judgment against wife in unlawful detainer action instituted by owners of premises in absence of proof of damages alleged.

Appeal from Superior Court, Los Angeles County; Ben Rosenthal, Judge.

Action for damages for alleged trespass by Victor F. Greene against Max S. Salisbury and others. From a judgment in favor of defendants, plaintiff appeals.

Judgment affirmed.

Benjamin D. Brown, Los Angeles, for appellant.

Geo. W. Rochester, Los Angeles, for respondents.

WILSON, Justice.

Action for damages for alleged trespass. From a judgment in favor of defendants plaintiff has appealed.

Plaintiff, with his wife and children, were tenants in possession of a dwelling in Los Angeles of which defendants were the owners. Defendant Max Salisbury, a veteran, having no home and needing a place of abode for himself and family, obtained a certificate relating to eviction from the Office of Price Administration and served it on plaintiff. Upon his refusal to vacate the premises defendants commenced an action for unlawful detainer in the municipal court against plaintiff and his wife. Summons and complaint were served on plaintiff's wife. Plaintiff was at home when the papers were served on her and knew that efforts were being made to serve him with process.

Judgment was entered against plaintiff's wife. A writ of possession was issued and placed in the hands of the marshal who moved plaintiff's furniture from the living-dining room into other rooms in the house and placed defendants in possession of that room.

After publication of the summons as to plaintiff, judgment was entered against him for immediate possession, whereupon he vacated the house. He then brought this action for damages for alleged humiliation, "mental suffering, fright and anguish," and for loss of the use of the room for five days.

Plaintiff testified that he was present when summons and complaint were served on his wife and knew that the action was to obtain possession of the house; he left the city with that knowledge; upon his return he moved defendants' furniture from the house into the garage and, in defiance of the writ of possession, repossessed the premises and locked defendants out of the house.

The court found that plaintiff's allegations with reference to damages asserted by him to have been suffered were not true. Plaintiff alleged several items of special damages claimed to have been the result of the unlawful detainer action but did not offer any evidence relating thereto, hence the finding is correct. Since the sole object of the action, the recovery of damages, must fail for want of evidence, the other grounds discussed in the briefs need not be considered.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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92 Cal.App.2d 230

PEOPLE v. ALEXANDER.

Cr. 4304.

District Court of Appeal, Second District, Division 1, California.

June 7, 1949.

Rehearing Denied June 17, 1949.

Hearing Denied July 7, 1949.

1. Criminal law 🔑1144(13)

On appeal from judgment of conviction the facts must be viewed in the light most favorable to the prosecution.

2. Criminal law 🔑1159(5)

Before an appellate tribunal can set aside verdict of jury on ground of insufficiency of the evidence because of asserted weakness of testimony identifying defendant the conclusion reached in trial court must be shown to be void of sufficient substantial evidence on any hypothesis whatever to support it.

3. Criminal law 🔑1144(13)

In the appellate court there must be an assumption in favor of the verdict of the existence of every fact which the jury could have reasonably deduced from the evidence.

4. Criminal law 🔑1159(5)

The identification of the perpetrator of the crime is essentially one for determination by the triers of fact, and their verdict will not be set aside unless appellate court can say as a matter of law that there was no substantial evidence to support the conviction.

5. Criminal law 🔑1159(5)

Unless it can be said that the evidence of identity was so weak as to constitute practically no evidence at all an appellate court is not entitled to set aside the jury's finding of guilt.

6. Criminal law 🔑1159(4)

The claimed inconsistencies and uncertainties in testimony of the prosecution as to identity of the defendant were matters which should have been directed to the attention of the jury and cannot be urged on appeal.

7. Criminal law 🔑739(2)

Defendant's defense of alibi was for jury.

8. Larceny 🔑65

Evidence sustained conviction of grand theft from the person, and whether the amount was $75 or $90 was immaterial, and fact that prosecuting witness did not testify that he saw defendant actually take the money was of little consequence.

9. Criminal law 🔑824(1)

Where court properly sustained objection to cross-examination, any prejudicial effect would have been cured by proper instruction of the court, and where no request was made for an appropriate admonition contention that misconduct of state's attorney was prejudicial error could not be sustained.

10. Criminal law 🔑1171(1)

Whether the substantial rights of a defendant have been prejudiced by the misconduct of a prosecutor must rest largely upon the facts of each case, and a reversal may be had only when it is made to appear that there has been a miscarriage of justice.

11. Criminal law 🔑784(1), 814(17)

Where a case rests entirely or chiefly upon circumstantial evidence it is proper that some direction be given the jury as to the law in such cases, but where the prosecution relies upon direct evidence and circumstantial evidence is merely incidental to and corroborative of the direct evidence, an instruction on the law of circumstantial evidence should not be given.

12. Criminal law ⚿814(17)

In prosecution for grand theft from the person court properly refused an instruction on the law of circumstantial evidence.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Josephine Alexander was convicted of grand theft from the person after prior conviction of a felony, and she appeals.

Judgment affirmed.

Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Dan Kaufman, Deputy Attorney General, for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused in two separate counts of the offenses of grand theft, and grand theft from the person. The information also charged the defendant with a prior felony conviction which was admitted.

In view of the fact that the jury was unable to agree on the verdict as to Count I and that the same was subsequently dismissed, it is unnecessary to here set forth the facts thereof.

Count II charged that the defendant on or about the 18th day of June, 1948, did wilfully, unlawfully, and feloniously take from the person of Kalman Kovatch $90.00.

Following the entry of a plea of not guilty and trial before a jury, a verdict was returned finding the defendant guilty of the aforesaid offense charged in Count II. From the judgment of conviction on Count II defendant prosecutes this appeal.

[1] Stating the facts in the light most favorable to the prosecution, as we are required to do following a guilty verdict, the record reflects testimony that Kalman Kovatch was in an automobile returning home from his work at about 12 o'clock midnight. He was proceeding west on Santa Barbara and thence south on Figueroa Street until he stopped for a signal at 42nd Place and Figueroa Street. He was alone in his automobile. While stopped for the signal, defendant opened the door of the automobile and asked for a ride for a couple of blocks. Before the witness had a chance to answer defendant was inside the car and after riding a block or so, she put her hand on his legs at the thigh, saying, "How about a good time?" to which the witness replied, "I am going home." Defendant then said to him, "Turn in here. I live in here." When defendant alighted from the car, the prosecuting witness proceeded to light a cigar, reached into his pocket and discovered that all of his papers were out on the seat. He thereupon took out his wallet, looked inside and found that his money was missing, whereupon he saw a night watchman and the two of them gave chase but failed to apprehend the defendant. The witness testified that the last time he examined his wallet prior to missing the money was at his place of employment some 15 or 20 minutes before he departed for home. That at that time he had between $75.00 and $90.00 in the wallet, "probably $90.00." During his testimony the witness was asked, "Did you know that she had taken any until you opened your wallet and saw that it was gone?" to which he replied, "No."

Some two or three weeks subsequent to the night of the alleged theft, the witness Kovatch saw appellant standing on a corner and called a police officer. Upon arrival of the latter he asked, "This the girl who picked your pocket," whereupon, with reference to this incident and question the prosecuting witness testified, "I look at her. I just don't exactly know the law what going to happen with me. I pick up something I am not positively sure of the girl * * *."

A few days later, at the same location, 42nd Place and Figueroa Street, the prosecuting witness stopped his automobile and gave the defendant a ride again. After entering his automobile she put her hand upon his person saying, "How about a little fun?" At this time he told her to wait a minute as he had to go into a liquor establishment to see a friend, but defendant left the car at once. Kovatch again called the police but defendant had disappeared. The next night he observed her again and called the police, but she again disappeared. The following night a couple of police officers "staked out" and defendant was arrested.

The witness testified that the second time defendant was in his automobile she was wearing a red coat, and on cross-examination he testified: "A. But I was afraid to make the arrest before I sure, because she was dressing entirely different way, you know; I know the face, but I still got doubt and when this Monday I got enough evidence on her when she put again the hand on my legs and telling me, 'You want a good time?' I know that is the girl. And she was over, same clothes, red coat next day and day after until she got arrested."

Police Officer Edward Charles Krueger testified to a conversation with the defendant on the day of her arrest, in the course of which he questioned her concerning various crime reports in his possession. She stated that she knew nothing about any people's pockets being picked, but that she would be glad to make some restitution rather than go to jail.

Defendant took the stand and denied being in the car with the complainant or doing any of the things testified to by him. In support of her claimed alibi, defendant testified that she was at her sister's residence making hats for a celebration that was to take place on June 19. She admitted talking to Officer Krueger and that she did not tell him that she was at her sister's home the night of the alleged theft, giving as the reason therefor that at the time of the conversation with the officer she did not recall that she was at her sister's. Defendant's sister was called and testified that the former was with her on the night of June 18 making hats for the occasion above referred to and remained there until "the small hours of the morning."

As grounds for a reversal, appellant urges, (1) the evidence is insufficient to justify the verdict and the verdict is contrary to the law and the evidence; (2) the prosecutor was guilty of misconduct by which a fair trial was prevented; and (3) the court erred in certain instructions given and refused.

In support of her first ground for reversal, appellant urges insufficiency of the evidence because of the asserted weakness of the testimony given by the prosecuting witness in his identification of appellant, his uncertainty about the amount of money in his possession, and because there was no evidence to show that appellant ever had possession of any money belonging to the prosecuting witness.

[2, 3] We must approach this contention in the light of the well established rule that before an appellate tribunal can set aside the verdict of the jury upon the ground now under consideration, the conclusion reached in the court below must be shown to be devoid of sufficient substantial evidence, upon any hypothesis whatever, to support it. And in the appellate court there must be an assumption in favor of the verdict of the existence of every fact which the jury could have reasonably deduced from the evidence. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

[4-6] On the question of identification of the perpetrator of the crime, it has been repeatedly held by the courts of this state that such a question is essentially one for determination by the triers of fact, and that their verdict or decision will not be set aside unless the appellate court can say as a matter of law that there was no substantial evidence to support the conviction. People v. Ash, 88 Cal.App.2d 819, 199 P.2d 711; People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814; People v. Hightower, 40 Cal.App.2d 102, 106, 107, 104 P.2d 378. Unless it can be said that the evidence of identity was so weak as to constitute practically no evidence at all, an appellate court is not entitled to set aside a jury's finding of guilt. People v. Braun, 14 Cal.2d 1, 5, 92 P.2d 402. In the instant case appellant has not met the burden imposed upon her to show that the identification evidence is inherently unbelievable. The claimed inconsistencies and uncertainties in the testimony of the prosecuting

witness were matters which should have been directed to the attention of the jury, and can not be urged upon appeal. People v. Skaggs, 80 Cal.App.2d 83, 97, 181 P.2d 390; Code Civ.Proc., sec. 1847.

[7] What we have just said is equally applicable to the testimony in support of appellant's defense of alibi. The jury was authorized to stamp this testimony as false.

[8] The fact that the prosecuting witness did not testify that he saw appellant actually take his money is of little consequence. Taken as a whole, the evidence most cogently tends to prove that appellant took the money, and whether it was $75.00 or $90.00 is immaterial.

Appellant next assigns as prejudicial misconduct the fact that on cross-examination of her, the prosecutor asked the following questions concerning a conversation to which on direct examination she had stated she had with an investigating officer:

"Q. As a matter of fact he talked to you about some other cases which involved the offense of pickpocket, didn't he? A. Yes, sir.

"Q. A number of other cases? A. Yes, sir.

"Q. Now you know something about pickpocketing, don't you?"

[9, 10] Appellant's counsel started to interpose an objection but before he could state the specific grounds therefor the court promptly sustained the same. Appellant contends that notwithstanding her failure to request the court to admonish the jury and instruct them to disregard the question and not to draw any inferences from the same, the resultant prejudice to appellant was such that the harmful result thereof could not be obviated by appropriate instructions. This contention cannot be sustained. We are fully satisfied that in the case at bar the prejudicial effect, if any, on the jury could have been cured by proper instruction of the court. It was therefore appellant's duty to request an appropriate admonition by the court. Appellant may not predicate error in this court in the absence of an assignment of alleged misconduct of the prosecution and a request to the trial court to instruct the jury. People v. DuBois, 16 Cal.App.2d 81, 87, 60 P.2d 190; People v. Davidson, 23 Cal.App.2d 116, 120, 72 P.2d 233; People v. Agnew, 16 Cal.2d 655, 660, 107 P.2d 601. Whether the substantial rights of a defendant have been prejudiced by the misconduct of a prosecutor must rest largely upon the facts of each case. And a reversal may ensue only when it is made to appear that there has been a miscarriage of justice. People v. Braun, 14 Cal.2d 1, 7, 92 P.2d 402. The instant case presents no such situation.

[11, 12] Appellant next contends that the trial court erred to her prejudice in refusing to give a proffered instruction on circumstantial evidence, wherein direction would be given the jury as to the necessity for establishing each fact, beyond a reasonble doubt, which is essential to complete the chain of circumstances tending to establish the crime charged. Where a case rests entirely or chiefly upon circumstantial evidence it is proper and desirable that some direction be given the jury as to the foregoing rule of law. It is now, however, firmly established in our law that where, as here, the prosecution relied upon direct evidence describing the circumstances under which the complainant was relieved of his money by appellant, and the circumstantial evidence was merely incidental to and corroborative of the direct evidence, an instruction on the law of circumstantial evidence need not, and indeed, should not be given. People v. Lapara, 181 Cal. 66, 70, 183 P. 545; People v. Savage, 66 Cal.App.2d 237, 247, 152 P.2d 240; People v. Holden, 13 Cal.App. 354, 359, 109 P. 495.

We have examined the instructions given and find no error therein. The court defined every element of the offense charged clearly and correctly. The jury was admonished that it was to be governed solely by the evidence, and it was also instructed on the presumption of innocence, reasonable doubt and burden of proof.

For the reasons herein stated, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

92 Cal.App.2d 330

CHAMBERLIN v. CITY OF LOS ANGELES et al.

Civ. 16804.

District Court of Appeal, Second District, Division 2, California.

June 9, 1949.

Hearing Denied Aug. 4, 1949.

1. Insurance 🔑591½

An intent to make obligation inure to benefit of third party must clearly appear in contract of insurance and if any doubt exists it should be construed against such intent.

2. Insurance 🔑612(1)

In absence of provision in contract of insurance or ordinance pursuant to which contract is issued making obligation inure to benefit of a third party, it is a condition precedent to any action against insurer that a final judgment be obtained against assured.

3. Insurance 🔑612(1)

Where there was no language either in city ordinance requiring applicant to secure public liability insurance as condition precedent to issuance of permit to place benches on city streets or in policy issued pursuant thereto providing that insurance should inure to injured person or public generally, person allegedly injured while using bench could not maintain suit against insurers on their undertaking with company placing benches on street and city without first procuring a judgment against city or company placing bench on street.

◆

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Action by Helen Chamberlin against City of Los Angeles, California Bench Company, the American Associated Insurance Companies and the American Automobile Insurance Association, Inc., to recover for personal injuries. From judgment in favor of defendant insurance companies predicated upon sustaining of their demurrer to the complaint as amended, the plaintiff appeals.

Affirmed.

Edward Raiden, Los Angeles, for plaintiff-appellant.

R. S. Harrington, Brawley, for respondents.

McCOMB, Justice.

From a judgment in favor of defendant insurance companies predicated upon the sustaining of their demurrer to plaintiff's complaint as amended in an action to recover upon a contract of indemnity insurance, plaintiff appeals.

FACTS: The Los Angeles Municipal Code provided that an applicant in order to place benches on streets in the city of Los Angeles must, as a condition precedent to the issuance of a permit, post and maintain with the city a surety bond or policy of public liability insurance conditioned as follows:

"(b) The bond or policy shall be conditioned that the permittee will indemnify and save harmless the City of Los Angeles, its officers and employees from any and all loss, costs, damages, expenses or liability which may result from or arise out of the granting of the permit, or the installation or maintenance of the bench for which the permit is issued and that the permittee will pay any and all loss or damage that may be sustained by any person as a result of, or which may be caused by or arise out of such installation or maintenance."

Defendant California Bench Company, in compliance with the foregoing provision and in order to obtain a permit from defendant city to place benches upon the public streets, posted a bond with defendant municipality conditioned to, "Pay any and all loss or damage that may be sustained by any person as a result of, or which may be caused by or arise out of such installation or maintenance." This bond was issued by defendant American Associated Insurance Companies through its affiliate, American Automobile Insurance Association, Inc.

Thereafter defendant California Bench Company placed a bench on a street corner in the city of Los Angeles where persons waiting for a bus might be seated. A hole or depression developed in front of the bench. Plaintiff, a woman 70 years of age stepped into it, fell and suffered a fracture of the femur. Plaintiff instituted the present action naming the city, the bench company and the insurance companies as defendants. The insurance companies demurred on the ground that no action will lie against an indemnity insurance company on its bond until final judgment has been obtained against the assured, which demurrer was sustained.*

QUESTION: Can plaintiff, as one of the general public, maintain a suit against the defendant insurance companies on their undertaking with defendants California Bench Company and City of Los Angeles without first procuring a judgment against the city and/or defendant California Bench Company?

This question must be answered in the negative, and is governed by these rules:

[1] 1. An intent to make an obligation inure to the benefit of a third party must clearly appear in a contract of insurance and if any doubt exists it should be construed against such intent. (Van Derhoof v. Chambon, 121 Cal.App. 118, 131, 8 P.2d 925.)

[2] 2. In the absence of a provision in the contract of insurance or ordinance pursuant to which the contract is issued making the obligation inure to the benefit of a third party, it is a condition precedent to any action against the insurer that a final judgment be obtained against the assured. (Girard v. Commercial Standard Ins. Co., 66 Cal.App.2d 483, 489, 152 P.2d 509; Van Derhoof v. Chambon, supra. See also Criss v. United States Fidelity & Guaranty Co., 105 W.Va. 380, 142 S.E. 849, 850.)

[3] Applying the foregoing rules to the facts of the instant case there is not any language in the ordinance or in the policy of insurance here involved providing that the insurance shall inure to the benefit of plaintiff or to the public generally. Therefore, under rule (1) supra, the undertaking did not inure to plaintiff's benefit and she was not entitled to maintain an action against defendant insurance companies under rule (2), supra until she had obtained a final judgment against one of the assured.

Since she had not obtained such a judgment the complaint as amended failed to state a cause of action against either insurance company. Hence the demurrer was properly sustained. This result is fair and equitable to all parties concerned since it is presumed that a judgment obtained against the city or the bench company will be paid and defendant insurance companies will abide by the terms of their contract and reimburse the insured for their loss, thus avoiding the necessity of the insured's instituting an action to enforce the obligation created by the insurance policy and saving defendant insurance companies the expense of defending unnecessary litigation.

Milliron v. Dittman, 180 Cal. 443, 181 P. 779, and other cases relied on by plaintiff are factually distinguishable from the instant case for the reason that in such cases either the bond or an ordinance pursuant to which it was given specifically provided that it be conditioned to inure to, and be for the protection of, anyone who should sustain any damage or injury. Such was not the situation in this case.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

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* In her brief plaintiff has waived the allegation in her pleading that the bond inures by its terms to the benefit of all persons suffering loss or damage as a result of the maintenance and installation of said bench, and consents to a decision as if the complaint alleged a bond in the language of the ordinance.

92 Cal.App.2d 277

HAMILTON v. FERRALL et al.

Civ. 16721.

District Court of Appeal, Second District,
Division 1, California.
June 8, 1949.
Hearing Denied Aug. 4, 1949.

1. Wills ⚷680

In the construction of a testamentary trust the primary consideration is the intention of the testator.

2. Wills ⚷680

When by will the testator creates a trust, a liberal construction should be given to its terms, since it is the policy of the law to carry out testator's intention so far as possible.

3. Wills ⚷680

The language of testamentary trust must admit of no other reasonable construction than that of illegality before a court will declare it invalid.

4. Wills ⚷686(1)

Provision in will that trust terminate and that the corpus thereof go to daughter upon her husband's death or divorce, was valid.

5. Executors and administrators ⚷315(6)

In the absence of pleading and proof of extrinsic fraud which would warrant setting aside decree of distribution, the trust provisions of the will carried into the decree of distribution were final and all questions as to the validity of the trust were eliminated.

◆

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Action by Faye F. Hamilton, by her guardian ad litem Alex C. Hamilton, as guardian of the person and estate of Faye F. Hamilton, substituted as party plaintiff in lieu of Bernard Potter, Jr., against George D, Ferrall and others for the construction of testamentary trust and for other relief. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

Potter, Potter & Rouse, Los Angeles, for appellant.

Earle M. Daniels, Burdette J. Daniels, and Hallam Mathews, Los Angeles, for respondents.

DRAPEAU, Justice.

Demurrer to plaintiff's complaint was sustained without leave to amend, and judgment followed. Therefore, a somewhat detailed statement of the allegations of the complaint is necessary.

The complaint alleges:

1. That the plaintiff, Faye F. Hamilton, appears by guardian ad litem; that the plaintiff and the defendant George D. Ferrall are sister and brother, and that their father died in 1940, leaving a last will and testament. By this will the defendant brother was nominated co-executor with another person, the brother to serve without bond.

2. After payment of specific bequests, the will directed one-half of the residue of the estate to go to the brother, or to his three children if he died before the testator; and the remaining one-half of the residue to go to the said brother and a bank named in the will, as testamentary trustees for the use and benefit of plaintiff daughter. After giving the trustees powers to carry on the trust estate, and to compensate themselves, the trust provides:

(a) That the plaintiff be paid the income of the trust, and if such income be insufficient to meet her needs, at the discretion of the trustees, corpus of the trust estate be used for that purpose.

(b) That the trust terminate and the corpus thereof go to the daughter "upon the death of Alex C. Hamilton, or his divorce from my said daughter * * *."

Alex C. Hamilton is the husband of plaintiff, with whom she lived for about 34 years as man and wife, with no dissension between them, and no suggestion or discussion of their separation.

(c) This contingency failing, it was directed that upon the death of plaintiff the trust should terminate and the corpus thereof go to the defendant brother and his three children.

3. The complaint further alleges that at the time of the execution of the will plaintiff

was suffering from illness which necessitated her placement in a sanitarium, where she remained until the filing of the complaint; that she was of unsound mind, incapable of caring for her property or understanding the nature or effect of her acts, prior to and since the entry of the decree of distribution which carried out the terms of the will and established the testamentary trust.

4. That it was the intention of the testator to give to his daughter one-half of the residue of his estate in fee simple if she would be divorced from her husband; that such a condition is contrary to good morals and legal policy, and therefore the trust was and is null and void.

5. That the defendant brother was executor of the estate until the decree of distribution, and since then has been trustee of the testamentary trust; that subsequent to the death of testator the brother entered into a conspiracy with a person named in the complaint to acquire plaintiff's property, and that while plaintiff's husband was away from California these two parties took the plaintiff to defendant brother's attorneys and induced her to make a will leaving all of her property except community to her said brother; that the making of this will was concealed from plaintiff's husband.

6. That in June of 1942 plaintiff employed an attorney at law (the guardian ad litem named in this proceeding) to procure an accounting in probate in decedent's estate, and to present a claim in her behalf that the trust was for maintenance and that she should be paid the income thereof from the date of death of the testator; that this claim was contested by the brother. That the brother called on plaintiff several times and told her that her husband and her attorney were endeavoring to beat her out of her property, that the brother would take care of her interests, and that she should dismiss her attorney. And that the defendant brother prepared in his own handwriting a note dated Nov. 5, 1942, reading as follows:

"This is to notify you that I don't want the case of mine appealed. I would like to have the trust made at once."

That this note was delivered to said attorney.

That it was decided in the probate court that the provisions in the trust were for maintenance, and the plaintiff accordingly was paid accumulated income therefrom. And that about the time of entry of the decree of distribution said attorney was discharged by plaintiff and ceased to act for her.

7. That thereafter plaintiff cancelled the will mentioned and requested the return to her of any documents signed by her in connection with it.

8. That in November of 1942 petitions were filed by the husband and the brother to be adjudged guardian of plaintiff's estate, but that both petitions were subsequently dismissed.

9. That plaintiff has never known that the trust was void; that she never attacked the trust, that there never was an adversary proceeding with relation thereto, and that because of the fraud of the defendant brother, and ignorance of the fact that the trust could be attacked, and because of her mental condition, mistake, and inadvertence, there never has been an adversary trial or adjudication of the issue; and that the defendant brother knew of the invalidity of the trust and never advised the plaintiff.

The complainant prayed for judgment declaring the trust void, that she is the owner of all of the trust property, and that the trustees are involuntary trustees thereof for her use and benefit.

The case turns upon whether the provision in the will and in the decree of distribution "upon the death of Alex C. Hamilton, or his divorce from my said daughter" renders the trust invalid. It would be possible for Mrs. Hamilton to divorce her husband, and thus acquire the trust estate, to do with as she pleases. If there is no divorce and the husband dies before the wife does, upon her death the trust estate will go to the brother and his children.

The position of plaintiff is well stated in Restatement, Trusts, Sec. 62, Comment d:

"A provision in the terms of the trust is against public policy and unenforceable if its enforcement would tend to induce the commission of acts, not in themselves illegal or immoral, by supplying an improper motive for their commission, where it is against public policy to encourage the doing of such acts from such a motive. Thus, a provision in the terms of the trust may be invalid on the ground that it affords a financial reward to a person for securing a divorce or separation from his spouse, or for neglecting his parental duties, or for refraining from marriage, or for changing his religious faith, or for refraining from performing acts beneficial to the nation or the State. Such a provision may be invalid not only where the act to be rewarded involves a violation of law, such as the securing of a divorce through fraud or collusion, but also where the act is in itself lawful. The reason is that it is against public policy to induce persons for a reward to do such acts."

In the early California case of Born v. Horstmann, 80 Cal. 452, 455, 22 P. 169, 338, 5 L.R.A. 577, it was held that the following clause did not destroy a testamentary trust:

"And in the event of any of my said daughters becoming a widow or otherwise becoming lawfully separated from her husband, then to distribute" the estate to such daughter to which it might apply.

In the pending case the trial court adopted the view that the intention of the testator was to protect his daughter; that he knew that so long as she was married to Alex C. Hamilton she would be supported by him, but anticipating that the death or divorce of the husband would end his daughter's support from that source, the testator tried to provide for her better support in either of these contingencies.

[1-3] In such cases as this the primary consideration is the intention of the testator. When by will he creates a trust a liberal construction should be given to its terms, it being the policy of the law to carry out the testator's intention so far as possible. In re Estate of Heywood, 148 Cal. 184, 82 P. 755. The language of the trust must admit of no other reasonable construction than that of illegality before a court will declare it invalid. In re Estate of Wellings, 197 Cal. 189, 240 P. 21.

[4] Therefore we approve of the holding of the trial court that the trust provision here in question is valid.

[5] Having come to this conclusion it is unnecessary to determine whether the complaint states sufficient facts in equity to require judicial inquiry as to extrinsic fraud which would warrant setting aside the decree of distribution. In the absence of pleading and proof of this essential prerequisite, the trust provisions of a will carried into the decree of distribution are final; all questions as to the validity of the trust are eliminated. South End Warehouse Co. v. Lavery, 12 Cal.App. 449, 107 P. 1008.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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92 Cal.App.2d 196

PEOPLE v. CORDERO.

Cr. 2565.

District Court of Appeal, First District,
Division 1, California.
June 6, 1949.

1. Assault and battery 🔑56

A beer bottle, when used as club or missile, constitutes a "deadly weapon" for purpose of establishing assault with a deadly weapon.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Deadly Weapon".

2. Criminal law 🔑1159(1)

District Court of Appeal has no power to substitute its opinion of facts for that of jury where evidence contains no inherent improbability.

3. Criminal law 🔑1144(13)

All conflicts in evidence must be resolved in favor of verdict on appeal.

4. Criminal law 🔑553, 554

Jury is not required to believe defendant or his witnesses.

5. Criminal law 🔑741(1), 742(1), 745

The weight and sufficiency of evidence, credibility of witnesses, and reasonable inferences to be drawn therefrom, are all matters for jury to determine.

6. Assault and battery 🔑92

Evidence supported conviction of assault with a deadly weapon based upon defendant hitting victim with beer bottle.

7. Criminal law 🔑1159(2)

District attorney has power to determine what evidence he desires to produce in criminal prosecution, and though his failure to produce available evidence may result in unfavorable inferences in trial court, it is for trier of fact and not appellate court to determine what weight should be given such inferences.

8. Criminal law 🔑1159(2)

In prosecution for assault with a deadly weapon based on defendant's allegedly striking victim with beer bottle, prosecution's failure to produce the beer bottle, to present victim's attending physician as a witness, or to produce X-rays though it might have resulted in unfavorable inferences in trial court, did not afford basis for reversal.

9. Witnesses 🔑337(5)

Where defendant charged by information with assault with a deadly weapon and with two prior convictions took witness stand, he waived protection of statute forbidding allusion to prior convictions, and prosecutor's questions on cross-examination as long as they did not go beyond fact of prior convictions and nature of prior crimes committed were proper for impeachment purposes, notwithstanding that such evidence might tend to prejudice defendant in eyes of jury. Pen.Code, § 1025.

◆

Appeal from Superior Court, San Francisco County; Daniel R. Shoemaker, Judge.

Adolph Cordero was convicted of assault with a deadly weapon, and with two prior convictions, and he appeals.

Affirmed.

J. Maxwell Peyser, San Francisco, for appellant.

Fred N. Howser, Esq., Attorney General, David K. Lener, Esq., Deputy Attorney General, for respondent.

PETERS, Presiding Justice.

The defendant was charged, by an information, with an assault with a deadly weapon upon Albert C. Durand, and with two prior convictions. He admitted the two priors, and pleaded not guilty to the main charge. He was found guilty by a jury, and from the judgment entered upon the verdict prosecutes this appeal.

There is no doubt but that the evidence shows defendant assaulted Durand, the basic question on this appeal being whether the evidence sustains the finding that a deadly weapon was used in such assault.

The assault occurred between 10:30 and 11:00 p. m. on May 19, 1948. Durand is a merchant seaman, and he had just returned to this port on that day. Early in the evening he and his wife, Viola, visited several bars where Durand, over a period of several hours, drank about six bottles of beer, and his wife consumed about three or four. Shortly after 10:00 p. m. they started home, but decided to drop in at Johnson's Restaurant located on Folsom Street near their residence, and have another bottle of beer. The arrived at the restaurant, which sells no hard liquor, at about 10:30 p. m., and seated themselves at the bar and ordered some beer. Both testified that neither was drunk nor adversely affected by the beer they had consumed, but defendant testified that, while Durand was not drunk, Viola was under the influence of liquor.

Defendant, then on parole, had arrived at the restaurant about an hour before the Durands, and before their arrival had consumed two bottles of beer. He was sober. When the Durands arrived, in addition to the defendant, the other persons in the restaurant were the proprietor Johnson, a waitress and her daughter, and apparently an unidentified customer. Durand testified that Viola went over to play the music box; that defendant accosted her, and began to talk to her in very "rough" language; that he, Durand, walked over to defendant and protested, and turned back to the bar; that thereupon defendant jumped on him from behind, and, with his fists, knocked him to the floor; that his eye and lip were cut from the blows; that Viola helped him up and assisted him to the front door, when he was again hit from behind and knocked unconscious. He was positive, as was his wife, that at no time did he strike defendant. His leg was broken in two places and he was hospitalized from May 19th to June 28th. He did not know what had knocked him unconscious.

Viola generally corroborated this story. In addition, she testified that defendant called her a "stool pigeon,"and cursed her in English, Spanish and Mexican; that when she started for the door with her husband she still had her bottle of beer in her hand; that defendant grabbed the bottle out of her hand; that as she and her husband tried to go out the door, defendant knocked her husband to the floor again with his fist; that as her husband tried to get up "Mr. Cordero took the bottle, just hit, like he said 'Kill him,' or whatever words he used. I got scared when he hit him with the bottle"; that she ran into the restaurant and called the police; that when she returned, defendant was kicking her husband. She answered certain other questions as follows:

"Q. * * * when your husband first left the swinging door of Johnson's restaurant he was struck with a bottle? A. Yes.

"Q. How many times did the defendant strike with the bottle? A. He just took the bottle and threw it. The bottle bounced back off the wall of the restaurant, but he hit him with the bottle, the bottle knocked him out.

"Q. Where was he struck with the bottle at that time? A. The leg, hit him like that with the bottle (indicating).

"Q. That's what knocked him down? A. Yes."

Viola also testified that prior to the assault, on several occasions, she had met defendant and had talked with him while he was sitting in his automobile and she was passing by; that on such occasions he had acted "very nice"; that on several occasions defendant had parked his automobile immediately underneath the windows of her home in the early morning hours and that she hollered at him to move away, and threatened to call the police.

This was the case for the prosecution. It was directly contradicted by defendant and his witnesses. The defense witnesses were all friendly to defendant, and apparently the jury believed they colored their testimony in his favor. These witnesses, however, all admitted that the defendant struck the first blows. The proprietor of the restaurant testified that defendant told Durand that his wife was a "stool pigeon" and then knocked Durand to the floor. He did not see Durand hit defendant, and did not see defendant hit Durand with a beer bottle. The waitress and her daughter testified that defendant struck Durand with his fists, and both testified that after defendant had knocked Durand down Viola seized a beer bottle and backed defendant out of the restaurant. None of these three witnesses, so they testified, saw what happened outside the restaurant. Defendant testified that he was in the restaurant talking to the waitress' daughter when the Durands arrived; that Viola approached and told the girl that defendant was "cheating on my wife and baby" (defendant was, in fact, unmarried, and had no children); that he objected, and Viola began to call him vile names; that he did not want any trouble, and started to leave the restaurant when Durand came up and struck him; that he struck back and knocked Durand back against the bar; that he then walked out of the restaurant; that Durand followed him and started hitting him; that he then knocked Durand down and walked away. He testified that at no time during the fight did he have a beer bottle in his hand, and denied kicking Durand.

A woman witness, a neighbor of defendant's, and who admitted going out with defendant on at least one occasion, testified that on the night in question she was walking her dog past the restaurant and saw what happened outside; that defendant did not hit Durand with a bottle or kick him while he was down; that when

Durand fell to the street defendant walked away. Viola testified that no one was on the sidewalk and street near the premises during the melee outside the restaurant.

[1-6] It is obvious that, if Mrs. Durand's story is to be believed, defendant committed an unprovoked assault on Durand with a beer bottle, which, used as club or a missile, constitutes a deadly weapon. The jury saw these parties and witnesses and elected to believe Mrs. Durand. We have no power to substitute our opinion of the facts for that of the jury where the evidence contains no inherent improbability. People v. Newland, 15 Cal. 2d 678, 104 P.2d 778; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631. All conflicts must be resolved in favor of the verdict. People v. Rankin, 10 Cal.2d 198, 74 P.2d 71. The jury is, of course, not required to believe the defendant or his witnesses. People v. Shaver, 7 Cal.2d 586, 61 P.2d 1170. Where there is substantial evidence to support the verdict, the appellate court must affirm. People v. Thomas, 62 Cal. App.2d 416, 144 P.2d 853. The weight and sufficiency of the evidence, the credibility of the witnesses, and the reasonable inferences to be drawn therefrom, are all matters for the jury to determine. People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Pianezzi, 42 Cal.App.2d 270, 108 P.2d 685.

The defendant attacks Mrs. Durand's testimony as being "too disjointed and contradictory to savor of credence." While her testimony is not as clear as might be desired, and while she is the only one who testified as to the use of the beer bottle by defendant, we cannot say that her story was inherently improbable. Indisputably, Durand's leg was broken in two places, requiring about six weeks' hospitalization. That is not the normal result of a simple assault.

[7, 8] Defendant also complains about the fact that the prosecution failed to produce the beer bottle, and argues that the only reason it was not produced must have been that no bottle could be found containing defendant's fingerprints. He also urges that the failure of the prosecution to present Durand's attending physician, and to produce the X-rays, indicates that Durand's leg was not injured by a beer bottle. These are arguments that more properly should be, and undoubtedly were, presented in the trial court. The district attorney has the power to determine what evidence he desires to produce, and while his failure to produce available evidence may result in unfavorable inferences in the trial court, it is for the trier of the fact and not the appellate court to determine what weight should be given such inferences.

[9] It is also urged that the prosecutor was guilty of prejudicial misconduct in his cross-examination of defendant in reference to the two prior convictions admitted by him. The record shows that the defendant, in response to questions from the prosecutor, admitted a grand theft conviction in San Francisco in 1945 and service of time therefor in San Quentin, and also admitted a robbery conviction, and service of time, in Nevada. That was the only information elicited by the prosecutor. It was proper to impeach the witness in this fashion. When a defendant takes the witness stand, he waives the provisions of § 1025 of the Penal Code. People v. Granillo, 140 Cal.App. 707, 36 P.2d 206; People v. Arnold, 116 Cal. 682, 48 P. 803; People v. Rogers, 94 Cal.App. 470, 271 P. 351. As long as the prosecutor does not go beyond the fact of the prior convictions and the nature of the prior crimes committed, the questions are proper. People v. David, 12 Cal.2d 639, 86 P.2d 811. This rule applies even though such evidence may tend to prejudice the defendant in the eyes of the jury. People v. Williams, 27 Cal.2d 220, 163 P.2d 692.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

92 Cal.App.2d 88

CHANEY et al. v. SCHNEIDER.

Civ. 16909.

District Court of Appeal, Second District, Division 1, California.

May 26, 1949.

1. Landlord and tenant ⚷86(4)

If an agreement to renew a lease is of essence of lease and terms of lease or rental to be paid thereunder are to be fixed by agreement or some other way at time of execution of lease, failure of parties to so agree or to fix particular terms does not avoid lease and courts will declare terms upon which parties fail to agree.

2. Appeal and error ⚷1008(3)

Where an instrument is susceptible of different interpretations, the one adopted by trial court, if it appears to be consistent with intent of parties and not abuse of discretion, will not be disturbed.

3. Landlord and tenant ⚷86(2)

Written notice putting lessor on notice that lessee desired to renew lease and lessee's informing lessor at a conference of such election was sufficient notice under terms of lease requiring notice to lessor to renew lease.

4. Landlord and tenant ⚷86(1)

Lease giving lessee first refusal for an additional 5 year term at rental and terms to be "mutually agreed upon" and giving lessor option to purchase facilities for use of lot as a trailer camp such as sewer, water, gas, light and other connections at 50 per cent of salvage value manifested intent of parties to enter into a lease for five years with an additional five years as part of original agreement and lessee was entitled to additional term at same terms and conditions as original lease but at an increased rental fixed by trial court.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Mutually Agreed Upon".

◆

Appeal from Superior Court, Los Angeles County; Harry Keeler, Judge.

Action by C. F. Chaney, Sr., C. F. Chaney, Jr., and Merle Scoles against Edith M. T. Schneider for renewal of a lease. From a judgment for the plaintiffs, defendant appeals.

Affirmed.

Charles A. Windham, Long Beach, for appellant.

Mize, Kroese, Larsh & Mize, Santa Ana, for respondents.

DRAPEAU, Justice.

The parties to this action became involved in a controversy respecting their rights under the following provision in a lease of real property:

"At the expiration of this lease, Lessor agrees to give Lessee first refusal for an additional term of lease, at rentals and terms to be mutually agreed upon at that time, provided, the said Lessee shall faithfully comply with and perform all of the covenants conditions of this lease, and provided, further, that the Lessee shall give 30 days' notice to the Lessor before the expiration of said lease, to renew said lease."

The lease was for five years, with the extension agreement quoted.

The trial court adjudged that the lessee was entitled to an additional five years upon the same terms and conditions as the original lease but at an increased rental.

The original lease was assigned to two of the parties plaintiff in this action, but for brevity in this opinion these parties and the original lessee will be referred to as "lessee".

Leases which left anything for future agreement of the parties were for a long time generally held to be void for uncertainty. The modern trend of decisions would seem to be in relaxation of the strictness of the rule, particularly when the amount of rental is left to future agreement. If there is in the writing a sufficient definite standard or method for the determination of the rental, and if the amount thereof is the only thing to be determined, courts of equity will hold that the parties agreed upon a reasonable rental for the extension, and will declare it if they do not agree. Young v. Nelson, 121 Wash. 285, 209 P. 515, 30 A.L.R. 572; 68 A.L.R. 157; 166 A.L.R. 1237; Streicher v. Heimburge, 205 Cal. 675, 272 P. 290.

The difficulty in enforcing the clause here under consideration lies in the fact that it provides for mutual agreement as to the terms as well as to the rental for the extended period of the lease.

In 51 C.J.S., Landlord and Tenant, § 56, page 597, it is stated: "A provision dealing with a renewal which by the use of the expression 'such terms as may be agreed upon' or by similar language, expressly makes the renewal dependent on future agreement of the parties, and is unenforceable." Similar statement is made in 32 Am. Jur. p. 806.

When this lease was made the demised property was a bare lot. The premises were to be used for a trailer court. The lessee expended upwards of $10,000.00 in providing facilities for the use of trailers to be parked thereon, such as sewer, water, gas, light and other connections. The lease provided that upon its termination the lessor was to have the option to purchase these facilities at 50% of the salvage price and that if the lessor failed to exercise this option, the lessee could remove the improvements at his own cost and expense. These improvements being mostly placed in the ground, the salvage value thereof would be nominal and the cost to the lessee of removal would be prohibitive. Therefore, as a practical matter, upon the termination of the lease the lessee will lose the improvements or their value. When requested to agree upon the terms of the extension, the lessor refused to negotiate; "she just would not give an answer." Then she said she wanted the ground for herself, that she would not lease it, and then she mentioned that she would like to have her son run the park. It is this phase of the case which causes one to pause and consider whether or not as a matter of law the contract really should be held impossible of enforcement because of uncertainty.

It seems clear that it was the mutual intention of the parties to enter into a lease for five years, with an additional five years as part of the original agreement. Otherwise the lessee would never have expended $10,000.00 on the property in improvements which both parties knew could not be removed without the loss by the lessee of practically all of his investment.

Like all other branches of the law, the rules as to uncertainty in interpreting contracts are developing along with changing conditions in business and human affairs. Time was in California when a lease of real property providing for renewal upon rental to be agreed upon at the time of the renewal was void for uncertainty. Morrison v. Rossignol, 5 Cal. 64.

An excellent statement of the developing law in this respect is to be found in Williston on Contracts, Revised Edition, 1936, Volume I, section 45, p. 131:

"Although a promise may be sufficiently definite when it contains an option given to the promisor or promissee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the very terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.

"On this ground clauses in leases containing renewal covenants leaving the renewal rental for the future agreement of the parties are in general held unenforceable for indefiniteness and uncertainty. On the contrary, some courts, recognizing the practical business utility of such clauses in a lease, treat them as sufficiently definite by interpreting them as meaning a reasonable rental under the circumstances in case the parties cannot agree. A similar development is taking place with respect to sales of goods at prices to be later agreed upon in jurisdictions unhampered by the statutory requisite of the memorandum under the Statute of Frauds."

California has adopted the rule of practical business utility in Streicher v. Heimburge, supra, 205 Cal. 675, 272 P. 290. In that case a lease provided for a renewal upon rental to be determined by arbitration. It was held that when arbitrators failed to agree the court would fix a reasonable rental.

[1] This decision is based upon the theory that an agreement for the renewal of a lease may or may not be a condition precedent, depending upon the intent of the parties; and that this intent is to be determined from a view of the instrument as a whole, and a consideration of all of the facts in the case. If the agreement to renew was of the essence of the contract, and the terms of the lease or the rental to be paid thereunder were to be fixed by agreement, or in some other way, at the time of the extension of the lease, then the failure of the parties to so agree, or to fix particular terms does not avoid the lease. In such a case the courts will declare the terms upon which the parties fail to agree.

In Joy v. City of St. Louis, 138 U.S. 1, 11 S.Ct. 243, 246, 34 L.Ed. 843, where a contract required a railroad to permit other railroads to use its trackage "under such reasonable regulations and terms as may be agreed upon", Mr. Justice Brewer, sitting in Circuit Court Central Trust Co. v. Wabash, St. L. & P. Ry. Co., C.C., 29 F. 546, 557, commented: "Does the omission of the details destroy the power of court, and practically nullify the force of the stipulation? or was it the intent of the parties simply to contract for a right, and leave with the court, in the absence of the agreement of parties, the full determination of all the details? I am aware of the rule that courts are not bound to relieve parties from mistakes or omissions, or to complete contracts which parties have left incomplete. But it is also true that ofttimes, at the making of a contract for a right, it may be impossible to determine details, or the changing situation of affairs may indicate that details also must be subject to modification, and therefore should not be definitely prescribed, and should be left to settlement by agreement or decree at the time the right is insisted upon. In such cases, if the right is absolutely contracted for, and the details are of a nature which courts may properly fix and settle, then, I take it, the courts should not hold the contract incomplete, but determine the right, and also prescribe and settle the details."

In the leading case of Kaufman v. Liggett, 209 Pa. 87, 58 A. 129, 132, 67 L.R.A. 353, 103 Am.St.Rep. 988, 994, a lessee placed valuable improvements upon real property under a lease which provided that renewals were granted at rentals to be fixed by arbitration. There was a failure to fix the rental as provided in the lease, the court decreed a renewal, fixed the rental and commented: "The right of renewal constituted the substantial element in this portion of the agreement. It was that feature which, in great measure, justified the lessees in erecting upon the premises a large and costly building, adapted to the needs of their business."

So in this case here before us, the right of renewal constituted a substantial element in the agreement of the lessor and lessee, and inasmuch as the lessor failed and refused to agree upon the terms of the renewal or the rental, these terms were properly declared by the trial court.

[2] Those covenants which run to the entire consideration of a contract are mutual and dependent, and where an instrument is susceptible of different interpretations the one adopted by the trial tribunal if it appears to be consistent with the intent of the parties and not the result of an abuse of discretion, will not be disturbed by an appellate court. Medico-Dental Building Company of Los Angeles v. Horton & Converse, 21 Cal.2d 411, 430, 132 P.2d 457.

[3] There is no contention but that the lessee lived up to all of the terms and conditions of the lease binding upon him, except that the lessor asserts that the notice given to her exercising the option for a renewal of the term was insufficient. We have examined the writing. Its language put the lessor on notice that the lessee desired to renew the lease, and at a subsequent conference between the parties the lessor was plainly advised of the election of the lessee. This was sufficient notice under the terms of the instrument.

[4] Lessor complains that there was no evidence to support the finding of the trial court upon which the amount of the increased rental was fixed in the judgment. This finding was for the benefit of the lessor. While there is no direct evidence to support it, the record discloses sufficient

facts from which the inference may be drawn.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

92 Cal.App.2d 136

In re SVOBODA'S GUARDIANSHIP.

Civ. 13538.

District Court of Appeal, First District,
Division 2, California.
June 1, 1949.

1. Judgment 🔑822(3)

If it appears that circumstances on which prior order of court of another state regarding custody of minor is based have not changed, California courts, on principles of comity, may refuse to decree a change of custody, but decree of sister state is not a bar to inquiry as to best interest of child.

2. Guardian and ward 🔑10

In proceeding by mother for letters of guardianship of person of minor child, the principal question is whether the mother was fit and proper person to have custody of minor at time of hearing.

3. Guardian and ward 🔑13(4)

In proceeding by mother for letters of guardianship of person of minor child, circumstances covering entire 15 month period during which mother and child had been in California was properly considered and court was not limited to period of four months, subsequent to custody order of court of sister state rendered on husband's petition for change of custody provision of divorce decree.

4. Divorce 🔑332

Evidence sustained order granting letters of guardianship of person of minor child to mother, notwithstanding prior order of court of sister state in divorce proceeding awarding custody to father.

5. Guardian and ward 🔑13(8)

In proceeding by mother for letters of guardianship of person of minor child, error, if any, in rejection of transcript of proceedings in sister state, court regarding custody of child was not prejudicial, where master's report and findings and order of court of sister state which summarized to a considerable extent the testimony were admitted and court accepted order of sister state court at full face value.

6. Guardian and ward 🔑13(1, 8)

The appointment of a guardian for a minor is a matter lying within sound discretion of court and conclusion reached will not be set aside on appeal unless it is shown to have been reached as a result of an abuse of discretion.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Proceedings in the matter of guardianship of the person of Linda Svoboda, a minor, on the petition of Gladys L. Hurst opposed by Arthur C. Svoboda. From an order granting letters of guardianship of a person to Gladys L. Hurst, Arthur C. Svoboda appeals.

Affirmed.

C. Fenton Nichols, San Francisco, Francis McCarty, San Francisco, for appellant.

Guy A. Ciocca, San Rafael, for respondent.

GOODELL, Justice.

This appeal was taken by Arthur C. Svoboda, the father of Linda Svoboda, a minor, from an order granting letters of guardianship of her person to respondent Gladys L. Hurst, her mother.

Appellant and respondent were married in Illinois in 1938. In 1945 respondent sued appellant in the Superior Court of Cook County, Illinois, where they lived, and on August 31, 1945 was awarded a divorce on the ground of extreme and repeated cruelty. The decree awarded respondent the custody of Linda, the daughter of the spouses, then aged three years, with leave to respondent to maintain the child with her and/or her parents out of the State of Illinois; it granted leave to appellant to see and take out the child at all reasonable times, and to have her during the summer months. Respondent with Linda left Illinois in late November, 1945, and came to Culver City, California, where they stayed with respondent's sister until early in 1946. On March 29, 1946 respondent married Roy M. Hurst, a sergeant in the army, in Fresno where he was stationed, and they lived there, with Linda as one of the family. In September, 1946, he was transferred and they moved to San Anselmo, where they resided at the time of the hearing.

On being discharged from the navy in December, 1945, appellant returned home and in February, 1946, instituted proceedings in Chicago to change the divorce decree so as to give him sole custody of Linda. The Illinois court appointed a Master to take the evidence and ordered that appellant should have the minor from July 1 to August 31, 1946. Respondent, then in California, was represented before the Master by counsel who had represented her on the divorce, but she did not testify before the Master either in person or by deposition. The Master reported that custody should be changed to appellant.

On October 21, while the Master's report was under submission to the Illinois court, respondent filed her petition for guardianship. Admittedly she then knew that the matter was under submission in Illinois.

On October 31, 1946 the Illinois court confirmed the Master's report and findings, held that the welfare and best interest of the minor would be best served by placing her in appellant's custody, and so ordered.

Appellant does not contend that the Illinois order was res judicata, see Foster v. Foster, 8 Cal.2d 719, 726, 68 P.2d 719, but admits that the courts of California have the power to appoint a guardian, and thus award custody, contra to the Illinois order, provided changed circumstances are proved. He claims, however, that the inquiry in California into such change should have been limited to the period of four months from the date of the Illinois order, October 31, 1946, to the Marin County hearing, February 27, 1947 and that no such change was shown. He claims, also, that our courts should not countenance the filing of guardianship proceedings while the question of custody is under submission to the court of a sister state having jurisdiction, and before which the parties have appeared and produced witnesses.

[1] Appellant's primary contention is "that the decree of a sister state is entitled, under principles of comity, to full faith and credit in this State in the absence of a showing that since the entry thereof appellant" has become an unfit person to have such custody. With respect to this contention the rule is stated in Titcomb v. Superior Court, 220 Cal. 34, 39, 29 P.2d 206, 209, as follows: "If it appears that the circumstances upon which the prior order of another state is based have not changed, our courts, on principles of comity, may refuse to decree a change of custody, but the decree of the other state is never a bar to inquiry as to the best interests of the child. In re Wenman, 33 Cal.App. 592, 165 P. 1024."

[2-4] The principal question before the court in the guardianship proceeding was whether the respondent was a fit and proper person to have the custody of the minor at the time of the hearing, Munson v. Munson, 27 Cal.2d 659, 665, 166 P.2d 268. In pursuing that inquiry the court went back over the entire fifteen-month period during which she and Linda had been in California. Aside from respondent and her husband, six witnesses testified for respondent, and one after another they traced her living conditions, and Linda's, from their arrival in California in November, 1945, to the time of the hearing in February, 1947.

Starting with their arrival respondent's sister testified that they lived with her in Culver City (and that respondent had to go out and work) until about March, when respondent went to Fresno and married Hurst. Another witness, a Mrs. Merrill, also covered this period. The testimony of a third witness embraced the time from respondent's marriage in March, until September, during which time she and her husband and Linda lived in Fresno. Two witnesses testified respecting the period from September, 1946, when the Hursts moved to San Anselmo, to the time of the hearing. All five witnesses were housewives and mothers and they testified that respondent was a good housekeeper and took good maternal care of Linda. The sixth witness was a soldier friend of Hurst, stationed with him, whose testimony covered the whole period from early in 1946, through the Hursts' marriage and residence in Fresno, their removal to San Anselmo and their residence there, right down to the time of the hearing. All this testimony was decidedly favorable to respondent and none of it was contradicted.

It is self-evident that in any inquiry into a change of circumstances the marital status of a woman and the support of herself and a dependent child are of primary importance. At the guardianship hearing the following facts were clearly proved: The Svoboda divorce decree awarded no alimony. After the divorce respondent had to work to support herself. While appellant was in the service he made an allotment of $42 a month for the child, which terminated on January 10, 1946, (after which time he sent nothing for Linda's support) and from then until her marriage respondent worked to support the child as well as herself. Respondent's marriage on March 29, 1946, changed all this. From then on she did not have to work, but devoted her time to caring for the household and the child, and the child was supported by her stepfather, as one of his family. That these facts impressed the court is indicated by his remark at the end of the hearing: "She had no husband then and she had no home" the reference of course being to the time when she alone was the breadwinner.

If the hearing had been confined, as appellant claims it should have been, to the four months subsequent to the Illinois order, much of this testimony, which is of the highest importance, would have been shut out. As it was, the court got a connected, and practically continuous, picture of the situation of respondent and Linda for well over a year immediately before the hearing.

Moreover, the date of the Illinois order meant practically nothing. Appellant's answer filed herein alleged that after his discharge from the service on December 10, 1945, he made an investigation respecting respondent's living conditions during the time he was away and as a result thereof filed his petition in Illinois for change of custody. Hence the issue in the Illinois proceeding and the evidence therein concerned matters occurring in 1945, and perhaps earlier, while respondent and Linda were in Illinois, although the Master's hearing was not held until July and August of 1946. To again quote the Titcomb case, "the circumstances upon which the prior order" was based were those of 1945, and long antedated October 31, 1946, when the order was dated.

For these reasons we must hold that appellant's contention that "The trial court erroneously admitted in evidence testimony relating to periods of time antedating the order of the Illinois court finding respondent an unfit person * * * and awarding custody to appellant" cannot be sustained.

We are also convinced that appellant's claim that the evidence before the Illinois court was the same as, or similar to, that before the California court must be rejected. The entire Illinois record was offered in evidence but the court rejected all except the Master's report and findings and the order of the court. The testimony before the Master was strenuously pressed on the court on the claim that it showed that the Illinois court had before it evidence similar to that given here. It would have shown but a small and rather inconsequential part of it. Mrs. Merrill, who testified here, was on vacation in Chicago during the Master's hearing and her testimony there was not materially different from her testimony here. Her contact with respondent was during the period from November 1945, when respondent and Linda came to Culver City, to the following March when they moved to Fresno. It was during that period that respondent had to work, just as she had to work while in Illinois. Respondent's economic status had not then changed. Mrs. Merrill's testimony brought before the Illinois tribunal no facts respecting respondent's marriage and the step-father's support of Linda, or the new family's situation after the marriage and could not have done so. No other witness in Chicago testified respecting respondent's or Linda's living conditions in California. The marriage to Hurst was not brought out in the Illinois testimony, although it was called to the court's attention by counsel before the Illinois order was signed. Aside from the fact that both hearings were concerned ultimately with the custody of Linda, they had nothing in common save Mrs. Merrill's testimony. The Marin County hearing, however, was based entirely on changed circumstances, since it included in its scope living conditions, environment, financial condition and marital status of respondent after she and Linda left Illinois, and for four months after the Illinois order of October 31, 1946.

On the theory that the Illinois order of October 31, 1946, had adjudicated appellant to be fit to have the minor's custody, respondent was asked if she knew of anything that had happened since that date to indicate that he was unfit. She answered in the negative, which is understandable since she had been in California for eleven months when the Illinois order was made and had never returned to Illinois. The father's fitness may be conceded. The mother's fitness was found by the California court, and "other things being equal," Linda being of tender years, respondent still had the statutory preference, sec. 138, Civ.Code. Moreover, "what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare", sec. 138; Titcomb case, supra, at the time of the hearing, Munson case, supra, was the question before the court.

[5] Appellant strenuously urges that the rejection of the Illinois transcript was error. It may have been admissible, see Foster v. Foster, 8 Cal.2d 719, 731–733, 68 P.2d 719, although there the admission of a transcript was not involved, but we are satisfied that if error, its rejection was not prejudicial for the reason that the Master's report and findings and the Illinois order which were admitted summarized to a considerable extent the testimony, and the court accepted the Illinois orders at their full face value. See Foster v. Foster, supra, 8 Cal.2d 719, at pages 731–733, 68 P.2d 719. This appears from the court's remarks when appellant's counsel urged that the Illinois transcript would show that the testimony was similar at both hearings. The court stated: "I am conceding that these two persons named appeared and testified at the hearing, and all they could testify about, obviously, is what had occurred up to that time * * *" The court was referring to one person's testimony at Chicago, not two, for Mrs. Merrill was the only one who testified at both hearings. The court said further: "I, of course, have admitted in evidence the Referee's findings and also the Judge's order, based on those findings for the purpose of comparing it with such testimony as might be produced here, to determine whether or not circumstances have changed * * * I am giving the Referee there perhaps more credit than you are willing to allow him, namely, that he made a finding based on sufficient evidence that she was not a fit and proper person at that time * * *" Elsewhere the court remarked: "* * * I did hear the finding of the Referee that the home of the Svobodas was very nice, and that he was a proper and fit person to have the custody of the child, and that she was not. That is all. Now then, having before me a finding she was not then a fit and proper person, I have been listening to evidence to show that she was a fit and proper person. In other words, that her circumstances have changed, even if her ex-husband's have not." Following that, when counsel argued with respect to the Illinois evidence on which the order of October 31 was based the court made the significant statement already quoted, that "She had no husband then and she had no home."

The record contains an abundance of testimony of circumstances definitely and radically changed between 1945 (on which the Illinois order of October 31, 1946 was based) and the guardianship hearing in February 1947.

Appellant relies on In re Wenman, 33 Cal.App. 592, 165 P. 1024; In re Marshall, 100 Cal.App. 284, 279 P. 834; In re Livingston, 108 Cal.App. 716, 292 P. 285, and In re Guardianship of Cameron, 66 Cal.App.2d 884, 153 P.2d 385. The first three were proceedings in habeas corpus. In the Wenman, Marshall and Livingston cases the minors had been abducted or kidnapped from a sister state and brought to California in violation of the order of the court of the outside state. The writ was sought and granted in each case on the application of the person having legal custody in the outside state, and in none of them was such person's unfitness or any change of circumstances shown. In the Cameron case the minor was brought to California under the permission of the court of Colorado, and while here the mother sought guardianship. There was no showing of the father's unfitness or of a change of circumstances and the opinion shows that in the trial court the decision (which was reversed) had been made because the views of the California judge differed from those of the Colorado judge on the subject of the custody of children. None of the cases is in point. Linda was brought to California under the express permission of the Illinois court and there was no abduction or kidnapping feature in the case.

[6] "The appointment of a guardian for a minor is a matter lying within the sound discretion of the court and the conclusion reached will not be set aside on appeal unless it is shown to have been reached as a result of an abuse of discretion" In re Guardianship of McCoy, 46 Cal.App.2d 494, 496, 116 P.2d 103, citing Matter of Allen's Estate, 162 Cal. 625, 629, 124 P. 237. No abuse of discretion appears in this record.

Appellant's contention respecting the findings and the formal order based thereon need not be discussed at any length. The court's order of March 17, 1947, "That letters of guardianship be issued as prayed for" contained no direction that findings should be drawn or an order made based on findings. It was from that order that this appeal was taken, and the various points urged by appellant have been considered as if no findings, or the later and formal order of April 10, 1947, had been made.

The order is affirmed.

NOURSE P. J., and DOOLING, J., concur.

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92 Cal.App.2d 157

FELT et al. v. L. B. FREDERICK CO., Inc., et al.

Civ. 13876.

District Court of Appeal, First District, Division 2, California.

June 2, 1949.

Rehearing Denied July 2, 1949.

Hearing Denied July 28, 1949.

1. Evidence 🔑450(8)

When printed form, designed for use by broker as deposit receipt which would become a contract of purchase and sale only upon its acceptance by owner evidenced by owner's signature, was used by broker's salesman in connection with proposed sale of real and personal property which broker held an option to purchase, an ambiguity was created which must be resolved by trial court with aid of extrinsic evidence.

2. Appeal and error 🔑1011(1)

Whether salesman for broker, who was not bound by deposit receipt for sale of property executed by salesman in name of broker, was liable to purchasers on implied warranty of authority or on ground that he executed document in broker's name without believing in good faith that he had authority to do so, was a question for trial court under conflicting evidence as to whether salesman represented to purchasers that he had authority to bind broker. Civ.Code, § 2342, 2343, subd. 2.

3. Signatures 🔑1

A printed name appearing on a document may be adopted as a signature.

4. Vendor and purchaser 🔑44

Purchasers, seeking to bind broker on theory that his printed name appearing on deposit receipt was adopted by broker as his signature to a binding contract to sell property which broker held an option to purchase, had the burden of proving adoption of signature by broker.

5. Vendor and purchaser 🔑44

Evidence sustained finding that deposit receipt for sale of property which broker held option to purchase, signed by purchasers and broker's salesman in name of broker without written authority to bind broker, was merely an offer to purchase subject to acceptance or rejection by broker and not a contract of purchase and sale, though printed name of broker appeared on receipt, the word "contract" appeared in both typewritten and printed portions of instrument, and broker exercised option after receipt was signed. Civ.Code, §§ 1624, subd. 4, 2309.

6. Contracts 🔑155

The rule that a document is to be construed most strongly against party preparing it is to be resorted to only in cases of uncertainty not removed by other rules, including the rule that document must be interpreted in the sense in which promissor believed that promisee understood it. Civ. Code, §§ 1649, 1654.

7. Estoppel 🔑93(5)

That purchasers sold other realty at a sacrifice to raise balance of purchase price of real and personal property for which they had made a down payment, and received a deposit receipt signed in name of owner by salesman, did not estop owner from denying that receipt was an executed agreement to sell, where salesman advised purchasers that offer evidenced by receipt was subject to owner's acceptance.

◆

Appeal from Superior Court, Alameda County; Leon A. Gray, Judge.

Action on alleged contract for purchase of real and personal property by William C. Felt and another against L. B. Frederick Company, Inc., and another. From a judgment in favor of defendants, plaintiffs appeal.

Judgment affirmed.

Franklin A. Dill, San Francisco, Thomas W. Martin, Oroville, Breece W. Sloan, Oakland, for appellants.

Milner J. Anderson, Oakland, for respondent Hill.

Eugene T. Nebiolo, J. Elwood Andresen, Oakland, for other respondents.

DOOLING, Justice.

Appellants filed a complaint against respondents Frederick and Hill and others upon an alleged contract for the purchase of certain real and personal property. The action went to trial against Frederick and Hill alone and judgment was entered in favor of these defendants.

Respondent Frederick is a real estate broker and respondent Hill is his salesman. Frederick had acquired an option to purchase a rooming house for $8000 and an option to purchase the furniture therein, which was owned by the tenant, for $4250. After negotiations between Hill and appellants resulting in an oral offer by appellants to purchase this real and personal property for $14,000 Hill presented to them for their signature and they signed a document which already bore the signature of Hill. The controversy centers around this document, the appellants contending that it was a completed contract and the respondents claiming that it was a mere offer later rejected by Frederick.

This document was a printed form designed to be used for the receipt of an offer and deposit from an intending buyer by the broker through his salesman for an owner of property who by its later acceptance evidenced by the owner's signature in a blank space provided therefor would ripen into a contract of purchase and sale between owner and buyer. So far as material to an understanding of the questions here presented it reads (the words added to the printed form appearing in italics):

"Office of
L. B. Frederick

* * *

"Received from *William C. Felt and Mae D. Felt his wife* * * * *Two hundred Dollars* * * * as deposit and part purchase price of the following property * * *

"The full purchase price being *$14,000.00* to be paid as follows * * * *The balance of cash to be paid, and all documents necessary to complete the transaction to be executed in accordance with this contract not later than April 15, 1945.* * * *

"In case this Contract is approved the Agent is authorized to order search. * * *

Board Commission Approved
———
Owner.

Signed *William C. Felt*
Mae D. Felt Buyer
L. B. Frederick Agent for Owner
By *Harry L. Hill*"

[1] It is clear that the document until signed by the owner would constitute a mere offer in any case where Frederick was acting for a third party in securing a buyer's signature. It is equally clear that the form is not designed for use in a case such as this where the broker Frederick is in fact the intending seller and not the agent for the seller. Its terms not being designed for use in a case such as here presented an ambiguity is created which it was necessary for the trial court to resolve with the aid of extrinsic evidence. Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 128 P.2d 665.

The appellants proceeded against Frederick on the theory that the document was in fact an agreement to sell binding upon him and in the alternative, if Frederick was held not bound, against Hill on an implied warranty of authority, Civ.Code, sec. 2342, and on the execution of the document by Hill in the name of Frederick without believing in good faith that he had authority to do so. Civ.Code, sec. 2343(2).

[2] The counts against Hill may be quickly disposed of. While appellants testified that Hill told them that he had authority to bind Frederick, Hill testified that when he presented the document to appellants for their signature "I said 'Here is your deposit receipt, I will submit the proposition to the office.'" This presented a conflict of evidence for the trial court to resolve and that court having found in accordance with Hill's testimony the theories upon which Hill was sought to be held are expressly negative by the facts as found.

[3-5] Turning to the cause of action against Frederick it was established that Hill had no written authority to bind Frederick as required by the equal dignities rule. Civ.Code, secs. 1624(4), 2309. Appellants seek to hold Frederick on the theory that his printed name appearing on the document was adopted by him as his signature to a binding contract to sell. It is true that a printed name may be adopted as a signature, Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal.App.2d 815, 819, 167 P.2d 523; Weiner v. Mullaney, 59 Cal.App.2d 620, 634–635, 140 P.2d 704, but the burden of proving its adoption by Frederick was on appellants. Frederick testified that he saw the document after Hill had signed it and before its presentation to appellants for their signature but the tenor of his testimony was that he intended it as a mere offer subject to his later acceptance or rejection. This intention was communicated by Hill to appellants at the time that they signed the document and the trial court found in accordance with this testimony that the document was not a contract but an offer to contract.

Appellants point to the use of the word "contract" in the typewritten portion of the document. The same word is used in the printed sentence authorizing a title search "in case this contract is approved." The document was intended to become a contract upon the owner affixing his signature thereto which sufficiently explains the use of the word "contract" therein.

[6] Appellants lean on the rule that a document is to be construed most strongly against the party preparing it, but this rule is only to be resorted to "(i)n cases of uncertainty not removed by the preceding rules," Civ.Code, sec. 1654, and one of the preceding rules is that "it must be interpreted in the sense in which the promisor believed * * * that the promisee understood it." Civ.Code, sec. 1649. In view of Hill's testimony that he told appellants "I will submit the proposition to the office" the court was justified in finding that appellants knew that Frederick and Hill understood the document to be an offer and not a contract. The fact that Frederick exercised the option to purchase the realty after the document was signed does not compel a finding that he treated or regarded the document as a binding contract of sale. The inference to be drawn from that fact was for the trial court to decide.

[7] To meet the balance of the purchase price appellants testified that they sold another parcel of real property at a sacrifice and they claim an estoppel against Frederick to deny that the document was an executed agreement to sell. This claim disregards the knowledge conveyed to them by Hill that the document was subject to Frederick's acceptance. With that knowl-

edge appellants were not justified in acting upon it before notice of its acceptance by Frederick. Appellants testified that they saw an assignment of the furniture with their names on the cover but Frederick swore that he had no knowledge of the preparation of this document.

The case presented questions of fact which were resolved against appellants, and the findings are supported by substantial evidence and the inferences reasonably drawn therefrom.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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92 Cal.App.2d 236

MORAN v. ZENITH OIL CO.

Civ. 16715.

District Court of Appeal, Second District,
Division 2, California.

June 7, 1949.

Hearing Denied Aug. 4, 1949.

1. Negligence 🔑16, 32(1)

When occupant of land knowingly permits workman to enter premises to perform acts which workman has been employed to do, proprietor must exercise reasonable care for protection of workman, and must supply reasonably safe place in which work is to be done, and must furnish and maintain such tools and appliances as are necessary and reasonably safe for use in the operations.

2. Master and servant 🔑125(4), 155(1), 235 (12)

Negligence 🔑24, 25, 67

Worker employed on land to do act which workman has been employed to do is chargeable with neither a concealed nor latent defect in equipment supplied him, and in event of injury as result of latent defect in instrumentalities furnished him of which he is ignorant, he may recover damages for resulting injuries, if it is shown that employer, licensor or proprietor knew or by reasonable care should have known of defect and failed to effect repair thereof or to warn workman.

3. Negligence 🔑136(16)

Whether owner of oil well could by reasonable care have discovered defect in rusty cable so as to prevent injury to cleaning contractor's worker when cable broke during cleaning of oil well was for the jury.

4. Master and servant 🔑321

Owner of oil well could not shift negligence, if any, resulting in injury to worker employed by contractor engaged in cleaning owner's oil wells to contractor so as to avoid liability to worker.

5. Negligence 🔑105

One does not assume risk so as to bar recovery in action for tort when he has no knowledge of peril involved.

6. Negligence 🔑136(1)

Whether worker employed by contractor to clean oil well assumed risk in using owner's rusty cable so as to preclude recovery for injuries sustained when cable broke was for the jury.

7. Appeal and error 🔑974(1)

Refusal to submit to the jury special interrogatories requested by appellant was within discretion of trial court.

8. Negligence 🔑138(1)

In action by workman employed by contractor against owner for injuries sustained when rusty cable furnished by owner for cleaning of oil well broke, charge that workman assumed risk of those dangers normally incident to occupation in which he was voluntarily engaged was proper.

9. Trial 🔑260(1)

Refusal to give requested instructions repeating in phraseology of counsel a given instruction correctly stating law was not prejudicial error.

10. Trial 🔑251(1)

Instructions which applied to moot issues were properly refused.

11. Trial 🔑260(1)

Requested instructions which were merely reiterations of instructions given by court in lengthy charge which amply covered all issues of the case were properly refused.

12. Trial ⚷194(6)

Refusal to give instructions directing jury to make findings favorable to appellant when in fact pertinent evidence was in dispute were properly refused.

13. Master and servant ⚷321

Where worker employed by contractor to clean oil wells was injured when rusty cable furnished by owner broke, fact that worker relied upon inspection and assurances of crew foreman as to safety of cable did not bar recovery under evidence that inspection failed to disclose any patent defect and that foreman's assurances, if any, were predicated upon information imparted to him by owner's superintendent.

14. Master and servant ⚷321

Where owner hired contractor to clean oil wells and furnished rusty cable, worker hurt by breaking of cable was not precluded from recovery for injuries on ground that there was no contract requiring owner to furnish equipment, and contractor used facilities available without representation by owner as to its safety.

15. Master and servant ⚷101(1)

An employer is obliged to furnish reasonably safe premises and instrumentalities for his employees.

16. Damages ⚷132(1)

$36,783 for permanent injuries suffered by workman struck by heavy falling weight was not excessive.

17. Appeal and error ⚷1004(1)

In determining whether verdict is so large as to be excessive, true value of sum recovered is to be determined by its power to obtain necessaries of life.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Wilbur B. Moran against the Zenith Oil Company, a corporation, for personal injuries sustained while in the employ of a contractor cleaning oil wells owned by defendant. From the judgment, defendant appeals.

Affirmed.

Bodkin, Breslin & Luddy, Los Angeles, and Henry G. Bodkin, Benjamin W. Henderson, and S. V. O. Prichard, Los Angeles, for appellant.

C. Ransom Samuelson, Joseph A. Ball, and Joseph A. Ball, Long Beach, for respondent.

MOORE, Presiding Justice.

The primary question for decision is whether the owner of oil wells is liable for damages on account of injuries resulting to a workman in the employ of a contractor who undertakes to clean the wells by using appliances of the owner where a reasonable inspection thereof by the contractor disclosed no patent defect. Such liability having been adjudged by the court below, the owner has brought the matter here for review.

Appellant, Zenith Oil Company, is the owner and operator of three oil wells on a lease in Los Angeles county. Well number 1 had been drilled sometime prior to 1938, well number 2 in 1938, and well number 3 at a later date. Charles McGee, production superintendent for appellant, had drilled wells 2 and 3, but not number 1. Since October, 1940, he had resided on the lease and was in charge of the wells. Over each well was a derrick containing a crown block, pulleys or sheaves, and about 500 feet of wire cable.

In June, 1943, appellant engaged the Harbor Production Company to pull and clean the three wells. For such work the contractor customarily furnished the necessary men, power truck, tools and bailing lines, and if a tubing line[1] should be required for the work, it would also furnish such line at a rental of $10 per day. When appellant engaged Harbor company, a tubing line was ordered but the order was later rescinded.

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[1] A tubing line is used to pull rods and tubes from the wells when cleaning or pump changing is required. It is 1 inch in diameter and consists of a core of manila hemp enclosed in 6 strands of woven wire, each strand containing 19 steel wires.

Harbor company supplied a crew of four men under the supervision of a foreman, one Deck, to do the work. Respondent Moran was one of the crew which pulled and bailed well number 3 using the tubing line in the derrick on that well. The day before the work was finished appellant's superintendent informed Deck that they should next pull and bail well number 1 which also had a tubing line in its derrick. McGee and Deck then inspected the cable on the well and were apparently satisfied as to its condition.

On the following morning when the crew reported at the well one of the men scraped some rust from the outside of the cable with a penknife to see if "it looks all right from the outside." Following the customary practice, the cable hanging in the derrick was strung through a series of pulleys, whereupon the rods and pump were removed from the well. The men then restrung the line into a three part fall giving a three-to-one mechanical advantage and proceeded to pull the tubing. Moran's assignment placed him directly beneath the traveling blocks which position required him to remove "slips" used to hold the weight of the tubing. While so occupied the tubing line parted near the crown block and the traveling blocks dropped upon Moran, pinning him to the floor of the derrick and inflicting grievious bodily injuries.

At the trial, defendant's motions for nonsuit, for a directed verdict, for judgment notwithstanding a verdict of $36,783 in favor of plaintiff were severally denied and the court entered judgment on the verdict. Appellant's motion for a new trial was also duly denied.

On appeal it is contended that (1) the verdict and judgment are against the undisputed evidence and the law, (2) the court erred in rejecting defendant's various motions, (3) the court abused its discretion in refusing to submit special interrogatories to the jury, (4) the court erred in refusing to give requested instructions and (5) the large verdict was given under the influence of passion and prejudice.

[1, 2] The judgment is contrary to neither the law nor the established facts. When the occupant of land knowingly permits a person to enter the premises for the purpose of performing acts which the workman has been employed to do, the proprietor is obligated to exercise reasonable care for the protection of the toiler. He must supply a reasonably safe place in which the work is to be done and must furnish and maintain such tools and appliances as are necessary and reasonably safe for use in the operations. A laborer so employed is chargeable with neither a concealed nor a latent defect in the equipment supplied. In the event he is injured as a result of a latent defect in the instrumentalities furnished him of which he is ignorant, he may recover damages for resulting injuries, if it is shown that the employer, licensor or proprietor knew or by the exercise of reasonable care should have known of the defect and has failed to effect a repair thereof or to warn the workman. Miller v. Pacific Constructors, Inc., 68 Cal.App.2d 529, 545, 157 P.2d 57.

[3] Pursuant to the foregoing doctrine the jury was warranted in finding that appellant was negligent and that its negligence proximately caused respondent's injuries. The record disclosed ample evidence to substantiate the jury's determination. Appellant invited respondent to work upon its premises and furnished him with its own instrumentality which proved to be in disrepair. That the defect was not readily apparent is established by the fact that the faulty cable was subjected to the usual inspection before use, once by appellant's employee, McGee, in the presence of the crew foreman, and again by the latter's crew on the day of the accident. When on the latter occasion it was scraped with a knife, shiny steel appeared beneath the rust. It cannot be said that the rust covering the cable was itself an indication of imminent peril. Many witnesses testified that all cables in the area accumulate rust after short exposure to the elements. Concededly, appellant may not have known of the dangerous condition of the cable, but on the facts established it cannot be said that the jury was arbitrary in finding that by the exercise of reasonable care appellant could have discovered the peril and thus have prevented injury to any employee. McGee testified that the cable had been hanging

in the derrick in excess of five years and to his knowledge had never been greased or oiled against the elements or tested for tensile strength. In addition, there was expert testimony that other operating oil companies serviced their hanging cables every two or three years to prevent corrosion and deterioration. Such lack of diligence to prevent injury to workmen falls below the high standard of care required in employing those who are to work under circumstances involving a high risk to personal safety.

[4, 5] Appellant's negligence may not be shifted to respondent's immediate employer. At most, the latter's negligence, if any, would present a case of concurrent negligence which would be no bar to a recovery against appellant. Leenders v. California Hawaiian etc. Corp., 59 Cal. App.2d 752, 758, 139 P.2d 987. Furthermore, appellant having failed properly to maintain its cable for a period of more than five years, and having failed to conclude that the mere passage of time itself coupled with inadequate inspection would produce a dangerous instrumentality cannot now be heard to say that it relied upon the cursory inspection of temporary workmen to disclose a latent defect. Of necessity, such an inspection was hasty at best, and as respondent testified, had he known how long the cable had hung in the open derrick he might have known of the danger. Thus though there was an assumption of the risk disclosed by his inspection, there could be no assumption of a risk not so disclosed. No one can be said to have assumed a risk when he had no knowledge of the peril involved.

[6] In asserting that the court should have granted each motion made by it at the trial, appellant puts much stress upon its claim that respondent knew as much about the defective cable as appellant knew and with such knowledge freely elected to use it. This may be conceded, but the argument misses the point that the duty of appellant was to know intimately the true condition of its own appliances and to relay such information to workmen who were to decide whether or not to make use thereof. It was for the trier of facts to determine whether such delinquency in duty constituted negligence. Neither fact nor inference is suggested to show that the court erred in permitting the jury to resolve that question and in abiding by its implied findings.

[7] Appellant suffered no prejudice by the court's refusal to submit to the jury special interrogatories requested by appellant. Such procedure is entirely within the discretion of the trial court and is therefore not ground for reversal. King v. Schumacher, 32 Cal.App.2d 172, 183, 89 P.2d 466.

[8-11] Appellant assigns as prejudicial the court's rejection of 40 instructions it offered. Nine of the rejected instructions pertain to the question of assumption of risk and each repeats in various ways the contentions of appellant. The court instructed the jury that "plaintiff in working for his employer assumed the risk of those dangers normally incident to the occupation in which he voluntarily engaged." This instruction is a correct statement of the law. Its repetition in the phraseology of appellant's counsel could not enlarge its merit. Still other instructions were refused because they applied to issues which had become moot by virtue of the dismissal of the second cause of action. Various arguments are advanced to demonstrate that prejudicial error resulted from the court's rejection of 30 other instructions, but without avail. All the rejected instructions except those discussed hereafter were merely iterations of various instructions given by the court in its lengthy charge which amply covered all the issues in the case. A careful reading of the entire charge fails to reveal any abuse of discretion in rejecting the proffered instructions.

[12] Using appellant's enumeration, instructions 2, 5, 6, 7, 11, 15, and 28 directed the jury to make findings favorable to appellant when in fact the pertinent evidence was in dispute. Clearly, such proposed instructions would have been error since the court would thereby have arbitrarily assumed the function of the jury.

[13] Instructions 16 and 17 like others rejected by the court would have told the

jury in effect that respondent could not recover if he relied upon the inspection and assurances of his crew foreman as to the safety of the cable. Such a contention overlooks the fact that the crew foreman's inspection and assurances of safety, if any, were predicated upon the information imparted to him by appellant's superintendent. That inspection failed to disclose any patent defect, in the absence of which it could reasonably be assumed that the cable was fit for use. But such inspection would not, nor was it intended that it should, disclose any latent defect. Respondent had a right to assume that he would be provided with a reasonably safe place to work, and with reasonably safe instrumentalities. Emery v. Pacific Telephone & Telegraph Co., 43 Cal.App.2d 402, 409, 110 P.2d 1079.

Appellant's failure to supply safeguards cannot now be cured by the assertion that respondent freely accepted what was supplied. Had the accident resulted from a defect in the apparatus that was readily apparent on reasonable inspection such a contention might be advantageous to appellant. But a reasonable inspection failed to disclose the deterioration which caused the accident. This condition should have been known by appellant from its knowledge of the history of the cable and its lack of proper maintenance.

[14, 15] Instruction 23 was also properly rejected by the court. It told the jury that if there was no contract requiring appellant to furnish equipment, and Harbor Production Company used the facilities available, as to which no representation of safety was made, there could be no recovery. Such a proposed instruction overlooks the doctrine of Miller v. Pacific Constructors, Inc., 68 Cal.App.2d 529, 545, 157 P.2d 57, to wit, that an employer is obliged to furnish reasonably safe premises and instrumentalities for his employees.

[16, 17] Appellant's final contention that the amount of the verdict was excessive fails to take into consideration the extensive medical testimony as to the nature and permanence of respondent's injuries. No prejudice or passion having been shown in arriving at the amount, it cannot be said to be excessive. Walker v. Adamson, 9 Cal.2d 287, 290, 70 P.2d 914. The current value of the dollar precludes a comparison of an award now for personal injuries with the amounts allowed for similar injuries in the pre-war days. The true value of the sum recovered is to be determined by its power to obtain the necessaries of life. Kircher v. Atchison, Topeka and Santa Fe Railway Company, 32 Cal.2d 176, 187, 195 P.2d 427; Butler v. Allen, 73 Cal.App.2d 866, 870, 167 P.2d 488; Nason v. Leth-Nissen, 82 Cal.App.2d 70, 73, 185 P.2d 880.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

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92 Cal.App.2d 77

PRICE et al. v. SCHWAFEL.

Civ. 13956.

District Court of Appeal, First District,
Division 2, California.
May 26, 1949.

Hearing Denied July 21, 1949.

1. Municipal corporations ⚷63(2)

Power to declare zoning ordinances unconstitutional should be exercised only where no substantial reason exists to support the determination of the city council and if reasonableness of the ordinance is reasonably debatable the ordinance must be upheld.

2. Municipal corporations ⚷63(1)

Although a court may differ from the determination of the legislative body unless a zoning measure is clearly oppressive it will be deemed to be within the purview of the police power.

3. Municipal corporations ⚷601(5)

Zoning may properly consider those factors which although they may not be exactly defined as relating to public health, safety or morals, come under the broad terms of general welfare.

4. Municipal corporations ⟾601(12)

A zoning plan must be viewed as a whole and the court will not search out individual cases of discrimination or hardship and it is not necessary to sustain such legislation to show that public welfare demands exclusion of business uses for each individual lot in the area zoned.

5. Municipal corporations ⟾625

Zoning ordinances or ordinances excluding any commerical use must be reasonable and the use excluded must bear some reasonable relation to the public interest.

6. Municipal corporations ⟾601(4)

Right to use private property may be restricted by an ordinance following a reasonable plan even though the use is neither a nuisance per se nor a menace to health, safety or morals in the particular district from which it is excluded.

7. Municipal corporations ⟾601(7), 626

A zoning ordinance limiting use of plaintiffs' property to residential purposes was not invalid as arbitrary, discriminatory and confiscatory and not a proper exercise of the police power though an interim zoning ordinance permitted use of property as a shopping center and nearby business property had the same characteristics as the parcel involved, where it was not contended that the property was suitable only for commercial purposes.

8. Constitutional law ⟾101
Estoppel ⟾62(4)

The enactment of an interim zoning ordinance permitting use of plaintiffs' property as a shopping center did not estop municipality from subsequently rezoning property for residential use only where no building permit was issued so that no vested right had been created and plaintiffs waited until the interim ordinance was in process of repeal before filing their application for a building permit. Code Civ. Proc. § 1962, subd. 3.

Appeal from Superior Court, Santa Clara County; John D. Foley, Judge.

Suit in mandate to compel the issuance of a building permit by L. H. Price and others, partners doing business under the firm name and style of Coastwise Construction Company against John V. Schwafel, building inspector of the City of Palo Alto, County of Santa Clara, State of California. The trial court denied the application and plaintiffs appeal.

Affirmed.

Howard E. Gawthrop, Redwood City, McCarthy & Rowell, Redwood City, for appellants.

Arnold Rumwell, City Atty., Palo Alto, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued in mandate to compel the issuance of a building permit. Following a trial on an agreed statement of facts the trial court denied the application, basing its judgment on a written opinion which we quote in full and adopt as the opinion of this court, with minor editing. It follows.

"This is a proceeding in which plaintiffs seeks a writ of mandamus to compel the defendant to issue a building permit.

"The matter was tried on an agreed statement of facts as modified by oral stipulation whereby it was agreed that certain portions of paragraph XXX of the agreed statement of facts be stricken and in lieu of the stricken matter it was stipulated that the particular business contemplated by plaintiffs would not be offensive to the persons surrounding it by virtue of noise, odor, increased traffic or public health or public safety.

"Plaintiffs are the owners of certain real property now situated in the City of Palo Alto. This property was formerly outside the boundaries of the City of Palo Alto at which time it was zoned so as to permit the construction of a shopping center, the use contemplated by plaintiffs. On May 2, 1947, plaintiffs' property was annexed to the City of Palo Alto. On May 12, 1947, an interim zoning ordinance was adopted by the City of Palo Alto permitting the use of plaintiff's property as a shopping center. The matter of rezoning the particular property came before the city council and city planning commission numerous times between May 12, 1947, and

January 15, 1948, on which latter date by emergency ordinance the property was rezoned as residential only. In the meantime and on January 12, 1948, plaintiffs made application to the defendant for a building permit which was not granted. On January 15, 1948, this present action was instituted.

"Plaintiffs contend first, the ordinance passed on January 15, 1948, limiting the use of plaintiffs' property to residential purposes, as applied to plaintiffs, is arbitrary, unconstitutional, discriminatory, and confiscatory and not a proper exercise of the police power, and second, that the City of Palo Alto is estopped from setting up the ordinance passed on January 15, 1948, as a defense in this action.

"1. Is the ordinance in question as applied to plaintiffs invalid?

"Upon the authorities hereafter referred to, this question is answered in the negative.

[1] " 'The power to declare zoning ordinances unconstitutional only should be exercised where no substantial reason exists to support the determination of the city council. If the reasonableness of the ordinance is reasonably debatable the ordinance must be upheld. Zahn v. Board of Public Works, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074. The line between business and residential property must be drawn somewhere. The mere fact that business property is located across the street or even adjoining the residential property involved does not determine that the ordinance is invalid or discriminatory. Smith v. Collison, 119 Cal.App. 180, 6 P. 2d 277; Feraut v. [City of] Sacramento, 204 Cal. 687, 269 P. 537. The fact that nearby business property has the same characteristics as the parcel involved in the proceeding does not justify the court in substituting its judgment for the legislative judgment. * * * Damage to petitioners' property by reason of being in a residential zone adjoining business property in no way affects the validity of the ordinance. Damage caused by the proper exercise of the police power is merely one of the prices an individual must pay as a member of society. The adaptability and suitability of petitioner's property for business purposes is not controlling—the best interests of the entire district is the controlling factor. Smith v. Collision, supra. Under these principles there can be but little doubt that the ordinance here involved represents a valid exercise of the police power.' (Reynolds v. Barrett, 12 Cal.2d 244, 249-250 [83 P.2d 29].)

[2] " 'It is now settled beyond question that although a court may differ from the determination of the legislative body, unless a zoning measure is clearly oppressive, it will be deemed to be within the purview of the police power. There will always be difference of opinion as to the means of accomplishing a particular end, but if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, a zoning ordinance to accomplish that purpose will be upheld. * * *

[3] " 'It has been made possible by general judicial approval of the doctrine that zoning may properly take into consideration those factors which, although they may not be exactly defined as relating to public health, safety or morals, come under the broad term of general welfare.

[4] " 'Also, a zoning plan must be viewed as a whole and the court will not search out individual cases of discrimination or hardship. Moreover, it is not necessary, in order to sustain such legislation, to show that the public welfare demands the exclusion of business uses for each individual lot in the area zoned.' " (Acker v. Baldwin, 18 Cal.2d 341, 344-345 [115 P.2d 455, 457].)

" 'The specific question here presented is whether the zoning ordinance, generally valid, is void as to respondent company, because of the facts shown by the record. Before respondent can succeed in its efforts to avoid the application of the ordinance to it, it must be held that it established that the ordinance is unreasonable as to it, in the face of a strong presumption to the contrary.'

[5] " 'Of course, zoning ordinances, or ordinances excluding any commercial use,

must be reasonable, and the use excluded must bear some reasonable relation to the public interest. But, as indicated from the above quotations, where reasonable minds may differ as to the propriety of the classification, the legislative determination is conclusive.' (Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 92, 94 [33 P.2d 672, 674].)

"'An examination of the California decisions discloses that the cases in which zoning ordinances have been held invalid and unreasonable as applied to particular property fall roughly into four categories: 1. Where the zoning ordinance attempts to exclude and prohibit existing and established uses or businesses that are not nuisances. Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14, see Biscay v. City of Burlingame, 127 Cal.App. 213, 15 P.2d 784. 2. Where the restrictions create a monopoly. In re White, 195 Cal. 516, 234 P. 396; Wickham v. Becker, 96 Cal.App. 443, 274 P. 397; Andrews v. City of Piedmont, 100 Cal.App. 700, 281 P. 78. 3. Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance. Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 934. Where a small parcel is restricted and given less rights that the surrounding property, as where a lot in the center of a business or commercial district is limited to use for residential purposes, thereby creating an "island" in the middle of a large area devoted to other uses.' (Wilkins v. City of San Bernardino, 29 Cal.2d 332, 340 [175 P.2d 542, 548].)

"The instant case does not fall within any of the four categories referred to in Wilkins v. [City of] San Bernardino, supra, nor does it fall within the rule of decision in the case of Lockard v. City of Los Angeles [Cal.App., 192 P.2d 110], in which it was held that if the use of property is so restricted that it can be said that the regulation amounts to a confiscation of the property, the restrictive ordinance is invalid and unconstitutional because the property is taken without due process of law. In that case the court held that since the property involved was suitable only for light manufacturing purposes, a zoning ordinance restricting its use to "service type" commercial use was unreasonable and constituted the taking of plaintiffs' property without due process of law. It is not contended in the instant case that plaintiffs' property is suitable only for commercial purposes.

"Plaintiffs rely heavily on the case of Dobbins v. [City of] Los Angeles, 195 U.S. 223 [25 S.Ct. 18] 49 L.Ed. 169. The question involved in the Dobbins case was the sufficiency of the complaint to state a cause of action. As pointed out in Marblehead Land Co. v. [City of] Los Angeles [D.C.], 36 F.2d 242, affirmed [9 Cir.], 47 F.2d 528, the complaint therein alleged not only that there was no change in conditions, but that the neighborhood was occupied by oil refineries and that the council enacted the second ordinance not for the purpose of protecting the people in the neighborhood, but for the purpose of granting a monopoly to another gas company operating in another district. The court held that the complaint stated a cause of action. The Dobbins case presents a situation coming within the fourth category referred to in Wilkins v. [City of] San Bernardino, supra. It might be noted that in Marblehead Land Co. v. [City of] Los Angeles, supra, a writ of certiorari was denied by the Supreme Court, 284 U.S. 634 [52 S.Ct. 18], 76 L.Ed. 540.

"The case of Vine v. Zabriskie, 122 N.J.L. 4, 3 A.2d 886 also relied upon by plaintiffs can be distinguished from the instant case in that it was found as a fact that the property involved therein was not marketable for either single or two family dwellings nor for business establishments. An ordinance zoning the property for business and apartment uses was amended prohibiting apartment uses after petitioner had applied for a permit to erect an apartment building. The court in such a factual situation held that the amending ordinance was an arbitrary interference with the lawful and legitimate use of private property. The court's comments on the manner in which the amending ordinance was adopted, while perhaps having a salutary effect on the legislative body, do not form the basis of its decision.

"In Bernstein v. Smutz, 83 Cal.App.2d 108 [188 P.2d 48], the court held plaintiffs' petition sufficient since it brought the case within the first, second, and perhaps the third category referred to in Wilkins v. [City of] San Bernardino, supra. The court in its opinion referred to the case of Vine v. Zabriskie, supra, but only insofar as the procedure followed in enacting the emergency ordinance was concerned.

[6, 7] "The fact that, as stipulated herein, the contemplated use of the property would not constitute a nuisance is not determinative of the question presented. The decisions of the courts of this state have recognized that the right to use private property may be restricted by an ordinance which follows a reasonable plan, even though the use is neither a nuisance per se nor a menace to health, safety, or morals in the particular district from which it is excluded. (Jones v. City of Los Angeles, 211 Cal. 304, 310 [295 P. 14].)

[8] "2. Is the defendant estopped from setting up the ordinance passed on January 15, 1948, as a defense in this action?

"This question for the reasons hereafter stated is likewise answered in the negative.

"Plaintiffs have cited the case of Pelham [View Apartments] v. Switzer, [130 Misc. 545], 224 N.Y.S. 56 in support of their contention of estoppel. In that case petitioner, relying upon a permit issued to him to build an apartment house, paid a substantial sum of money on account of the purchase price of the property, had the land surveyed, employed the services of an architect and expended about $1,000 in excavating. His original permit was then revoked, such revocation being predicated upon an amendment to the zoning ordinance. It was held that where a permit to build a building has been acted upon, and where the owner has proceeded to incur obligations and to in good faith proceed to erect the building, such rights are then vested property rights and the courts in such cases apply the remedy of mandamus to cancel the revocation and to reinstate the permit.

"In the instant case the permit was not issued and the following rule set forth in Brougher v. Board of Public Works, 205 Cal. 426, 434 [271 P. 487, 491], is applicable, 'The exception noted in the foregoing authorities, that a permit would not be revoked in those cases where the licensee "had done something under the license from which the mere privilege would ripen into a vested right," does not exist in those cases like the one before us, where no permit has ever been issued. In such cases there is no opportunity for any privilege to ripen into a vested right, for the reason that no privilege, in the sense used in the authorities cited, is acquired until a permit has been issued.' Also Sunny Slope Water Co. v. [City of] Pasadena, supra.

"The case of Wheat v. Barrett, 210 Cal. 193 [290 P. 1033] refers specifically to Pelham [View Apartments] v. Switzer, supra, in the following language, [210 Cal.] page 199 [290 P. page 1035] 'We do not think the wording of the opinion justifies respondents' conclusion as stated in his (sic) brief that "the court held that where a permit had been secured and the owner had entered into contracts for the erection of the building, a subsequent zoning ordinance will not revoke the permit for the reason that a vested right has been secured." The conclusion of respondents drawn from the opinion, if correct, is against the weight of authority in other jurisdictions and is not the rule in this state.'

"The case of Marblehead Land Co. v. [City of] Los Angeles, [D.C.], 36 F.2d 242, affirmed [9 Cir.], 47 F.2d 528, was an action in which plaintiff sought to enjoin defendant from enforcing a zoning ordinance by the terms of which oil well drilling operations were declared illegal in the zone wherein the land owned by plaintiff was located. Plaintiff's land had been excluded from a residence zone and plaintiff had expended substantial sums in preliminary work in connection with their project for oil development. Later the city repealed the ordinance excluding plaintiff's land from a residence district and enacted an ordinance reincorporating said land in the residence district. The could held that a zoning ordinance declaring oil well operations illegal within a residence district which repealed a prior ordinance excepting such land from the district was valid and that there is no vested right in a permit or an ordinance by which the boundaries of the residential zone were changed to exclude plaintiff's property therefrom.

"The plaintiff in that case relied strongly upon the case of Dobbins v. [City of] Los Angeles, supra, as does plaintiff in the instant case. In conclusion the court said ([47 F.2d] page 534) 'The loss suffered by the appellants by reason of this change in legislative policy is no more a taking of their property than is the loss resulting to them by reason of being deprived of the right to develop the oil on their property or the right to use their land for other than residence purposes.'

"In the case of O'Rourke v. Teeters, 63 Cal.App.2d 349 [146 P.2d 983], it was held that the fact that a party makes a large investment in a city lot, which at the time it is purchased is free of restrictions, with intent to use it for business purposes, does not invalidate a zoning ordinance subsequently adopted restricting the use of the property to residential purposes.

"Also in Brett v. Building Commissioner, 250 Mass. 73, 145 N.E. 269, cited with approval in Brougher v. Board of Public Works, supra, it was held that the fact that owners of property in a zone in which two-family dwellings were allowed had obtained permits for the construction of such dwellings and had started some preliminary work and entered into contracts with third persons for the construction thereof did not render invalid or inapplicable as to them an amendment of the zoning ordinance creating a single family residence district in which their property was included."

It should be added in reference to the claim of estoppel that from the time of the enactment of the so-called "interim" zoning ordinance on May 12, 1947, to the time of its repeal on January 15, 1948, appellants had ample notice that the city council was not satisfied with the zoning and that plans for the repeal of the May ordinance were being continually discussed. If an application for a building permit accompanied by the proper plans and other data had been made during that interim there is no question but that appellants would have been entitled to the permit under the existing "interim" ordinance. But appellants waited until that ordinance was in process of repeal and filed their application too late to permit respondent to make necessary investigation regarding the plans of the building proposed to be erected. The evidence fails to show the essential elements of an estoppel. 5 Cal.Jur.Supp. p. 586, sec. 14; Code Civil Procedure, sec. 1962, subd. 3; Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 273, 83 P.2d 503.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

92 Cal.App.2d 39

CASTRO et ux. v. GIACOMAZZI BROS. et al.

No. 13984.

District Court of Appeal, First District, Division 1, California.

May 25, 1949.

Rehearing Denied June 23, 1949.

Hearing Denied July 21, 1949.

1. Automobiles 🔑245(83)

Evidence that a motorist failed to see a parked car on the roadway at night, standing alone, is not sufficient to find that motorist is negligent as a matter of law.

2. Automobiles 🔑245(78, 83)

In action for injuries sustained when plaintiffs' automobile struck rear of truck parked partly on the highway at night when plaintiff was temporarily blinded by lights of an approaching automobile, whether plaintiff should have stopped or slowed down presented questions of fact for jury. Vehicle Code, § 582.

3. Automobiles 🔑245(83)

A motorist is not guilty of negligence as a matter of law merely because he drives his car into another lane or onto the left side of the highway.

4. Negligence 🔑122(1)

In a violation of the law, an unlawful act is presumed to carry with it an unlawful intent, but presumption is not conclusive and may be rebutted by evidence showing that the act was justifiable or excusable under the circumstances. Code Civ.Proc. § 1963, subd. 2.

5. Automobiles 🔑245(83)

Motorists whose automobile collided with a truck parked in part on the main highway when they were blinded by lights of an approaching automobile were not contributorily negligent as a matter of law merely because motorist when blinded and while driving in the right-hand lane of a three-lane highway moved to the right and struck the truck when attempting to return to the highway.

6. Appeal and error 🔑1050(1)
Evidence 🔑271(2)

Statement of motorist subsequent to accident to police officer that he did not see truck with which he collided and that it did not have any tail lights or reflectors on it and that he had one drink of wine before his dinner was self-serving but its admission was not prejudicially erroneous.

7. Judgment 🔑251(1)

If matter is not directly made an issue in the pleadings but evidence of such facts is introduced without objection, relief may be granted upon the evidentiary issue if pertinent to the general pleading.

8. Pleading 🔑403(2)

Failure of complaint to allege whether defendants were a corporation or partnership was cured where answer disclosed that defendants were a partnership. Code Civ.Proc. § 452.

9. Automobiles 🔑244(26)

Evidence of driver of truck with which automobile of plaintiffs collided and that of one of his employers was sufficient to impute responsibility for the accident to the owners of the truck on the ground that the driver was operating the truck with the express or implied permission of the owners. Vehicle Code, § 402(a).

10. Automobiles 🔑234

Under statute providing that when imputed evidence of responsibility from negligence of driver of motor vehicle prevails, driver shall be made a party defendant if personal service of process can be had upon him "within this state", liability of the owner is not dependent upon service of summons upon the driver who is not an indispensable party to the maintenance of the action. Vehicle Code, § 402(c, d).

11. Appeal and error 🔑187(3)
Parties 🔑84(1)

If appearance of a party is indispensable in the sense that it is a question of jurisdiction, question may be raised at any time, but otherwise a failure to object on the ground that a party who could, has not been served, is a waiver of the right to compel the opposing litigant to comply with the statute respecting service upon operator of a vehicle involved in an accident in which responsibility is imputed to the owner. Vehicle Code, § 402(a, c, d)

12. Appeal and error 🔑1170(1)

The fundamental purpose of reviewing judgments and orders is to determine if there has been a miscarriage of justice. Const. art. 6, § 4½.

13. Appeal and error 🔑1170(1)

In action for damages sustained in an automobile accident where responsibility was sought to be imputed to owner of truck involved under the statute because of negligence of operator thereof, failure to serve operator of the truck did not require a reversal as resulting in a miscarriage of justice where operator was a witness on the trial and defendants did not object to an instruction imposing liability under the statute. Vehicle Code, § 402(a, c, d); Const. art. 6, § 4½.

14. Automobiles 🔑246(55)

In action for damages sustained when plaintiffs' car struck a parked truck of defendant, evidence authorized instruction that no person shall park a vehicle upon the paved or main traveled portion of the highway when it is practicable to park the vehicle off the highway.

15. Trial 🔑256(13)

Instruction respecting damages if applicable to either plaintiff was not erroneous in absence of an offered instruction requesting that it be confined to one plaintiff.

16. Damages ⚿185(1), 187

Testimony of an expert witness on the subject of pain or future earning ability of injured plaintiff was unnecessary.

17. Appeal and error ⚿1066

Instruction respecting medical expenses of injured plaintiffs, if error because of lack of evidence thereof, was not prejudicial to defendants.

18. Damages ⚿130(1)

$4,000 to husband and wife for injuries rendering wife unconscious and causing injury to the leg and chest of the husband and other injuries to the wife and requiring hospitalization of the wife for 16 days and damage to the car of plaintiffs was not excessive.

◆

Appeal from Superior Court, Santa Clara County; A. M. Runnells, Judge.

Action for injuries sustained in an automobile accident by Frank Castro and another against Giacomazzi Brothers and others. From the judgment, defendants appeal.

Affirmed.

Campbell, Hayes & Custer, Robert E. Hayes, San Jose, Edward J. Niland, Santa Clara, of counsel, for appellants.

Gomez & Nelson, Manny C. Gomez, San Jose, for respondents.

WARD, Justice.

Defendants, individually and as copartners, appeal from a judgment entered after a jury verdict of $4,000 in favor of plaintiffs in a personal injury action, the result of an automobile accident. It is alleged in the complaint that in February, 1946 defendants so negligently parked a tractor and semi-truck on a highway as to cause to violently collide with it an automobile operated by Frank Castro.

The evidence shows that the accident occurred about 8 p. m. outside of the city limits of San Jose. Plaintiff, Frank Castro, accompanied by his wife, Dora, was driving north at tweny-five miles an hour in the right hand lane of a three lane highway. The lights from a car approaching in a southerly direction temporarily blinded him. He moved to the right and after the car had passed he saw a reflector on his right which he thought was on a post. He attempted to return to the highway and just at that moment hit the left-hand side of a parked truck belonging to Giacomazzi Bros., damaging the right-hand side of his car. Defendants' truck and semi-truck was parked one foot from the edge of the main lane with both dual tires of the semi-truck on the improved shoulder. Trees next to where the truck was parked hindered its being pulled further from the main traveled portion of the highway. Though plaintiffs saw no lights on the truck, when police officers arrived at the scene of the accident two tail lights and a clearance light were lighted. There were also three reflectors, one of which was damaged. Castro testified that his bright beam would reveal an automobile ahead " 'bout 150, 100 feet."

Defendants called the driver of the truck as a witness. He testified that he was employed by defendants to drive the truck; that at about a quarter to eight or 8 o'clock he stopped the truck to go to a restaurant on the side of the road; that he put on his clearance light, headlights, and four lights on the back consisting of two tail lights and two clearance lights; and that he was just reaching the restaurant when he heard a crash. After speaking to the plaintiff Frank Castro he checked his lighting, found a tail light and one clearance light broken. He testified that he replaced two of the lights and that his purpose was to demonstrate to the police officers that the lighting facilities were in good condition.

The collision rendered Mrs. Castro unconscious. Mr. Castro suffered an injury to his leg and chest. He was not hospitalized, but claimed he did not attend to his work for three months. Mrs. Castro, as the result of two broken ribs, an injured knee, blurry vision in one eye and soreness in the neck, remained in the hospital for sixteen days.

The model "A" Ford which Castro was driving at the time had been purchased for $350 from one Grasko, who repurchased the car after the accident for $60. Towing costs of $14 and $20 for watching the car left a balance of $26 recovered for the car.

Defendants contend that there was no substantial evidence to show that defendants' negligence was the proximate cause of plaintiffs' injuries. They argue that the driver's negligence could be predicated only on two possible grounds: (1) his alleged violation of section 582 of the Vehicle Code, and (2) his alleged failure to display any lights on the parked truck. Defendants urge that even if the truck had been parked in violation of section 582 plaintiffs' car was so far onto the shoulder that plaintiffs would still have crashed into the truck. As to the question whether the failure to display lights was the proximate cause of the accident, defendants conclude that plaintiff was totally blinded by the approaching lights and it does not appear that he would have been able to see the truck whether the clearance lights were on or not.

[1, 2] The question of proximate cause is a question of fact. Evidence that a motorist failed to see a parked car on the roadway, standing alone, is not sufficient to find that the motorist is negligent as a matter of law. It is the facts and circumstances surrounding the failure to see the parked car that is the determining factor. One may be guilty as a matter of law who fails to comply with the provisions of a statute or ordinance requiring certain lighting facilities attached to a motor vehicle, but whether with or without the designated lighting facilities a person would be able to see a parked car is a question of fact. The driving lights on the Castro car showed 150 feet ahead. There is evidence that the lights from a vehicle passing in the opposite direction momentarily blinded plaintiff Frank Castro, which caused him to swerve to the right. He testified, "I don't see no lights at all—no red lights, no nothing." Then the accident occurred. Whether plaintiffs should have stopped or slowed down also presents questions of fact. Frank Castro had stopped in a town some distance away and consumed a bottle of beer, after which the plaintiffs continued their journey.

[3-5] In the present case the preceding questions and whether the plaintiffs violated the law by driving from one lane to another may be considered in connection with the claim that plaintiffs were guilty of contributory negligence. "The operator of a car obviously is not guilty of negligence as a matter of law merely because he drives the car into another lane or onto the left side of the highway." Finney v. Wierman, 52 Cal.App.2d 282, 286, 126 P.2d 143, 146. In a violation of the law an unlawful act is presumed to carry with it an unlawful intent (Code of Civil Procedure, § 1963, subd. 2), but the presumption is not conclusive and may be rebutted by evidence showing that the act was justifiable or excusable under the circumstances. Assuming that under the law one should drive in a certain lane of a highway, it is for the triers of that issue to determine if there is a reasonable excuse for such violation. It may be that the cause of the violation was under unusual conditions or beyond the control of the violator. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279.

[6] Through a mistake a statement made by plaintiff subsequent to the accident to police officers was read into the record. The statement reads in part: "I was travelling towards San Jose and did not see this truck until I struck it. It did not have any tail lights lighted or reflectors on it. I did have one drink of wine in Gilroy before I had my dinner." The statement was self-serving, but not prejudicially erroneous.

[7, 8] The main question raised is whether plaintiffs failed to prove and recover on the cause of action stated in their complaint. The complaint alleged: "That Giacomazzi Bros. is either a corporation or a partnership doing business under the name and style of Giacomazzi Bros. The true capacity of said organization is at this time unknown to plaintiffs and plaintiffs ask leave of Court to amend when the true names and capacities have been ascertained." The record does not show that a demurrer was filed. The introduction to the answer reads: "Come now Wm. Giacomazzi and Elven Giacomazzi, individually and as co-partners doing business as Giacomazzi Bros., and in answer to plaintiffs' complaint on file herein, admit, deny and allege as follows: * * *" The required information having been set forth in the answer, it was not necessary to amend the complaint. If a matter is not directly

made an issue in the pleadings, but evidence of such facts is introduced without objection relief may be granted upon the evidentiary issue if it is pertinent to the general pleading. 14 Cal.Jur. p. 974, § 62. "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." Code Civ.Proc., § 452.

[9] For the purposes of civil damages there is imputed to an owner of a motor vehicle liability and responsibility resulting from the negligence of a person using or operating such vehicle with the express or implied permission of the owner. Vehicle Code, § 402, subd. a. In the present case the driver of the truck appeared as a witness and testified to the facts and circumstances surrounding the accident including the fact that he was employed by Giacomazzi Bros. and had been so employed for about two years. The driver reported the accident to one of the brothers, Elven Giacomazzi, who also appeared as a witness. There is ample evidence to show that the facts of the case are brought well within the provisions of the Vehicle Code, to the effect that the owners were liable under subdivision (a) of section 402. There is authority holding that where the employee is driving his employer's car at the time of the accident it may be inferred that the car was operated with the owner's permission. Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868; Hicks v. Reis, 21 Cal.2d 654, 134 P.2d 788.

[10] Subdivision (c) of section 402 provides that when such imputed evidence prevails the operator of the vehicle "shall be made a party defendant if personal service of process can be had upon said operator within this State." Upon recovery of judgment, recourse shall first be had against the operator's property. Subdivision (d) of the same section in part provides that "such owner is subrogated to all the rights of the person injured or whose property has been injured and may recover from such operator the total amount of any judgment and costs recovered against such owner." In the present case the operator could have been served. The language of the section indicates that the Legislature intended that the operator should be served if "within this State." It is important to consider two points, jurisdiction and whether in this case the failure to serve the employee has resulted in a miscarriage of justice.

The superior court has jurisdiction over the party owner and the subject notwithstanding that the operator may not be a party to the action. The liability of the owner is not dependent upon service of summons upon the operator of the vehicle. The operator is not an indispensable party to the maintenance of such an action. The liability is joint and several. Sayles v. Peters, 11 Cal.App.2d 401, 54 P.2d 94, and cases cited therein; see also Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043.

[11] If the appearance of a party is indispensable, Bank of California v. Superior Court, 16 Cal.2d 516, 106 P.2d 879, in the sense that it is a question of jurisdiction it may be raised at any time, Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163, but otherwise a failure to object on the ground that a party who could has not been served is a waiver of the right to compel the opposing litigant to comply with the statute. Davidson v. Ealey, 69 Cal.App.2d 254, 158 P.2d 1000. As previously stated, the lack of service on the operator is not a matter that deprives the court of jurisdiction.

[12, 13] One instituting an action under the provisions of Vehicle Code section 402 should comply with the statute to avoid possibility of reversal of a favorable judgment. The fundamental purpose of reviewing judgments and orders is to determine if there has been a miscarriage of justice. Const. of Calif., art. VI, § 4½. It may be that under some circumstances the failure to serve one operating a motor vehicle with the permission of the owner which was involved in an accident might result, after an examination of an entire cause, in demonstrating a miscarriage of justice. Such condition did not exist in the present case. The operator of the motor vehicle was a witness in the trial of the case. It does not appear from the

record that the owners were prejudiced by the form of the pleading. In addition to the waiver it is interesting to note that defendants did not object on the trial or on appeal to the following instruction: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

[14] Defendants contend that it was error to give the following instruction: "Upon any highway outside of a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway." There is evidence that the tractor was parked with certain parts off and other portions on the improved highway. There is also evidence that trees interfered with parking the tractor vehicle entirely off the improved highway, but there was evidence that proper parking facilities could have been obtained at another point on the road. The court did not attempt to instruct the jury that the truck was on or off the main portion of the highway. Error does not appear in the wording of the instruction or in the propriety of giving the instruction to the jury.

[15-18] The nature and extent of the injuries have been heretofore related. The court instructed that in determining the amount of damages future physical or mental suffering and the extent and degree thereof, to which the injured party was reasonably entitled, could be considered; whether such injuries are temporary or permanent; the future power to earn money; the expense incurred for care and medical treatment and the loss of wages. Most of the paragraphs dealing with the subjects just noted contained the words "if any." If the instruction was applicable to either plaintiff it was not erroneous in the absence of an offered instruction requesting that it should be confined to one plaintiff. Mrs. Castro testified that she still suffered from the injuries at the time of the trial some two years after the accident, and that she had been unable to work since the date of the accident. The jury had an opportunity to observe each plaintiff and determine the probability of continuance of the present physical conditions—the pain previously suffered and the probability of a continuation of that suffering. It was not necessary to produce an expert witness on the subject of pain or future earning ability. However, attention has not been called to evidence of medical expenses, but in that regard the instruction read: "* * * the sum that will fairly and reasonably compensate plaintiffs, or either of them, for the expenses, if any, that each has reasonably and necessarily incurred or paid for medical attention, such as physicians, hospitalization and drugs, and caring for him—and drugs and curing him of any injuries suffered as a direct and proximate result of the accident complained of; provided that you find from the evidence that plaintiffs sustained any injuries." The amount was to be computed, "if any." If there was no evidence of medical expenses, there was no necessity to give the instruction, but it has not been shown that defendants were prejudiced thereby.

Judgment affirmed.

PETERS, P. J., and BRAY, J., concur.

92 Cal.App.2d 149

ROLLER v. CALIFORNIA PACIFIC TITLE INS. CO. et al.

Civ. 13834.

District Court of Appeal, First District, Division 2, California.

June 2, 1949.

1. Vendor and purchaser 🔑44, 334(1), 338

A purchaser claiming rescission on ground of mistake may sue for money had and received to recover portion of purchase price paid, but his right to recover is governed by principles of equity, though the action is one at law, and purchaser has the burden of proving all the elements of actionable mistake. Civ.Code, § 1577.

2. Vendor and purchaser 🔑341(4)

In suit by purchaser to rescind contract for sale of realty and recover portion of purchase price paid on ground that contract was entered into by mistake, trial court's finding that contract had been entered into and breached by purchaser negatived the claim of actionable mistake. Civ.Code, §§ 1550, subd. 2, 1577.

3. Vendor and purchaser 🔑45

Whether purchaser was negligent in entering into contract for sale of realty under mistaken belief that it provided security for payment of rent for the realty to be leased to vendor, so that such mistake would afford no ground for rescission of contract and recovery of portion of purchase price paid was a question of fact. Civ.Code, § 1577.

4. Contracts 🔑93(1)

"Mistake" to be available in equity as ground for rescission of contract must not have arisen from negligence, where means of knowledge were easily accessible, and party complaining must have exercised at least the degree of diligence which may be fairly expected from a reasonable person. Civ.Code, § 1577.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Mistake".

5. Cancellation of Instruments 🔑4
Reformation of Instruments 🔑17(1)

Equity will not encourage the cancellation or revision of instruments on ground of mistake where they appear to have been executed by complainant without exercise of reasonable care. Civ.Code, § 1577.

6. Contracts 🔑1
Evidence 🔑66

One will be presumed to know the meaning of unambiguous language and will be bound by solemn execution of a written instrument in absence of fraud, confidential relations or circumstances indicating excusable mistake. Civ.Code, §§ 1550, subd. 2, 1577.

7. Reformation of instruments 🔑17(1)

Where failure to familiarize one's self with contents of written contract prior to its execution is traceable solely to carelessness or negligence, reformation should be denied. Civ.Code, § 1577.

8. Vendor and purchaser 🔑31, 334(1)

Where contract to purchase realty and lease it to vendor for ten years was prepared by purchaser without any misrepresentation by vendor, purchaser's mistaken belief that contract provision authorizing him to credit unpaid rent against obligation to pay balance of purchase price afforded security for rent did not constitute such "mistake" as would entitle purchaser to rescind contract and recover back portion of purchase price paid. Civ.Code, §§ 1550, subd. 2, 1577.

9. Equity 🔑8

A mistake which is caused by neglect of a legal duty is not a "mistake of fact" for which relief may be had in equity. Civ. Code, § 1577.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Mistake of Fact".

10. Vendor and purchaser 🔑108, 334(1)

Where contract for sale of realty providing that vendor would lease property from purchaser for ten years at stated monthly rental and that all clauses of lease would be included on standard form of business lease usage, accepted by both parties, was prepared and drawn by purchaser without any misrepresentation by vendor and was not uncertain as to any of the essential elements, purchaser was not entitled to rescind contract and recover back portion of purchase price paid on ground that contract was void for uncertainty.

11. Contracts ⚷9(1), 147(1)

The law does not favor destruction of contracts because of uncertainty, and will, if feasible, so construe contracts as to carry into effect the reasonable intentions of parties, if that can be ascertained.

12. Vendor and purchaser ⚷21

The memorandum of a contract for sale of realty must within itself show who is the vendor and who is the purchaser, what the price is and when it is to be paid and so describe the realty that it may be identified.

13. Vendor and purchaser ⚷44

In suit by purchaser to rescind contract for sale of realty and recover back portion of purchase price paid on ground of mistake, purchaser has the burden of proving such type of mistake as is cognizable in equity and not merely a mistake affecting some collateral though material matter, constituting merely a matter of inducement. Civ.Code, § 1577.

14. Equity ⚷8

A "mistake of fact", to warrant relief in equity, must be material, and the fact must be such that it animated and controlled conduct of party complaining, going to essence of object in view and not merely incidental, and court must be satisfied that but for mistake complainant would not have assumed obligation from which he seeks to be relieved. Civ.Code, § 1577.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Mistake of Fact".

15. Vendor and purchaser ⚷31, 334(1)

Purchaser's mistaken belief that provision in contract to purchase realty and lease it to vendor for ten years authorizing purchaser to credit any unpaid rent against obligation to pay balance of purchase price afforded security for payment of rent was not such a "mistake" as would entitle purchaser to relief in equity by way of rescission of contract and recovery of portion of purchase price paid. Civ.Code, § 1577.

Appeal from Superior Court, San Mateo County; Andrew R. Schottky, Judge.

Action for money had and received by Albert F. Roller against H.M.H. Inc., to recover the down payment on purchase of realty which had been placed in escrow with California Pacific Title Insurance Company, which was for that reason joined as a party defendant. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Lloyd S. Ackerman, San Francisco, Philip S. Mathews, San Francisco, for appellant.

Hoffmann & Draper, San Mateo, for respondent.

GOODELL, Justice.

Appellant sued respondent for $5,000 in an action for money had and received. The $5,000 was escrowed with the Title Company which was joined only because of the escrow. It paid the $5,000 into court and was dismissed from the case. A judgment against the plaintiff, which awarded the $5,000 to respondent, was entered on the findings, and this appeal followed.

The litigation arose out of a contract for the sale by respondent to appellant of a piece of improved real property in the City of San Mateo. The legal effect of the judgment was to hold the contract valid and enforceable, and to hold, further, that it had been breached by appellant.

After paying the initial $5,000, appellant served a notice or rescission and filed this action to recover it back.

The property formerly belonged to one Martin A. Poss, and a deed of trust covering it had been given by respondent, the owner, to Poss and others, to secure a promissory note for $42,000.

On August 3, 1946, a "deposit receipt" was drawn which constitutes the contract in suit. It was signed on that day by appellant and on the next day by respondent.

It showed the purchase price to be $60,000, acknowledged the receipt of $5,000, called for the payment of $13,000 within 30 days, and provided: "Buyer to take over present mortgage of $42,000 at 4% interest, held by Martin Poss, and is subject to conditions of this mortgage * * *." It then provided that respondent, doing business as Poss Flowers (the property was at the time a nursery and flower store), would lease the property from appellant for 10 years at a monthly rental of $500, and that all clauses of the lease would be included on the standard form of business lease usage, accepted by both parties.

The controversy pivots on the following provision in the deposit receipt: "Any failure to pay rent when due may, at buyer's option, be credited against buyer's obligation to pay balance of purchase price." It is obvious that with the $5,000 and $13,000 payments and the outstanding encumbrance of $42,000 payable, not to the vendor but to a third party, Poss, there would be no balance subject to offset.

On August 19 respondent lodged with the Title Company a deed executed and acknowledged by respondent to appellant with escrow instructions as to its delivery; an agreement to be signed by the buyer assuming and agreeing to pay the respondent's $42,000 note secured by deed of trust to Poss, and a form of the proposed 10-year lease to be executed by both parties.

The next day appellant sent respondent a notice of rescission which specified as its grounds that appellant's "consent * * * was given by mistake exercised by or with your connivance, and by misrepresentation and/or mistake in that the undersigned would not have entered into said contract had not you and your agents represented to the undersigned that (1) you would enter into a lease of said property for a period of ten years at a monthly rental of $500.00, plus certain other payments, and (2) your obligation to pay the rental thereunder would be secured by the right of the undersigned to offset unpaid rent and other sums becoming due under the lease against the unpaid portion of the purchase price * * *. Said agreement of sale is incomplete, indefinite, ambiguous and uncertain and not enforceable as an executory contract to enter into a lease. Said agreement provides no security for said rent and other payments."

On the 22nd respondent sent a letter to appellant in which it offered to do whatever was needful to meet appellant's objections, but nothing came of the parleys which ensued.

Appellant says "The basic issue on this appeal is whether there was the 'consent' required by Civil Code, sec. 1550(2) to the contract which is the subject of this action."

[1] Mistake was the principal foundation on which appellant's notice of rescission was based, see McCall v. Superior Court, 1 Cal.2d 527, 533, 36 P.2d 642, 95 A.L.R. 1019, and he elected to sue for money had and received, a procedure fully sanctioned in this state. Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990. That being so, his "right to recover is governed by principles of equity, although the action is one at law", 1 Cal.2d at page 522, 36 P.2d at page 640, 95 A.L.R. 990, and the burden of proving all the elements of actionable mistake was, of course, appellant's.

[2] There was no express finding on the question of mistake, as appellant points out, but on that score he cannot complain since he did not plead mistake. Indeed there is nothing in his pleadings (or briefs) to indicate whether he relies on a mistake of fact or of law. That a mistake was made by appellant may be conceded, but whether it was one from which he can be relieved in equity is another question and a serious one. The finding that a contract had been entered into, and breached by appellant, of course negatives the claim of actionable mistake.

The notice of rescission asserts that appellant's consent was given by mistake "exercised by or with your [respondent's] connivance, and by misrepresentation and/or mistake" and that respondent and its agents misrepresented that the rental would be secured and could be offset. There was no evidence of any misrepresentation or connivance, and the court found that respondent made no representation.

A real estate broker named Lilienthal initiated and carried on the negotiations. The court found that in doing so he was not the agent of respondent, and appellant presents this appeal on the assumption that he was not.

[3] The court found that the agreement was drawn and prepared by plaintiff and that it was not drawn or prepared in any way, directly or indirectly, by defendant. When read in connection with the finding that the broker was not respondent's agent the finding may be taken as meaning that appellant himself was responsible for the language which he now claims caused the mistake. Whether appellant was negligent is purely a question of fact.

Section 1577 of the Civil Code in defining mistake of fact rules out, in its opening sentence, such mistake as is "caused by the neglect of a legal duty on the part of the person making the mistake."

[4] One of the leading cases on rescission is Grymes v. Sanders, et al., 93 U.S. 55, 23 L.Ed. 798, which has been followed in scores of cases. There the court said: "Mistake to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence 'which may be fairly expected from a reasonable person' Kerr on Fraud and Mistake, 407." The party there complaining of mistake had bargained for a piece of land which was thought to contain gold but it turned out that the mining shaft which he believed was on that land was located elsewhere.

[5, 6] That case was followed in Fraters Glass & Paint Co. v. Southwestern Const. Co., 107 Cal.App. 1, 5, 6, 290 P. 45, 47 (hearing denied) where the court said: "Courts of equity will not encourage the cancellation or revision of instruments on the ground of mistake where they appear to have been executed by the complainant without the exercise of reasonable care. [citing 9 C.J. 1169, sec. 21; 4 R.C.L. 507, sec. 20 and Grymes v. Sanders] * * * In the absence of fraud, confidential relations, or circumstances indicating excusable mistake, one will be presumed to know the meaning of unambiguous language and will be bound by the solemn execution of a written instrument. [Citations.]"

In Placer County Bank v. Freeman, 126 Cal. 90, 58 P. 388, the bank sued on a draft and the defendants resisted payment on the ground, inter alia, "That they signed the draft believing it to be a receipt only for the money." In reversing a judgment for the defendants the court 126 Cal. at pages 94-95, 58 P. at page 390 said: "The real question in the case, we think, is, should defendants, in view of all the undisputed facts, be permitted to avoid the consequences of their voluntary acts? Obviously, the loss in the transaction, by the plainest considerations of justice, ought not to fall upon plaintiff, and we think the rules of law call upon us so to hold. The principle governing the case has been applied many times and under a great variety of circumstances. It is this: Where a person enters into an obligation with another upon an equal footing, i. e. where he does so free from any fraud practiced upon him and not being under any undue influence, and there are no relations of confidence and trust, and the means of knowledge are equally open to both, and he executes the instrument without reading it or having it read to him, and without exercising the means of knowledge open to him, neither the courts of law nor courts of equity will relieve him from the effects of his folly. Judge Story, in his Equity Jurisprudence (section 200a), quotes the rule from Kent's Commentaries as follows: 'The common law affords to everyone reasonable protection against fraud in dealing, but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information.'"

[7] On the subject of the failure of a party to read an instrument, or to read it correctly, it must be conceded that the authorities are by no means all one way. The court in California Trust Co. v. Cohn, 214 Cal. 619, 626, 627, 7 P.2d 297, 300, in pointing this out says: "The failure to read an instrument prior to its execution is an act to be explained, and, where the testi-

mony sufficiently explains such failure, it is removed from the case just as other acts of failure might be removed. Siem v. Cooper, supra [79 Cal.App. 748, 250 P. 1106]. There has always been a sharp struggle in the courts between the desire to repress fraud upon the one hand, and on the other to discourage negligence and the opportunity and invitation to commit perjury. *We are inclined to the view, therefore, that where the failure to familiarize one's self with the contents of a written contract prior to its execution is traceable solely to carelessness or negligence, reformation as a rule should be denied* * * *." (Emphasis added.)

The cases just discussed deal with the failure of a person to read an instrument drawn by another, and with the burden of explanation of such failure. Appellant's burden of explanation was much heavier since, as the court has found, he drew and prepared the contract. The language therein, attributable to himself, is now claimed by him to have caused his mistake. It was appellant's own proposal, already signed by him, which was presented to respondent for acceptance or rejection. If appellant's negligence had been induced by respondent's misrepresentation an entirely different problem would be presented, see Security-First Nat. Bank v. Earp, 19 Cal.2d 774, 777, 122 P.2d 900, and authorities there cited, including California Trust Co. v. Cohn, supra, but the court has found "That no representation of any kind or character was made by or on behalf of defendant * * * to plaintiff * * *."

An extensive annotation on the subject is found at 59 A.L.R. 818-834, dealing with unilateral mistake.

[8] We are satisfied that the finding that appellant prepared and drew the contract, brings the case within the rule stated in the Grymes, Cohn and Fraters cases, supra, and that, for the reasons given in those cases, see, also, sec. 1577, supra, he has not established a case of actionable mistake.

[9] The language of section 1577, Civ. Code, itself shows that it is not any and every mistake that is remediable. When that section provides that "Mistake of fact is a mistake, not caused by the neglect of a legal duty * * *" it means by its very language, that a mistake which *is* so caused is *not a mistake of fact* within the meaning of the law.

A mistake of fact consists of "An unconscious ignorance or forgetfulness of a fact past or present, material to the contract", sec. 1577, supra. Appellant was not ignorant of the fact that $5,000 plus $13,000 plus $42,000 accounted for the total purchase price. He was, apparently, unconscious or forgetful of the conclusion resulting from such computation, namely, that no purchase price would remain, against which unpaid rent (if any) could be offset.

When, in Germain Fruit Co. v. Western Union Tel. Co., 137 Cal. 598, 70 P. 658, 59 L.R.A. 575, the telegram was garbled from "Santa Ana oranges, one fifty; Riversides, two sixty" to read Santa Ana oranges $1.50 Riversides $1.60, because the word "two" was dropped in transmittal such omission was a clear mistake. If the contract in suit had been drawn so as to call, say, for a purchase price of $70,000 instead of $60,000, because of a mistake in transcribing, it would have been the same type of mistake. If, with knowledge that $60,000 was meant, respondent had signed, the rule illustrated by the Germain case would perhaps be applicable for, as Williston says, it would be "too good to be true." 1 Williston on Contracts, Rev. Ed., sec. 94. As the case stands, however, there was no such "mistake" here, and instead of falling within the "snap up" rule the case seems to be squarely within the negligence rule applicable in cases where, on equitable principles, Philpott case, supra, relief is sought.

[10] Appellant contends that the contract was void for uncertainty or unintelligibility.

[11] In the first place, "'The law does not favor, but leans against, the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained.' * * *" Roy v. Salisbury, 21 Cal.2d 176, 184, 130 P.2d 706, 710.

Secondly, respondent is not seeking specific performance where the requirement of certainty is strict. See Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 164, 88 P.2d 698, 89 P.2d 386.

Thirdly, the language is attributable to appellant, Weil v. California Bank, 219 Cal. 538, 541, 27 P.2d 904 and "One who prepares a contract can by exactness of expression more readily prevent mistakes in meaning than one with whom he is dealing." Hunt v. United Bank & Trust Co., 210 Cal. 108, 116, 291 P. 184, 188.

[12] The contract was primarily and essentially one for the purchase and sale of a piece of real estate for $60,000. "The requirements of a contract for the sale of real property have been definitely established and are that the memorandum of the agreement shall within itself show who is the seller and who is the buyer, what the price is and when it is to be paid, together with a description of the land so that it may be identified * * *." O'Donnell v. Lutter, 68 Cal.App.2d 376, 381, 156 P.2d 958, 960. There was no uncertainty as to any of these essential elements.

Talmadge v. Arrowhead Reservoir Co., 101 Cal. 367, 35 P. 1000, relied on by appellant, turned simply on the fact that the negotiators were never ad idem as to price. That case did not deal with an ambiguous contract, but with an inchoate instrument. Caldwell v. Western Development Co., 54 Cal.App. 776, 782, 203 P. 158. The same may be said for Los Angeles Immigration & Land Co-op. Ass'n v. Phillips, 56 Cal. 539 and Breckinridge v. Crocker, 78 Cal. 529, 21 P. 179, both cited in the Arrowhead case. In none of the three cases did a contract come into existence.

There is no merit in this point.

[13, 14] In dealing with the subject of the materiality of the provision for the security of the lease appellant points out in his brief that "respondent cites no case in which it has been held that such security is not a matter of material importance." It is not respondent's burden to establish a negative. Appellant was the actor in the trial court and, as appears earlier, his "right to recover is governed by principles of equity, although the action is one at law." Philpott case, supra [1 Cal.2d 512, 36 P.2d 640]. It was appellant's burden to prove such type of mistake as is cognizable in a court of equity, not merely a mistake affecting "some 'collateral' though material matter, constituting merely a matter of inducement." 6 Cal.Jur. p. 79. It was incumbent on appellant to convince both the trial court, and this court that his case is not within the rule stated in 6 Cal. Jur. p. 79, which seems to be the rule elsewhere, on the subject. He has cited no authorities whatever on the point. In this connection the court in Grymes v. Sanders et al., supra, said: "A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied, that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved [citations]".

[15] Appellant did not sustain his burden in this respect.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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33 Cal.2d 876

Ex parte PEDRINI.

Cr. 4963.

Supreme Court of California, in Bank.

May 20, 1949.

1. Criminal law ⚷996(2)

Trial court cannot make an order prescribing how its sentence should run with reference to a previously existing sentence after expiration of 60-day period specified in statute. Pen.Code, § 669, as amended, St.1935, p. 1670.

2. Criminal law ⚷996(2)

Trial court cannot, after commencement of imprisonment of defendant, modify or add an order as to whether more than one sentence imposed by it on same occasion shall be served consecutively or concurrently.

3. Criminal law ⚿996(2)

Where petitioner was convicted in 1935 of first-degree murder, first-degree robbery and first-degree burglary, and court ordered that the three sentences should run consecutively, trial court had no power 16 days later, on discovery that petitioner had been convicted in 1928 of second-degree robbery and had been released on parole, to modify the manner in which 1935 sentences should run in relation to one another. Pen.Code, § 644, § 669, as amended, St.1935, p. 1670.

4. Criminal law ⚿995(6)

Order that sentence on murder count run consecutively with sentences for robbery and burglary, that sentence on robbery count run consecutively with sentences for murder and burglary, and that sentence on burglary count run consecutively with murder and robbery, failed to specify order in which the sentences should run, but such failure did not make it impossible to carry out apparent intent and direction that sentences should run consecutively in relation to each other.

5. Criminal law ⚿995(4)

Sentences should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them.

6. Criminal law ⚿1216(3)

Where court ordered that sentence on murder count run consecutively with sentences for robbery and burglary, that sentence on first degree robbery count run consecutively with sentences for murder and burglary, and that sentence on burglary count run consecutively with sentences for murder and robbery, and 16 days later, court, after learning that petitioner had been convicted of second-degree robbery in 1928, and had been released on parole, ordered that sentences for murder, robbery and burglary should commence to run from date of expiration of sentence for robbery of second degree, order of sentences was sentence for robbery of second degree, sentence for murder, sentence for robbery of first degree, and sentence for burglary.

7. Criminal law ⚿1207

Amendment of statute in 1941 providing for merger of lesser terms in a term expressly prescribed to be life imprisonment did not apply retrospectively to order that sentences imposed in 1935 and in 1936 should be consecutive. Pen.Code, §§ 3, 669.

8. Criminal law ⚿991(1)

A trial court can order that a subsequently pronounced sentence of imprisonment shall run consecutively to an indeterminate sentence with no maximum prescribed by statute.

9. Criminal law ⚿991(1)

In absence of a statute to the contrary, a sentence which in technical sense is expressly for life, but which does not necessarily mean actual imprisonment for life, can run consecutively to lesser sentences.

10. Criminal law ⚿991(1)

A 1928 sentence for robbery in second degree and sentences for first-degree robbery and first-degree burglary in 1935 were not merged in life sentence in 1935 for first-degree murder, and could run consecutively. Pen.Code, §§ 190, 213, 461, 644, 3046; § 669, as amended, St.1935, p. 1670.

CARTER, J., dissenting in part.

◆

Proceeding in the matter of the application of Frank Pedrini for a writ of habeas corpus to secure his release from the Folsom State Prison.

Writ discharged and petitioner remanded to custody.

Albert L. Wagner, Sacramento, under appointment by the Supreme Court, for petitioner.

Fred N. Howser, Attorney General, and Doris H. Maier, Deputy Attorney General, for respondent.

SCHAUER, Justice.

Petitioner, an inmate of Folsom State Prison, is confined under sentences upon conviction of four crimes. One of these sentences is for life imprisonment; three are indeterminate sentences with no maximum specified by statute. By this application for habeas corpus petitioner questions the validity and effect of certain orders of the trial court purporting to determine whether the sentences, as severally related to each other, are to run concurrently or consecutively. It is petitioner's principal contention that a sentence of imprisonment for life cannot run consecutively to indeterminate sentences or sentences for years because the lesser sentences merge in the life sentence.[1] For the reasons hereinafter stated, we have concluded that this contention is without merit.

In 1928 petitioner was convicted of robbery of the second degree and sentenced to state prison for the term prescribed by law. In 1935 he was released on parole. During the same year he was charged with and pleaded guilty to murder, robbery and burglary. The trial court determined that each of these three offenses was of the first degree. On December 28, 1935, the court rendered its judgments in the three cases; it fixed the punishment on the murder count at life imprisonment and ordered that the sentence on the murder count "run consecutively with[2] the sentences for robbery and burglary," that the sentence on the robbery count "run consecutively with[2] the sentences for murder and burglary" and that the sentence on the burglary count "run consecutively with[2] the sentences for murder and robbery." On January 13, 1936, the trial court made the following order *in each of the three 1935 cases:* "It being brought to the attention of the court that at the time of the pronouncing of judgment in this action on the 28th day of December, 1935, there was a prior existing sentence and judgment against said defendant of which the Court had no knowledge * * * and the Court, at the time judgment was pronounced herein on the 28th day of December, 1935, did not determine, as is required by Section 669 of the Penal Code[3] * * * the manner in which judgment herein should run in relation to the prior existing judgment * * * It Is Hereby Ordered * * * that the sentence imposed * * * in this action * * * shall commence to run from the date of the expiration of the former existing sentence."

It is impossible that each of the three 1935 sentences should run "consecutively with" (i.e., in relation to) the other two, as directed by the December 28, 1935, judgments, and that at the same time each of the 1935 sentences should "commence to run from the date of the expiration" of the 1928 sentence, as directed by the orders of January 13, 1936. If *each* of such sentences is to "commence to run" on the same date then those sentences must run concurrently. Therefore, it must be determined whether the January 13, 1936, orders, insofar as they necessarily purport to provide, in effect, that the 1935 sentences run concurrently with each other, actually supercede those portions of the 1935 judgments which provide that those three sentences shall run consecutively *in relation to each other,* or whether they affect the sentences of 1935 *only in their relation to the unexpired 1928 sentence.*

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[1] As is hereinafter explained, this is now the statutory rule (Pen.Code, § 669) but at the time the orders as to petitioner's sentences were made no statute expressly provided whether a life sentence could or could not be made consecutive to other, lesser sentences of imprisonment.

[2] This use of the preposition "with," instead of the preposition "to," although unusual, apparently is intended to mean "in relation to."

[3] The applicable portion of section 669 then provided, "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be. In the event that the court at the time of pronouncing the second or other judgment * * had no knowledge of a prior existing judgment * * *, then, upon such prior judgment * * * being brought to the attention of the court at any time prior to the expiration of sixty days from and after the actual commencement of imprisonment upon the said second or other subsequent judgment, the court shall determine how the term of imprisonment upon said second or other subsequent judgment shall run with reference to the prior incompleted term or terms of imprisonment." (Stats.1935, p. 1670.)

[1-3] In People v. McAllister (1940), 15 Cal.2d 519, 102 P.2d 1072, the court reviewed earlier California cases which considered the question whether a trial court could modify its previously pronounced sentence and concluded (page 526 of 15 Cal.2d, page 1075 of 102 P.2d), "we think the following rule has been established: If the sentence has been entered in the minutes of the court, or if the defendant has begun serving said sentence or has been restrained by the sentence imposed, then the court is without jurisdiction to vacate, add to, or in any manner modify the sentence originally pronounced. On the other hand, if the sentence pronounced has not been entered by the clerk in his minutes, and no legal restraint has been imposed upon the defendant by reason of said sentence, then it is proper for the court to change the sentence originally pronounced." To this rule there are two statutory exceptions which permit the trial court in certain circumstances and within specified time limitations to modify provisions of its judgments which affect the length of time of imprisonment: (1) "[I]n exceptional cases, at any time not later than 60 days after the actual commencement of imprisonment, the court may, in its discretion, provide that the defendant is not an habitual criminal" (Pen.Code, § 644); and (2) (as appears from footnote 3, above, quoting the statute as it read in 1936 on the date of the subject orders) "In the event that the court at the time of pronouncing the second or other judgment * * * had no knowledge of a prior existing judgment * * * then, upon such prior judgment * * * being brought to the attention of the court at any time prior to the expiration of sixty days from and after the actual commencement of imprisonment upon the said second or other subsequent judgment, the court shall determine how the term of imprisonment upon said second or other subsequent judgment shall run *with reference to the prior incompleted term* * * *." (Pen.Code, § 669). (Italics added.) It will be noted that the last quoted statute does not purport to authorize the court to amend its "second or other subsequent" judgments inter sese, and as the first noted exception obviously does not apply to petitioner, it appears that the purported amendments to the 1935 judgments, as affecting their relationship to each other, lack express statutory authority. Attempts to modify judgments except as authorized by the above quoted statutes have generally not been permitted. Thus, it has been held that the trial court, after expiration of the 60 day period provided in section 644, cannot modify its judgment by determining that defendant is or is not an habitual criminal (People v. Jones (1936), 6 Cal.2d 554, 555, 59 P.2d 89; In re Fontino (1933), 135 Cal.App. 466, 468, 27 P.2d 413; In re Schenk (1943), 61 Cal.App.2d 168, 174, 142 P.2d 343; People v. Avelino (1947), 81 Cal.App.2d 934, 935, 185 P.2d 361); nor can the trial court, after expiration of the 60 day period specified in section 669, make an order prescribing how its sentence should run with reference to a previously existing sentence (In re Radovich (1943), 61 Cal.App.2d 177, 180, 142 P.2d 325); nor can the trial court after commencement of defendant's imprisonment, modify or add an order as to whether more than one sentence imposed by it on the same occasion shall be served consecutively or concurrently (Albori v. Sykes (1937), 18 Cal.App.2d 619, 621, 65 P.2d 84). This petitioner, at the time (January 13, 1936) the trial court ordered that each of the three 1935 sentences should begin to run at the expiration of the 1928 sentence, was under restraint because of the 1935 sentences. Therefore, under the rule of the McAllister case, supra (page 526 of 15 Cal.2d, page 1075 of 102 P.2d), and lacking statutory authority, the trial court had no power to modify the manner in which the 1935 sentences had been ordered to run in relation to one another.

[4, 5] As among themselves, the order in which the three 1935 sentences run can-

not be said to be prescribed by the directions in each of the 1935 judgments that each 1935 sentence run "consecutively with" the other two 1935 sentences. However, the failure of the trial court to specify the *order* in which the sentences run does not, in the circumstances, make it impossible to carry out the apparent intent and direction that the sentences shall run consecutively in relation to each other. The following language in United States v. Daugherty (1926), 269 U.S. 360, 363, 46 S.Ct. 156, 157, 70 L.Ed. 309, is applicable: "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded. Tested by this standard, the judgment[s] here [were] sufficient to impose * * * three * * * terms, * * * to be served consecutively, and to follow each other in the same sequence as the [order in which the judgments were entered]." (See also, Rice v. United States, 9 Cir. (1925), 7 F.2d 319, 321; Gillenwaters v. Biddle, 8 Cir. (1927), 18 F.2d 206, 207; Collins v. United States, 8 Cir. (1927), 20 F.2d 574, 577; Boyd v. Archer, 9 Cir. (1930), 42 F.2d 43, 44, 70 A.L.R. 1507; Subas v. Hudspeth, 10 Cir. (1941), 122 F.2d 85, 87; People v. Forbes (1863), 22 Cal. 135, 138; Ex parte Kirby (1888), 76 Cal. 514, 520, 18 P. 655; People v. McCracken (1945), 68 Cal.App.2d 574, 576, 157 P.2d 21.)

[6] According to the 1935 judgments and the operative portion of the orders of January 13, 1936, therefore, petitioner's sentences run as follows: The 1928 sentence for robbery of the second degree, followed by the 1935 sentence for murder of the first degree, followed by the 1935 sentence for robbery of the first degree, followed by the 1935 sentence for burglary of the first degree.[4] The punishments for these offenses were, at the respective times of their commission, and now are, as follows: Robbery of the second degree is punishable by an indeterminate sentence, regarded for some purposes as a life sentence until the Adult Authority fixes the term. (In re Quinn (1945), 25 Cal.2d 799, 800, 154 P.2d 875; Pen.Code, § 213, par. 2.) Murder of the first degree is punishable by death or "confinement in the state prison for life" (Pen.Code, § 190) and on the life term the prisoner is subject to parole after serving seven calendar years (Pen.Code, § 3046 [Stats.1941, ch. 106, § 15]). Robbery of the first degree and burglary of the first degree are punishable by indeterminate sentences, regarded for some purposes as life sentences until and unless the Adult Authority has fixed the term at a period of years. (In re Quinn (1945), supra; Pen.Code, § 213, par. 1; Pen.Code, § 461, par. 1.) Petitioner's principal contention is, as stated above, that the life sentence cannot run consecutively to the indeterminate sentence for second degree robbery (which was fixed by the Adult Authority at ten years), nor can the 1935 indeterminate sentences run consecutively to the life sentence, because all lesser sentences merge in the life sentence.

[7] In 1935 and 1936, when the questioned orders were made, no statute prohibited the court from making them. In 1941 section 669 of the Penal Code (quoted supra, footnote 3, as it read in 1935 and 1936) was amended (Stats.1941, ch. 742, § 1) to add the proviso that "if the punishment for any of said crimes is expressly prescribed to be life imprisonment, then the terms of imprisonment on the other convictions, whether prior or subsequent, shall be merged and run concurrently with such life term." (The section was again amended in 1943 [Stats.1943, ch. 219, § 1] in respects not here material.) No part of the Penal Code "is retroactive, unless expressly so declared" (Pen.Code, § 3), and there is no declaration that the 1941 amendment of section 669 was intended to be retroactive. Therefore such amendment, providing for merger of lesser terms in a term expressly

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[4] It may be noted that all the sentences imposed upon petitioner are regarded as comprising a single, continuous term of confinement for the purposes, among others, of allowing and forfeiting good-time credits. (In re Cowen (1946), 27 Cal.2d 637, 644, 166 P.2d 279.) This fact does not affect the determination of any question here presented.

prescribed to be life imprisonment, does not apply retrospectively to the orders that the sentences of petitioner are consecutive. (See People v. Ferlin, 1928, 203 Cal. 587, 602-603, 265 P. 230; In re Fisher (1934), 1 Cal.App.2d 449, 36 P.2d 841; People v. Cowen (1937), 20 Cal.App.2d 674, 675, 677, 67 P.2d 737.)

In determining whether, in the absence of a controlling statute, a life sentence can run consecutively to lesser sentences, the following matters are pertinent:

[8] It is settled that a trial court can order that a subsequently pronounced sentence of imprisonment shall run consecutively to an indeterminate sentence with no maximum prescribed by statute. (In re Quinn (1945), supra, 25 Cal.2d 799, 804, 154 P.2d 875; People v. Hayes (1935), 9 Cal. App.2d 157, 160, 49 P.2d 288; People v. Glab (1936), 15 Cal.App.2d 120, 125, 59 P. 2d 195; People v. Cowen (1937), supra, 20 Cal.App.2d 674, 676, 67 P.2d 737.) The practical considerations supporting the view that such sentences can be consecutive, as expressed by Judge Fricke in the Hayes case and approved by this court in the Quinn case, are as follows (page 160 of 9 Cal.App.2d, page 290 of 49 P.2d; page 805 of 25 Cal.2d, page 878 of 154 P.2d): "[E]ven where a defendant is already under a life sentence or even a sentence of death, this does not afford him immunity from prosecution and conviction of other offenses; nor does it preclude the court from passing judgment and sentence upon a subsequent conviction. The fact that a prisoner who serves a life term, and, while serving such, dies in prison cannot serve other sentences imposed for other offenses and running consecutively does not prevent, as a matter of law, the imposing of such consecutive sentences even though, as stated in Re Woofter, 134 Cal.App. 580, 583, 25 P.2d 859, the additional penalty cannot be imposed, i.e., actually inflicted, upon such life termer. It might also be mentioned that even where a prisoner is serving a life sentence this does not of necessity mean that he will remain in prison until he dies. Parole, commutation, or pardon may release him from prison long before his term of life ends."

[9, 10] The practical considerations expressed in People v. Hayes, supra, impel to the conclusion that, in the absence of a statute to the contrary, a sentence which in a technical sense is expressly for life—but which does not necessarily mean actual imprisonment for life—can run consecutively to lesser sentences. We recognize that in People v. McNabb (1935), 3 Cal.2d 441, 457, 45 P.2d 334, and in People v. Jones (1936), supra, 6 Cal.2d 554, 557, 59 P.2d 89, are statements to the effect that a "life sentence" cannot be made consecutive to other sentences "because a prisoner cannot in fact serve a term longer than his natural life." These statements—whether they be regarded as referring to life sentences *with*, or to life sentences *without*, possibility of parole—were unnecessary to the decision of those cases and are, therefore, not controlling here. The effect of the view so suggested in the McNabb and Jones cases, which view petitioner urges us to declare as law of the state, retroactively applicable to his sentences, would be (and the effect of section 669 since its 1941 amendment is) that once a defendant is sentenced to life imprisonment he is immune from punishment for a further crime unless that crime is one for which sentence of death is imposed. To illustrate: A defendant sentenced to life imprisonment for murder of the first degree and paroled after the expiration of seven years may commit as many robberies, burglaries, and rapes as he has opportunity to commit; his parole, granted by the Adult Authority as an act of grace, can be revoked by that agency, but nothing can be done by the courts by way of punishing him for his depredations committed while he was on parole because sentences therefor merge in the previous life sentence. Such a result, in our opinion, should be permitted to occur only where the law as enacted is so clear and specific in its terms as to admit of no other interpretation. We find nothing in the 1941 amendment which requires us to give it retroactive application to the end urged by petitioner.

For the reasons above stated the writ is discharged and petitioner is remanded to custody.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice (concurring and dissenting).

I concur in the judgment discharging the writ and remanding the prisoner to custody.

I feel, however, that the 1941 amendment to section 669 of the Penal Code, which provides that "if the punishment for any of said crimes is expressly prescribed to be life imprisonment, then the terms of imprisonment on the other convictions, whether prior or subsequent, shall be merged and run concurrently with such life term", is not only wise, but is a provision containing good, common sense, and that said section should be interpreted as having this meaning even before the 1941 amendment.

Even the most hardened criminal has but one life. As this Court said in People v. McNabb, 3 Cal.2d 441, 45 P.2d 334, 341: "The lawmakers had no thought of attempting to impose additional time to the longest possible span of time or of supplementing the infinite with the finite. The whole is greater than any of its parts. The proposition contended for reduces itself to an absurdity. The lawmakers had no thought of a life sentence when the section was adopted. It was dealing with consecutive terms of imprisonment for a term of years." People v. Jones, 6 Cal.2d 554, 59 P.2d 89.

The argument set forth in the majority opinion by way of illustration as to the possible effect of the amendment is not well put—it defeats its proponents. To say that one sentenced to a life term and who is later paroled may commit as many crimes as he chooses with impunity so far as the law is concerned is absurd. A parolee may still be under the supervision of the proper authorities and may be considered as still serving his sentence and yet be free of the bars and walls behind which he was confined. If he does not lead the life of a useful, law-abiding citizen while on parole, but breaks other laws, and commits other crimes, and is convicted of them, his parole is revoked and he is once again imprisoned. Penal Code, sections 3040 to 3065 inclusive. A prisoner serving a life sentence is not entitled to credits for good behavior, so his imprisonment cannot be shortened in that way. A life sentence means just that unless the prisoner is released through parole, commutation or pardon. In this connection it must be noted that the prisoner is not entitled to parole, commutation or pardon as a matter of *right.* All three are matters of "grace" and are discretionary. The Governor of this State *may* pardon a prisoner or commute his sentence to a lesser one, and the Adult Authority *may* grant him a parole. Both the Governor and the Adult Authority represent the people of this State, and it must be assumed that as representatives of the people, that the duty of protecting the public will be discharged. A prisoner whose record shows that he was convicted of other crimes while "out on parole" would, most probably, be considered an unlikely subject for either parole, commutation, or pardon.

It appears to me quite unreasonable to say that the courts can do "nothing by way of punishing" a parolee for depredations he had committed while at large. If such a prisoner is convicted of the lesser crimes, and his parole is revoked, and he is once again remanded to prison to serve his life term out, it would seem that he is sufficiently punished, and that adding a term of years to extend beyond his death is a sentence which the Courts of this State, while they may impose it, have no jurisdiction to enforce. The law should not countenance such a useless procedure.

34 Cal.2d 20

NATIONAL AUTOMOBILE & CASUALTY INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 20925.

Supreme Court of California.
June 3, 1949.

1. Workmen's compensation ⚷1070

Where evidence showed that insurance agent was advised that insured desired a policy of workmen's compensation insurance covering insured's employees who were relatives and agent agreed to obtain such a policy, but that policy as written excluded relatives, evidence disclosed a proper case for reformation of policy to include relatives whether failure to include them was due to agent's negligence, fraud, or mistake, or mistake of insurer, or mutual mistake of employer and agent or insurer. Labor Code, § 5301.

2. Workmen's compensation ⚷1939

The sufficiency of evidence to establish a given fact, where law requires proof of fact to be clear and convincing, is primarily a question for Industrial Accident Commission, and, if there is substantial evidence to support its conclusion, determination is not open to review on appeal. Labor Code, §§ 5301, 5800.

3. Workmen's compensation ⚷1070

Where employer only employed relatives and so advised agent who solicited compensation policy, fact that policy contained clauses excluding relatives from coverage, providing that policy conditions or provisions could be waived or altered only by certain named officers, and reciting that no notice or knowledge of agent could effect a waiver or change in policy, did not preclude a reformation of policy.

4. Workmen's compensation ⚷1070

The mere failure of insured employer to read a compensation policy does not militate against its reformation upon ground of mutual mistake.

5. Insurance ⚷90

Limitations on power of an agent contained in a compensation policy are binding as to subsequent acts of agent, but as to transactions prior to delivery of policy and before employer had any notice of limitations in policy, employer has a right to suppose that agent is authorized to do all acts connected with business entrusted to him.

6. Workmen's compensation ⚷1820

Where panel of Industrial Accident Commission reviewed entire record and there was adequate reason on face of record to disbelieve testimony of compensation insurer's agent and credit contrary evidence, commission was not guilty of arbitrary action in coming to a conclusion on the facts contrary to that of the referees. Labor Code, §§ 5301, 5313, 5315, 5800.

7. Workmen's compensation ⚷1820

Industrial Accident Commission may make a factual determination contrary to that of a referee, although testimony is conflicting and commission did not itself hear testimony or observe witnesses but did examine evidence and record. Labor Code, §§ 5301, 5310, 5313, 5315, 5800.

◆

Original proceeding on the petition of National Automobile & Casualty Insurance Company to have annulled an award of the Industrial Accident Commission of a death benefit to Jean Guest and to Fredwinna Guest, a minor, by her guardian ad litem and trustee, Jean Guest, by reason of the death of Fred Guest, employee, after reforming and fixing liability, as reformed, a workmen's compensation insurance policy issued by petitioner to Michael Lebedeff, doing business as Valley Taxi, employer.

Award affirmed.

Henry G. Sanford, San Francisco, for petitioner.

T. Groezinger and Robert Ball, San Francisco, for respondents.

CARTER, Justice.

Petitioner, insurance company, seeks to have annulled an award of respondent Commission reforming and fixing liability as reformed, a workmen's compensation insurance policy issued by it to Michael Lebedeff, an employer.

A. W. Schmidt and Lebedeff, in May, 1946, operated on a "50-50" basis, but in Schmidt's name, a taxicab business, under the name Valley Taxi. Schmidt retired from the venture and Lebedeff became the sole owner.

Schmidt had previously obtained a workmen's compensation insurance policy from petitioner which excluded employees who were relatives. In July, 1946, after the purchase of the business by Lebedeff, Ernest W. Schween, an agent for petitioner, approached Lebedeff on the subject of selling him a policy of workmen's compensation insurance for the latter's employees. Lebedeff advised Schween that his only employees were relatives, two brothers-in-law, one named Fred Guest, and a sister-in-law. Schween having stated that he would take care of the coverage, Lebedeff told him to write such a policy. About a week later, Lebedeff received a policy of workmen's compensation insurance dated July 21, 1946, issued by the petitioner. It contained a clause excluding injuries to relatives. Lebedeff did not read the policy. He sent Schween a check for the premium. On August 24, 1946, Guest sustained an injury in the course of his employment by Lebedeff which resulted in his death the same day. A claim by Guest's dependents for death benefits under the workmen's compensation laws followed and was resisted by petitioner on the ground that the insurance policy expressly excluded relatives, including Guest.

A panel of the commission found that Lebedeff had advised Schween, petitioner's agent, that coverage of relatives was desired and that the policy should be reformed to embrace relatives.

Petitioner contends that the evidence is not sufficient to support the finding and that the panel of the commission had no authority to find contrary to the finding of the referee.

It is conceded that Schween was the agent of petitioner. It appears that the taxi business had been in Schmidt's name prior to the first part of May, 1946, but under an arrangement with Lebedeff whereby the latter engaged in the business with Schmidt on a "50-50" basis. Schmidt carried an insurance policy that had been arranged by Schween. Then Lebedeff purchased the business from Schmidt, but never saw any insurance policies in connection with it. Apparently the policy Schmidt had obtained expired about July 21, 1946. Schween, having heard of the change in ownership of the business and knowing of the expiration of the Schmidt policy, contacted Lebedeff at his place of business for the purpose of selling him a workmen's compensation policy covering his employees. There is a variance in the testimony as to the date when Schween made his solicitation, but it was sometime between July 22 and 27, 1946. All witnesses are agreed that a conversation was had between Schween and Lebedeff while the latter was sitting in one of his taxis and that Schween solicited Lebedeff to buy the insurance. Schween admits there were several men other than he and Lebedeff present at the time. It is undisputed that the only employees Lebedeff had at the time were his relatives. The divergence in the testimony comes with respect to whether Lebedeff told Schween that his employees were relatives. Lebedeff testified positively that when Schween asked him to take a policy, he said that he had only relatives working for him, to which Schween replied that that was all right and that he would take care of it. Lebedeff's version of the conversation was corroborated in substantially all particulars by the men who were present at the conversation. While one of them was an employee of Lebedeff, the others were not. Moreover, it is unlikely that Lebedeff would agree to take a policy which excluded relatives when his only employees were in that category.

Schween testified that nothing was said to him about Lebedeff's employees being relatives, but he was evasive and usually phrased it in the words "I do not remember" that such a thing was said. In addition to that, he wrote a letter to the insurer, petitioner, three days after Guest met his death (August 27, 1946) in which he stated: "At the time that the policy was ordered by Mr. Lebedeff, we had a conversation in which he advised that he was hiring some relatives. These relatives are in-laws of Mrs. Lebedeff, and as such I failed to report them to you, which according to the policy should have been done since they should have been specifically named." Later (Sep.

tember 23, 1946) he wrote to petitioner: "It did not occur to me to inquire of Mr. Lebedeff as to whether or not he had relatives in his employ at the time of his ordering the policy or up to the time Mr. Guest was injured. He has stoutly maintained since the accident that he advised me on a certain occasion that he had his brother-in-law employed as a taxi driver. *I do not remember same* but I do remember the occasion referred to. *It could have happened,* but I don't usually forget business matters, as important as that." [Emphasis added]. Petitioner's investigator who made an examination of the circumstances of the injury to Guest, testified that Lebedeff told him that he had not informed Schween that relatives were employed when the policy was ordered. Lebedeff denied it. It also appears that in the course of the investigation in September, 1946, an endorsement to the policy which specifically included a named relative was ordered by Schween and affixed to the policy.

[1] As we understand petitioner's contention, it argues that the evidence is insufficient and that even when viewed most favorable to Lebedeff it does not make out a case of mutual mistake or mistake by one party known by the other which would justify reformation. The evidence shows that an agent (Schween) of the insurer (petitioner) was advised that the insured (Lebedeff) desired a policy of workmen's compensation insurance covering the insured's employees and the agent agreed that such a policy would be obtained. In spite of such an arrangement the policy as written excluded relatives. The insurer had the knowledge of its agents concerning the coverage of the policy that was to be supplied. Whether the failure to include relatives was due to the agent's negligence, fraud or mistake, or the mistake of the insurer, or mutual mistake of Lebedeff and the agent or the insurer, we have a proper case for the reformation of the policy to include relatives. The general rule has been stated: "Where an agent is authorized to act in the premises, and through his mistake or fraud the policy fails to express the real contract between the parties, or if, by inadvertence or mistake of the agent, provisions other than those intended are inserted, or stipulated provisions are omitted, there is no doubt as to the power of a court of equity to grant relief by a reformation of the contract; at least, in case there is no fraud or collusion between the agent and the insured. In other words, where a policy of insurance does not represent the intention of the parties solely because of some fault or negligence of an agent of the insurer, equity will reform it so as to make it express such intention. So, a policy will be reformed to express the actual contract made with the agent in obtaining the insurance, although such contract differs from the expressed terms of the policy, and notwithstanding it is provided that agents have no authority to make, alter, or discharge contracts." Cyc. of Ins. Law, Couch, sec. 1392. See also, Bankers Indemnity Ins. Co. v. Industrial Acc. Comm., 4 Cal.2d 89, 47 P.2d 719; Peterson v. Commonwealth, 212 Mo.App. 434, 249 S.W. 148; Rapides Club v. American Union Ins. Co. of New York, D. C., 35 F.2d 253; Stewart v. Commonwealth Casualty Co., 137 Kan. 919, 22 P.2d 435; Appleman on Insurance Law & Practice, § 7609.

[2] In connection with the claim of insufficiency of the evidence, it is argued that the evidence must be clear and convincing, a quality it does not here attain. However, "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732, 736. See also, Viner v. Untrecht, 26 Cal.2d 261, 158 P.2d 3; Home and Farm Co. v. Freitas, 153 Cal. 680, 96 P. 308; Hercules Gasoline Co. v. Security Ins. Co., 122 Cal.App. 499, 503, 10 P.2d 128. In the instant case, whether the evidence was clear and convincing, was for the determination of the commission.

[3] Further, in connection with the claim of the insufficiency of the evidence to establish a case for reformation, petitioner asserts that the policy was not subject to reformation because it contained clauses providing that relatives were excluded;

that no conditions or provisions of the policy may be waived or altered except by certain named officers of the insurer; and that no notice or knowledge of an agent of the insurer may effect a waiver or change in the policy.

[4] In regard to the clause excluding relatives, it is clear that if the policy bars reformation, then there never could be a reformation for the doctrine of reformation rests upon the proposition that by reason of mistake or fraud the contract as written contains or fails to contain matters which it was agreed and intended it should not or should contain. The only bearing such clause has in the instant case is whether the insured's failure to discover its presence after the delivery of the policy to him debars his recovery. He testified that he did not read the policy; it was a relatively short time after it was delivered to him that Guest was killed; he stated that he relied upon Schween to take care of his insurance; and it is clear there was no reason for him to suppose that the policy excluded relatives contrary to the agreement. The rule is settled in this state "that the mere failure to read an insurance policy does not militate against its reformation upon the ground of mutual mistake." Payne v. California Union Fire Ins. Co., 129 Cal.App. 582, 586, 19 P.2d 40, 42. See also, Golden Gate Motor T. Co. v. Great American Indemnity Co., 6 Cal.2d 439, 58 P.2d 374; Hercules Gasoline Co. v. Security Ins. Co., 122 Cal.App. 499, 10 P.2d 128; California Packing Co. v. Larsen, 187 Cal. 610, 614, 203 P. 102; Los Angeles R. R. Co. v. New Liverpool Co., 150 Cal. 21, 87 P. 1029; Travelli v. Bowman, 150 Cal. 587, 89 P. 347; Sullivan v. Moorhead, 99 Cal. 157, 33 P. 796; S. E. Slade Lbr. Co. v. National Surety Co., 128 Cal.App. 419, 17 P.2d 775; Cantlay v. Olds & Stoller Inter-Exch., 199 Cal. App. 605, 7 P.2d 395; 22 Cal.Jur. 726.

[5] Turning to the clause purporting to limit the power of agents and confining the power to write or modify policies to certain named officers of the company, it is equally clear that such clause does not bar reformation. In addition to the above discussion on the relative exclusion clause, it is pertinent to note that Schween was the petitioner's agent. Lebedeff had no reason to suppose that his authority was limited as stated in the policy, at least prior to the delivery of the policy to him, and as seen, his failure to read the policy was not necessarily negligence barring reformation. Thus it is soundly reasoned, after stating that limitations on the power of an agent contained in a policy are binding as to subsequent acts of the agent: "But as to transactions that have taken place prior to the delivery of the policy, an entirely different rule applies. While engaged in these transactions with the agent the third party has as yet received no notice of limitations in the policy, and has a right to suppose that the agent is authorized to do all acts connected with the business intrusted to him. Therefore these restricting provisions in the policy will not affect the rights of the insured as to any act done before the delivery of the policy. Thus it is held, with little dissent, that a stipulation in the policy that the agent taking the application shall be deemed the agent of the insured will not prevent the insurer from being bound by any acts done by the agent in taking the application, or by any information communicated to the agent at that time." Vance on Insurance, p. 434. And it has been held that such limitations do not bar reformation of the policy in accordance with the prior agreement with the agent. Stewart v. Commonwealth Casualty Co., 137 Kan. 919, 22 P.2d 435; Rapides Club v. American Union Ins. Co. of New York, D.C., 35 F. 2d 253; see, Golden Gate Motor T. Co. v. Great American Indemnity Co., supra; Peterson v. Commonwealth Casualty Co., 212 Mo.App. 434, 249 S.W. 148.

It is urged that inasmuch as the referee, prior to rehearing, recommended a finding against reformation (believing Schween instead of Lebedeff and his witnesses), and the referee on the hearing after a rehearing was granted made the same recommendation, the commission was without authority to allow reformation for it did not have an opportunity to observe the demeanor of the witnesses as the referees did; further, that the referee's refusal to believe Lebedeff's evidence shows an insufficiency of the evidence. After the initial hearing at which Lebedeff and two of his witnesses, Schween and the insurer's investigator testified, the referee made his report and prepared findings in which he found against reformation, stating that he believed Schween rather than Lebedeff on the subject of whether the latter told the former he was employing relatives. In accordance therewith the commission made its award refusing reformation and absolving petitioner from liability. Guest's dependents and Lebedeff petitioned for a rehearing setting forth the heretofore quoted letter written by Schween on August 27, 1946, as newly discovered evidence and proposing to call a third witness to the conversation between Lebedeff and Schween. The referee who had conducted the original hearing recommended the granting of the petition. A rehearing was granted and a hearing held before a different referee. All the evidence theretofore given was considered and witnesses called. The August 27th letter was admitted in evidence. After that hearing, the last mentioned referee made his report recommending against reformation stating that the evidence showed that Lebedeff did not notify Schween that he employed relatives. A third referee then made his report reciting that the panel of the commission had reviewed "the entire record" and had decided the questions of law. The panel then made its award allowing reformation and recovery against petitioner. Petitioner's petition for a rehearing was denied by the panel and in a memorandum on such denial it stated:

"The testimony of Lebedeff that he had told Schween that he employed no one but relatives in the taxi business was corroborated by witnesses Harry Singleton, Mathew Gunn, and Sam Gunn, who swore that they were present and heard the conversation.

"Schween stated, variously, that Lebedeff had told him that he was hiring relatives; that Lebedeff had never told him he was employing relatives; and then, that he did not remember whether Lebedeff had or had not told him about the employment of relatives.

"A few days after the accident, Schween wrote a letter to the National Automobile Insurance Company (August 27, 1946), stating: 'At the time that the policy was ordered by Mr. Lebedeff, we had a conversation in which he advised that he was hiring some relatives.'

"In view of the facts as stated above, it is my opinion that the Insurance Company should be estopped from relying on the clause excluding relatives as a defense.

"In view of the conflicting statements made by Schween, it seems more reasonable to believe that Lebedeff told Schween that the only employees he had were relatives, which was corroborated by three other witnesses, than to believe Schween. He apparently was more interested in selling a policy than he was in whom it would protect.

"In addition to this, there is the factor that although Schween was an agent of the National Automobile Insurance Company he was purporting to tell Lebedeff what types of policies would be best for Lebedeff, and it was only natural for Lebedeff to rely on the belief that the policies which were delivered to him and on which he paid the premiums were covering the only employees he had in his business."

[6, 7] We believe the foregoing memorandum adequately analyzes the situation and shows, as has heretofore been discussed, that there was adequate reason on the face of the record to disbelieve Schween and credit the contrary evidence. Hence it cannot be said that in coming to a conclusion on the facts contrary to that of the referees, the commission acted arbitrarily or without support in the record. Aside from that, however, the commission may make a factual determination contrary to that of a referee although the testimony is conflicting and it did not itself hear the testimony or observe the witnesses, but did examine the evidence and record. That conclusion clearly follows from the following provisions of the Labor Code. The commission "is vested with full power, authority and jurisdiction to try and determine finally all the matters * * * subject only to the review by the courts as specified in this

division. Such jurisdiction may be exercised by the commission through either of its panels * * * or, subject to the approval by the panel of the order, decision, or award, through a commissioner or referee." Labor Code, sec. 5301. "After final hearing by the commission, it shall, within 30 days, make and file: (a) Its findings upon all facts involved in the controversy. (b) Its order, decision, or award stating its determination as to the rights of the parties. * * *" Labor Code, sec. 5800. The commission "may appoint one or more referees in any proceeding, as it may deem necessary or advisable, and may refer matters arising out of the same proceeding to different referees. The commission may appoint general referees. Any referee appointed by the commission has the powers, jurisdiction, and authority granted by law, by the order of appointment, and by the rules of the commission * * *." Labor Code, sec. 5310. "The referee shall report his findings in writing to the commission within fifteen days after the testimony is closed. The report shall be made in the form prescribed by the commission and shall include all matters required to be included in the order of reference or by the rules of the commission. The facts found and conclusions of law shall be separately stated." Labor Code, sec. 5313. "Upon the filing of the report of the referee, the commission may confirm, adopt, *modify, or set aside* the same or any part thereof and *may,* with or without further proceedings, and with or without notice, *enter its order, findings, decision, or award* based in whole or in part upon the report of the referee, *or upon the record in the case.*" [Emphasis added.] Labor Code, sec. 5315. Pursuant to those provisions, this court held in Pacific Indemnity Co. v. Industrial Acc. Comm. 28 Cal.2d 329, 170 P.2d 18, that it was proper for the commission to grant a rehearing although the hearing referee recommended against it, and to direct him to reach a different result when he still entertained different views on the sufficiency of the evidence. It was held in Darling v. Industrial Acc. Comm., 67 Cal.App.2d 300, 154 P.2d 421, that the commission had power to decide the facts on conflicting medical reports in the record contrary to the conclusion of the referee and that such did not constitute a denial of due process of law. See also, Evans v. Industrial Acc. Comm., 71 Cal. App.2d 244, 249, 162 P.2d 488. It appears that the commission may adopt the recommendation of the referee on a rehearing (who did not hear the evidence at the original hearing but did read it) reaching a different result than the hearing referee. Helmick v. Industrial Acc. Comm., 46 Cal.App. 2d 651, 116 P.2d 658. The evidence upon which the commission's award is based may be adduced before several referees at least where the commission reviews the evidence. O'Hare v. Industrial Acc. Comm., 44 Cal. App.2d 629, 112 P.2d 915. Implicit in the rule that it is not a denial of due process for the commission to base its award on a report of a referee although it does not review the record, is the corollary that if it reviews the evidence in the record it may validly make an award contrary to the referee's recommendation. It is said: "Under section 5315 of the Labor Code, if the commissioners follow the recommendations of the referee who heard the evidence or read the record, they need not themselves review the evidence; however, if they make a contrary determination they are required to make an independent examination of the record. Bethlehem Steel Co. v. Industrial Acc. Comm.,42 Cal.App.2d 192, 194, 108 P.2d 698; Taylor v. Industrial Acc. Comm., 38 Cal.App.2d 75, 82, 100 P.2d 511." Pacific Indemnity Co. v. Industrial Acc. Comm., 28 Cal.2d 329, 339, 170 P.2d 18, 24. See also, Lumbermen's Mutual Casualty Co. v. Industrial Acc. Comm., 29 Cal.2d 492, 175 P.2d 823; Hohreiter v. Garrison, 81 Cal. App.2d 384, 184 P.2d 323; 48 Col.L.Rev. 173, 181.

For the foregoing reasons the award is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

34 Cal.2d 11

JEPPI et al. v. BROCKMAN HOLDING CO., Inc., et al.

L. A. 20674.

Supreme Court of California, in Bank.
June 3, 1949.

1. Corporations 🔑432(12)

Evidence showed that corporation's board of directors authorized corporation's president to enter into and bind corporation by contract to sell realty constituting its sole remaining asset. Civ.Code, § 343.

2. Corporations 🔑298(7)

The fact that authorization of corporation's president to sell corporation's realty was given at directors' informal meeting, of which no minutes were kept, was immaterial. Civ.Code, § 343.

3. Corporations 🔑442

A corporation's sale of all its assets in ordinary course of business for which it was organized, without stockholders' consent, is not ultra vires; such consent being necessary only where sale is outside normal and regular course of corporation's business. Civ.Code, § 343.

4. Corporations 🔑442

A contract by corporation, organized for sole purpose of managing and disposing of property of a decedent's estate, to sell realty thereof, pursuant to stockholders' resolution that corporation's remaining assets be sold in order to liquidate it as soon as possible, was made in normal course of corporation's business, and hence not subject to statute prohibiting sale of all or substantially all of corporation's property and assets without approval by shareholders' vote or written consent. Civ.Code, § 343.

5. Frauds, statute of 🔑116(3)

A corporation's executive officer need not have written authority to enter into contract, required by law to be in writing, on corporation's behalf, as he is not merely an agent of corporation, but the representative thereof. Civ.Code, § 2309.

6. Courts 🔑92

A decision of District Court of Appeal that corporation's agent, though executive officer, may not bind corporation on lease of realty for longer than one year, without written authority from corporation, was dictum, where crucial point of decision was not extent of agent's authority, but whether corporation was in position to avail itself of statute of frauds to escape liability; there being grounds of estoppel present.

7. Appeal and error 🔑927(3)

On appeal from judgment of nonsuit, Supreme Court must consider evidence and reasonable inferences therefrom in light most favorable to plaintiff, and fact that other evidence in record would support equally reasonable inferences to contrary is immaterial.

8. Vendor and purchaser 🔑170, 343(1), 345

A corporation's repudiation of its president's contract to sell its realty and notice to purchasers of sale thereof to another by telegram to title company, as escrow holder of original purchasers' check for agreed purchase price, amounted to anticipatory breach of contract, giving original purchasers cause of action therefor and avoiding necessity of continuing to tender performance, so that their withdrawal of deposit and title company's marking of escrow instructions as canceled after receipt of telegram did not bar such action on ground of purchasers' cancellation of contract.

9. Corporations 🔑410

A corporation's president, authorized by board of directors to enter into escrow agreement for sale and conveyance of corporation's realty, had power to bind corporation by her execution of such agreement.

10. Corporations 🔑306

Though one is not liable personally on contract executed by him as officer of corporation, he may, if he acted without authority, be held to account on theory of breach of implied warranty of authority or, if he acted in bad faith, as principal. Civ.Code, §§ 2342, 2343.

SHENK, TRAYNOR and SCHAUER, JJ., dissenting.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Frank Jeppi and another against the Brockman Holding Company, Inc., and another to recover damages for defendants' refusal to convey certain realty to plaintiffs. From a judgment of nonsuit, plaintiffs appeal.

Reversed.

Prior opinion 191 P.2d 534.

Calvin H. Conron, Jr., Mack & Bianco and D. Bianco, Bakersfield, for appellants.

Stead & Boileau and Charles R. Stead, Pomona, for respondents.

EDMONDS, Justice.

Frank Jeppi and W. B. Camp, Sr., are suing for damages assertedly sustained by them because of the refusal of Brockman Holding Company, Inc. and Mary C. Spalding, its president, to convey certain real property. A decision of the appeal from the judgment which followed an order granting a nonsuit turns upon the authority of Mrs. Spalding to bind the corporation.

The evidence presented by the appellants, stated most favorably to them, may be summarized as follows: Brockman Holding Company, Inc. was organized in 1930 to manage and dispose of the estate of I. W. Brockman, deceased. The corporation's principal place of business was at Pomona, where most of the directors lived. Mrs. Spalding was a resident of Santa Cruz. It was the custom to hold only one directors' meeting each year; during the interim matters were handled informally by the directors.

At the annual meeting held on May 1, 1944, the following resolution was adopted: "Motion was made by Bert Harvey, seconded by Spalding, that the property of Brockman Holding Company be sold in order to close up the company as soon as possible." In May of the following year, at the conclusion of the stockholders' meeting, a majority of the directors, who controlled 29,000 shares of the 42,000 shares outstanding, held a meeting and, among other matters considered, informally discussed the sale of the land which is the subject of the present controversy.

This property, acreage in Kern County and a lot in Los Angeles County, constituted substantially all of the remaining assets of the corporation. The minutes of the board meeting make no reference to the informal discussion. However, according to the testimony it was agreed that Mrs. Spalding should go to Bakersfield and negotiate a sale of the property. The evidence includes a letter from L. W. Young, dated in December, 1944, offering $25,000 for the Kern County land. There was testimony as to a prior offer obtained by H. I. Tupman, who managed the corporation's property in Kern County, and Mrs. Spalding was instructed to contact him for the purpose of ascertaining whether the offer was still open.

Three weeks after this meeting, Mrs. Spalding, Tupman and Jeppi visited the property and Jeppi made an offer of $27,500 for it. Mrs. Spalding said: "It suits me all right, and I will get in touch with my people in Pomona by phone and let you know." Jeppi replied: "All right, if your directors decide to sell * * * I will meet you at the abstract office * *." The next day at the office of a title company, an escrow agreement was signed by Mrs. Spalding, as the president of the corporation, and Jeppi and he deposited his check for $27,500 in escrow. By the terms of this agreement, title was to be conveyed to Jeppi and W. B. Camp, Sr.

On the same day, the title company sent a letter to the corporation requesting that it forward deeds as called for by the escrow agreement concerning the sale of the land. A week later, the following telegram was received in reply: "Brockman Holding Company sale not approved by directors and better offer has been received. Directors meeting to consider all proposals will be held June 14th." Jeppi was advised that the corporation had received an offer of $30,000 for the property. Through his counsel, Jeppi gave notice that he intended to stand upon the agreement as stated in the escrow instructions but, to avoid a lawsuit, he would offer $30,100. On June 14th, Jeppi was notified that the property had been sold for $32,025, and the following day he withdrew his deposit from the title company.

At the conclusion of the appellants' presentation of this evidence, the court granted a motion for a nonsuit made on the grounds that there was no proof of a contract by Mrs. Spalding or by any authorized officer of the corporation. The appeal is from the judgment which followed that order.

Whether the ruling upon the motion was correct, primarily depends upon the narrow question as to the authority of Mrs. Spalding to execute the escrow instructions on behalf of the corporation. The appellants assert that the evidence shows such authority. She and the corporation take the position that (1) there was no evidence of any actual or implied authority to enter into a contract of sale; (2) as the escrow instructions included substantially all of the assets of the corporation, the approval of a majority of the stockholders was required; (3) the "equal dignity rule" requires that Mrs. Spalding's authority be in writing; (4) the record shows actual notice to Jeppi of her lack of authority; and (5) the appellants themselves canceled the alleged contract.

[1,2] From the evidence in regard to the informal nature of the corporation's conduct of business, the general declaration of policy made by the directors in 1944 to sell the remaining property, the informal discussion immediately prior to Mrs. Spalding's trip to Kern County, and her execution of the escrow agreement after a delay in the negotiations for the express purpose of getting approval from her "people", it reasonably may be inferred that the board of directors had authorized her to enter into the contract and to bind the corporation. It is not material that the authorization was given at an informal meeting of the directors of which no minutes were kept. Brainard v. De La Montanya, 18 Cal.2d 502, 511, 116 P.2d 66.

The corporation relies upon section 343 of the Civil Code, now sec. 3901, Corporations Code, which reads: "No corporation shall sell * * * all or substantially all of its property and assets * * * unless under authority of a resolution of its board of directors and with the approval of the principal terms of the transaction and the nature and amount of the consideration by vote or written consent of [the] shareholders * * *." The appellants take the position (1) that the question as to the applicability of this statute was not presented for the purposes of nonsuit by the pleadings or the evidence; (2) that the section is not applicable to a wasting assets corporation; and (3) that, in any event, the corporation is not a party who may assert the invalidity of a sale made contrary to the requirement.

[3] The testimony of the escrow agent who handled the transaction showed that the transaction concerned a sale of the sole remaining assets of the corporation. As to the second point, the California courts have not been called upon to determine the question of whether the statute in question applies to a wasting assets corporation, but authority from other jurisdictions places no restriction upon sales made in the ordinary course of business. "It is the rule at common law * * * that the directors of an ordinary business corporation have no power to dispose of all of its assets without the consent of all its stockholders. This rule has been modified * * by statute, so that the corporation may dispose of all its assets and wind up its business when authorized by a majority vote of the outstanding stock * * *. The reason for this limitation is that a corporation is organized for the purpose of doing business of some nature, and, if so, its shareholders have the right to insist that the corporation continue for the purpose for which it was organized. A sale, therefore, of all its property, or so much thereof as would prevent it from continuing in such business, would constitute a violation of the corporate contract. 7 R.C.L. 574. To this rule there are * * * exceptions. * * * If the conversion of all assets into cash * * * is in furtherance of the business for which the corporation was organized, the transaction is not ultra vires. For instance, if a corporation is organized for the purpose of buying, selling, and dealing in real estate, it would naturally have the power to sell all the real estate it owned at a particular time because that is the very object of its organization. The sale of its tangible assets under such circumstances furthers rather than hinders the carrying out of its con-

tract with its stockholders. * * *" Thayer v. Valley Bank, 35 Ariz. 238, 276 P. 526, 527.

The provisions of the statute should not be applied solely upon the basis of the quantity of the property; the test which determines the question of the necessity for consent of the stockholder is, "whether the sale is in the regular course of the business of the corporation and in furtherance of the express objects of its existence, or something outside of the normal and regular course of the business. * * Applying this test to the case at bar, we find the sale of the property in order to carry out the liquidation and distribution of the assets to the stockholders, was the explicit purpose, indeed the only purpose, for the organizatoin of the corporation and manifestly was a sale in the regular course of its business. That was the very object for which the corporation was formed and for which it existed." In re Miglietta, 287 N.Y. 246, 39 N.E.2d 224, 228.

[4] The undisputed evidence in the present case is that the Brockman Holding Company was organized for the sole purpose of managing and disposing of the property of a decedent's estate. Further, at the 1944 meeting of the stockholders a motion was made that the remaining assets should be sold "in order to close up the company as soon as possible". The contract of sale, therefore, was made in the normal course of business and cannot be held subject to the restrictive provisions of former section 343 of the Civil Code.

[5] Section 2309 of the Civil Code reads: "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." The language of the California decisions does not make entirely clear whether this statute, the so-called "equal dignity rule", is applicable to the acts of a corporation's executive officer. In Carrier v. Piggly Wiggly of San Francisco, 11 Cal.App.2d 180, 182, 53 P.2d 400, 401, the plaintiff was allowed to recover upon a contract, the court stating: "Corporations can act only through the agency of natural persons, and it has been held that the authority of an agent of a corporation need not be in writing, so far as the statute of frauds is concerned. McCartney v. Clover Valley Land & Stock Co. [8 Cir.] 232 F. 697, citing Boggs v. Lakeport Agricultural [Park] Ass'n., 111 Cal. 354, 43 P. 1106." Yet in Corporation of America v. Harris, 5 Cal.App.2d 452, 453, 43 P.2d 307, 310, after discussion of the cases, the court concluded: "The weight of authority, we believe, supports the view that the agent of a corporation, whether he be an executive officer or not, may not, merely because of his office, bind his principal upon a lease of real property for longer than a year, unless he has written authority from his principal so to do."

In discussing this conflict, the Court of Appeals of the Ninth Circuit said: "It should also be noted that McCartney v. Clover Valley Land & Stock Co., supra, cited and relied on in the Piggly Wiggly case, expressly limits the exception, there stated, to the executive officers of a corporation. And Boggs v. Lakeport Agricultural [Park] Ass'n, supra, cited in the McCartney case, is a case dealing with the authority of the 'president' of a corporation. It does not expressly appear from the facts stated in the Piggly Wiggly case what position in the defendant corporation was held by the agent there involved, but it is a fair assumption from the facts that he was an executive officer. In the case of an executive officer of a corporation an exception from the requirement of written authority finds at least plausible support in reason in that, as said in the McCartney case: 'The executive officer of a corporation is something more than an agent. He is the representative of the corporation itself.'" E. K. Wood Lumber Co. v. Moore Mill & Lumber Co., 97 F.2d 402, 408; see also, Note, 1 A.L.R. 1132; 17 Cal.L.Rev. 70. This reasoning squares with sound principles and the necessities of modern business.

[6] The language in Corporation of America v. Harris, supra, which does not recognize any exception to the rule, is, at most, dictum. The "crucial point" of the decision was not the extent of the agent's authority but, as the court stated

it, whether the defendant "under all the facts and circumstances of the transaction, is in a position to avail itself of the statute of frauds as an avenue of escape from liability", there being grounds of estoppel present. So limited, the opinion is not authority for the position taken by the respondents in the present litigation, and the decision, insofar as it concerns the application of the statute to the act of an executive officer of a corporation, is disapproved.

[7] Considering a further contention of the respondents, by stating testimony obtained from Mrs. Spalding under section 2055 of the Code of Civil Procedure and that of Jeppi, with inferences most favorable to the corporation, they endeavor to show knowledge by Jeppi of Mrs. Spalding's lack of authority. But upon appeal from a judgment of nonsuit, it is the duty of this court to consider the evidence and the inferences which reasonably may be drawn from it in the light most favorable to the plaintiff. That other evidence may be found in the record which would support equally reasonable inferences to the contrary is of no consequence.

[8] Finally, the respondents argue that the "appellants having themselves cancelled the contract cannot seek relief pursuant thereto". They rely in this connection on Jeppi's withdrawal of his deposit and the title company's action in marking the escrow instructions "cancelled". But all of this occurred a week after the respondent corporation, by its telegram to the title company, repudiated the contract and notified Jeppi of the sale of the property to Young. Such acts clearly amounted to an anticipatory breach of the contract, giving the appellants a cause of action and avoiding the necessity of continuing to tender performance of their obligation under the contract. Atkinson v. District Bond Co., 5 Cal.App.2d 738, 43 P.2d 867; 6 Cal.Jur. 460, sec. 274; 5 Williston on Contracts, 3700 sec. 1302.

[9, 10] The evidence of the appellants, with inferences which reasonably may be drawn therefrom, would amply support a finding that Mrs. Spalding was authorized to enter into the escrow agreement. Having that authority, she could of course bind the respondent corporation by her execution of the escrow agreement. Its motion for a nonsuit, therefore, should have been denied, and the same ruling made upon the motion by Mrs. Spalding. Although one is not liable personally on a contract executed by him as the officer of a corporation, he may, if he acted without authority, be held to account on a theory of breach of the implied warranty of authority, Civ.Code sec. 2342, or, if bad faith is found, as a principal, Civ.Code sec. 2343. The extent of Mrs. Spalding's liability, if any, depends upon the determination of questions of fact which cannot be made until the issue of her authority to act for the corporation is decided.

The judgment is reversed.

GIBSON, C. J., and CARTER and SPENCE, JJ., concur.

SHENK, Justice (dissenting).

The judgment is reversed principally on the ground that the agreement to sell was merely an agreement to sell property in the ordinary course of business by a corporation whose only function was to sell the assets of the Brockman estate. There is thus projected an exception to the rule established by sec. 3901 of the Corporations Code which requires that a transfer of all corporate assets be authorized by resolution of the board and by written consent of shareholders.

It is undisputed that the purported agreement was intended to convey substantially all of the assets of the corporation. The statute makes no fine distinction between transfers of all the assets in the ordinary course of business and other transfers of the entire assets. On its face the statute would apply without exception wherever all assets are transferred. This was not an ordinary sale. It was an attempted complete disposal of the corporate property and required to be properly authorized. The evidence on which the opinion relies as showing that this was not a wind-up sales proves the opposite. On May 1, 1944, a resolution was adopted that "the property of Brockman Holding Company be sold in order to close up the company as soon as possible." Just a year later plaintiff and defendant's president entered into an agreement whereby all of the property of the corporation was to be transferred to the plaintiff.

The aim of the statute is "to give some protection to the shareholders by affording them a chance to have a vote in making a transfer." (Ballantine and Sterling, California Corporation Laws, [1949] 398.) More pointedly, the purpose of the statute is to prevent directors or officers from selling the corporation out from underneath the shareholders if they object to the terms of sale. Here the directors owned 29,000 of the 42,000 shares. All of the directors did not authorize Mrs. Spalding to sell the remaining property of the corporation. Only a majority of the directors, who for all that appears constituted less than a majority in stock ownership, orally sanctioned the sale. I am unable to conclude that this was not a case where the statutory protection was appropriate.

I would affirm the judgment in accordance with the opinion of the District Court of Appeal of the Fourth District, 191 P.2d 534.

TRAYNOR and SCHAUER, JJ., concur.

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92 Cal.App.2d 267

In re LARSON'S ESTATE.

MERRICK v. LARSON.

Civ. 13990.

District Court of Appeal, First District,
Division 1, California.

June 8, 1949.

Hearing Denied Aug. 4, 1949.

1. Appeal and error 🔑544(2)

On a judgment roll appeal, since evidence is not before District Court of Appeal, court is confined to determination of questions as to whether complaint states a cause of action, whether findings are within issues, whether judgment is supported by findings and whether reversible error appears upon face of the record.

2. Appeal and error 🔑544(2)

Where notice of appeal and election to proceed by settled statement were timely filed but thereafter appellant abandoned effort to procure statement and filed clerk's transcript and so-called designation of documents to be transmitted, District Court of Appeal would not consider oral proceedings or depositions of witnesses, but would treat appeal as a judgment roll appeal and consider only those facts appearing in the findings. Rules on Appeal, rules 4(a, b), 5, 6, 7.

3. Appeal and error 🔑539

A stipulation concerning respondent's evidence filed by appellant on motion to augment the record, which was otherwise incomplete, would not be considered by District Court of Appeal as completing the record so as to permit consideration of oral proceedings in absence of supplementation of clerk's transcript by authorized methods. Rules on Appeal, rules 4(a, b), 5, 6, 7.

4. Attorney and client 🔑11

Layman's activities in soliciting decedent's heir living in foreign country for assignment of portion of interest in estate in consideration of layman's establishing title to share, authorizing him to employ attorneys at his cost and expense, all disbursements to be charged against his share, constituted unlawful "practice of law", so that assignment and agreement under which layman claimed compensation were void as contrary to public policy. Probate Code, § 1020.1.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Practice of Law".

5. Descent and distribution 🔑86

Where layman solicited decedent's heir living in foreign country for assignment of portion of interest in estate, and consideration for services to be rendered by layman was on the face grossly unreasonable, burden was upon layman to prove real value of services. Probate Code, § 1020.1.

6. Descent and distribution 🔑86

Where layman solicited decedent's heir living in foreign country for assignment of portion of interest in estate and agreement authorizing layman to employ attorneys to establish title to the interest, and layman to receive 30 per cent of heir's share and bear all costs and disbursements, consideration was grossly unreasonable, and probate court could properly refuse to make distribution pursuant to terms of agreement under evidence that heir was not in fact a missing heir. Probate Code, § 1020.1.

◆

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Proceeding in the matter of the estate of Frederick Olof Larson, deceased. From an order and judgment of final distribution to Georgia May Larson which disapproved an assignment made by distributee in favor of W. H. Merrick, W. H. Merrick appeals.

Judgment and order affirmed.

Robert E. Hatch, San Francisco, Raymond D. Williamson, Stanley M. Fernwood, San Francisco, for appellant.

Gavin McNab, Schmulowitz, Aikins, Wyman & Sommer, Nat Schmulowitz, Peter S. Sommer, Sidney F. DeGoff, San Francisco, for respondent.

PETERS, Presiding Justice.

This is an appeal from an order and judgment made under § 1020.1 of the Probate Code determining that an assignment by Georgia May Larson to appellant of a portion of her interest in the estate of Frederick O. Larson was null and void.

[1] At the threshold of this appeal we are met with a dispute over what constitutes the record on appeal. The appellant filed a timely notice of appeal. He could then have had prepared a total or partial reporter's transcript, or an agreed or settled statement, or he could have elected to proceed on the clerk's transcript alone. The latter type of appeal is usually referred to as a judgment roll appeal. On such an appeal since "the evidence is not before this court, we are confined to a determination of the questions as to whether the complaint states a cause of action; whether the findings are within the issues; whether the judgment is supported by the findings and whether reversible error appears upon the face of the record." Montaldo v. Hires Bottling Co., 59 Cal.App.2d 642, 646, 139 P.2d 666, 668.

[2] After filing the notice of appeal appellant, within the time permitted by the Rules on Appeal, filed an election to proceed by a settled statement in lieu of a reporter's transcript, and gave proper instructions to have prepared a clerk's transcript. He, thereafter, failed to comply with the provisions of Rule 7, and abandoned all efforts to secure a settled statement. A clerk's transcript was prepared and filed.

After the clerk's transcript had been filed, appellant, purporting to act under Rule 5, filed with the clerk of the trial court a so-called "designation" of documents to be transmitted to the appellate court. In this fashion appellant seeks to have considered on this appeal a portion of the oral proceedings, including depositions of witnesses, and seeks to have such depositions and other documents transmitted to this court in direct violation of Rule 5(e). It is the theory of the appellant that this court should now consider, as the record on appeal, the clerk's transcript proper, that is, the judgment roll, all documents, affidavits and exhibits on file in the office of the clerk of the trial court, and some of the oral proceedings, that is, certain depositions used on the trial, even though there has not been prepared, as required by the Rules, a total or partial reporter's transcript, or an agreed or settled statement. In his reply brief, and on the oral argument, appellant has referred to portions of this evidence and expects this court to wade through this mass of uncorrellated material and evaluate it without a total or partial reporter's transcript or without a settled or agreed statement. By this confused procedure appellant would have the clerk's transcript type of record imperfectly perform the functions which another, and authorized, type of record might have accomplished.

Such procedure cannot be permitted. An appellant may elect, if he desires a review of the oral proceedings, to secure a total reporter's transcript under Rule 4(a), or a partial reporter's transcript by stipulation or designation under Rule 4(b), or he may proceed under Rule 6 upon an agreed statement, or under Rule 7(a) by a settled statement. If he does not desire a review of any portion of the evidence, under Rule 5, he may proceed to appeal on a clerk's transcript. That is what was done by appellant here. On such an appeal no portion of the oral proceedings may be considered. This appeal must be treated as a judgment roll appeal, and only those facts appearing in the findings should or will be considered.

[3] Appellant has also filed a motion to augment the record by including a "Stipulation Concerning Respondent's Evidence," dated December 4, 1947. This stipulation could be relevant only if the clerk's transcript were supplemented by one of the authorized methods of presenting, in whole or in part, the oral proceedings. This was not done. The motion to "augment" cannot be used to create a record. Its function is to supplement an incomplete but existing record.

The facts as they appear in the findings are as follows:

January 18, 1945: Frederick O. Larson died intestate in, and as a resident of, San Francisco. Prior to his death he had been employed by Libby, McNeill & Libby in San Francisco.

January 19, 1945: The San Francisco office of the Libby company telegraphed its Chicago office to examine Larson's employment application and to ascertain whether he had there designated the names of his next of kin. On the same day the Chicago office ascertained that Larson had listed the name of Georgia May Larson, his sister, and whose address was given as Audubon, Minnesota. On the very same day the Chicago office further discovered that Georgia May was then living in Apartment 1B, Pullmer Apartments, Winnipeg, Canada. This information was communicated to Libby's San Francisco office on January 20th.

January 22, 1945: W. H. Merrick, the appellant, arrived in Winnipeg. Merrick, who has never been admitted to the Bar in any of the United States or in Canada, is a so-called "heir hunter."

January 23, 1945: The Public Administrator of San Francisco, upon petition, was appointed special administrator of Larson's estate, and the hearing on his petition to be appointed general administrator was set for February 9, 1945. On this same day (January 23d) Merrick called upon Georgia May in Winnipeg. At the conclusion of this meeting, Georgia May signed and delivered to Merrick a document which reads, in full, as follows:

"Agreement and Assignment

"Whereas, W. H. Merrick of the City of Detroit and State of Michigan, possesses information indicating that I am the owner of certain property of which I have no knowledge and

"Whereas, I wish to obtain from the said W. H. Merrick such information and establish my title to said property, and

"Whereas, said W. H. Merrick has expended and will necessarily expend sums of money for my benefit, which disbursements cannot now be ascertained.

"Now, Therefore, I hereby employ said W. H. Merrick to take in my name and behalf, all proper measures to establish my interests in and title to said property, and if necessary to employ attorneys to institute proceedings for that purpose.

"In consideration of the said information given, the said services rendered and to be rendered and expenditures made and to be made by the said W. H. Merrick in my behalf, I hereby agree to pay him out of any money or property so recovered, thirty per cent (30%) of the gross amount or value thereof, which share he is hereby authorized to retain. All proceedings taken shall be at his cost and expense and all disbursements charged against his said share.

"In the event of no recovery, I am to pay him no sum whatsoever. I agree to execute at the request of said W. H. Merrick all instruments and papers necessary to establish or aid to establish my title to said property.

"In consideration of the premises herein and the sum of One Dollar to me in hand paid by the said W. H. Merrick at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, I hereby sell, transfer, set over and assign, to said W. H. Merrick, his heirs, executors, administrators, and assigns, to his or their own proper use and benefit forever, the said thirty per cent (30%) of all property, real or personal, interest of whatsoever kind and of all moneys now due or to become due to me, from the *Estate of Fredcrick O. Larson now being probated at San Francisco, California.*

"And I Grant unto said W. H. Merrick, his heirs, executors, administrators and assigns, full power and authority for his or their own use and benefit, but at his or their own cost to ask, demand, collect, receive, compound and give acquittance for the same or any part thereof, and in my name or otherwise to execute any deed, document or paper that may be necessary in the premises, and to prosecute and withdraw any suit or proceeding at law or in equity therefor. This agreement and assignment to be binding on me and my heirs, executors, administrators and legal representatives.

"In Witness Whereof, I have hereunto set my hand and seal this 23 day of January, A. D. 1945.

"(Signed) Georgia M. Larson.

"In presence of:
"(Signed) A. Ascoe
"(Signed) Jean M. Nelson
Witnesses —"

When signed by Georgia May the words italicized above had not yet been inserted into the document.

January 24, 1945: Merrick again called upon Georgia May, and, pursuant to the provisions of the assignment and agreement, had her sign an authorization empowering a designated San Francisco lawyer to act for her. This lawyer was unknown to Georgia May.

January 25, 1945: The Chicago office of the Libby company instructed its San Francisco office to communicate with the Libby company manager in Winnipeg and have him notify Georgia May of the death of her brother, of the value of his estate, and of the pending probate proceedings initiated by the public administrator.

January 27, 1945: Georgia May received his information from the Winnipeg manager of Libby. The manager forwarded a report of his conversation with Georgia May to his San Francisco office.

February 1, 1945: A copy of the report of the Winnipeg manager was delivered to the office of the public administrator in San Francisco.

February 21, 1945: Georgia May, by formal notice served on Merrick, rescinded the agreement and assignment of January 23d.

July 28, 1945: Merrick notified the public administrator that he claimed an interest in Larson's estate, and accompanied the notice with a photostatic copy of the agreement and assignment. These were filed with the clerk of the probate court on August 8, 1945.

August 17, 1945: Georgia May filed her notice of motion under § 1020.1 of the Probate Code, to inquire into the consideration of the assignment and to have it annulled. Merrick was represented by counsel on the hearing of this motion.

Based on these facts, the court further found, and concluded, that the fees, charges and consideration Georgia May had agreed to pay Merrick were "grossly unreasonable," and that the agreement was not procured by duress, fraud or undue influence. The court also found that on January 23, 1945, when the agreement was signed, Georgia May "was not a missing heir." By its order and judgment the court declared the agreement and assignment of January 23d to be null and void and against public policy, and directed the public administrator to distribute the undistributed balance of the estate to Georgia May free and clear of all claims of Merrick. Merrick appeals.

[4] The form of assignment and agreement here employed by Merrick, although differing in some details, is substantially similar to those used by the heir hunters involved in Re Estate of Butler, 29 Cal.2d 644, 177 P.2d 16, 171 A.L.R. 343, and in Re Estate of Reilly, 81 Cal.App.2d 564,

184 P.2d 922. Both of these cases held that such agreements constituted an unlawful undertaking to engage in the practice of the law by an unlicensed person, and were, therefore, null and void, and violative of the public policy of this state. The fact that the agreement may be to employ counsel and not to act himself as a lawyer does not take the case out of the rule. This is made crystal clear in the following quotation from the Butler case, 29 Cal.2d at page 647, 177 P.2d at page 18, 171 A.L.R. 343: "Operating from his principal office * * * respondent admittedly conducts his business in the following manner: by contacting and soliciting the heirs, securing their authorization to appear for them, and employing counsel to represent them under powers of attorney or assignments. Thus, as a nonlawyer acting for prospective beneficiaries under agreements providing for his paying 'any and all expenses incident to the doing of the things he is authorized to do by said power of attorney, including attorneys' fees and court costs,' respondent assumes complete control of litigation instituted on behalf of the beneficiaries through attorneys hired by him and becomes a 'middleman' intervening for profit in the conduct of legal proceedings. Such procedure amounts to 'commercial exploitation' of the legal profession and is contrary to public policy." This holding was reaffirmed in the Reilly case.

[5, 6] The holding of these cases is clearly controlling here. Even if this were not so, there is another and cumulative reason why the order here involved has to be affirmed. The probate court has found that the consideration agreed to be paid by the heir was "grossly unreasonable," and there is no finding that the services rendered by Merrick were of any value at all. In fact, the findings, including the finding that Georgia May was not a missing heir, demonstrate that Merrick's "services" to Georgia May were valueless. Section 1020.1 of the Probate Code empowers the court, where it finds that the consideration agreed to be paid was grossly unreasonable, to "refuse to make distribution pursuant thereto except upon such terms as it deems just and equitable." Where the consideration is "grossly unreasonable," the burden is upon the heir hunter to prove their real value. In re Estate of Reilly, 81 Cal.App.2d 564, 569, 184 P.2d 922; In re Estate of O'Donnell, 85 Cal.App.2d 1, 12, 192 P.2d 94. So far as the record shows, Merrick offered no evidence on this issue at all, and, furthermore, the facts found demonstrate the claimed services were worthless.

For either of the two reasons mentioned it is quite apparent that this appeal lacks merit.

The motion to augment the record is denied, and the judgment and order appealed from are affirmed.

WARD and BRAY, JJ., concur.

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92 Cal.App.2d 287

BROADWAY-LOCUST CO., Inc., et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 16908.

District Court of Appeal, Second District, Division 3, California.

June 8, 1949.

1. Workmen's compensation 🔑**2009**

Where an award for temporary disability has been made or compensation voluntarily paid, permanent disability resulting from the injury is a "new and further disability" within statute conferring continuing jurisdiction on Industrial Accident Commission for period of 245 weeks. Labor Code, § 5410.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "New and Further Disability".

2. Workmen's compensation 🔑**2009, 2017**

Where employee received award for temporary disability from hernia and phlebitis of the left leg, subsequent claim of permanent disability from the same injury was upon a claim of new and further disability arising out of the same injury, and under statute, Commission exceeded its jurisdiction in making an award upon petition filed more than 245 weeks after date of injury. Labor Code, § 5410.

3. Workmen's compensation ⚿2016

Under statutes conferring continuing jurisdiction on Industrial Accident Commission, time limit is imposed upon Commission's jurisdiction to make additional awards for new and further disability, and continuing jurisdiction to award further benefits arising from same transaction, after a timely original application has once been filed, is limited as to time, in case of a new award as well as in case of an alteration or modification of former award. Labor Code, §§ 5400–5410, 5803, 5804.

4. Workmen's compensation ⚿2003

Under statute permitting injured employee to institute proceedings for compensation within 245 weeks after date of injury upon ground that original injury has caused new and further disability, a new and further disability may follow making of an award as well as follow the voluntary payment of compensation. Labor Code, § 5410.

5. Statutes ⚿218, 219

Where for more than 30 years the compensation law had been administered under a common understanding of the Industrial Accident Commission and public that powers of Commission expired 245 weeks after injury except as to certain claims, the long continued interpretation by Commission would be given considerable weight in determining whether a claim filed after 245 week period could properly be allowed. Labor Code, §§ 5400–5410, 5803, 5805; Insurance Code, § 11732.

6. Statutes ⚿147

Separation of statutory provisions into separate code sections effected no change of meaning, and provisions were not to be read piecemeal but as a single enactment. Labor Code, § 2.

7. Workmen's compensation ⚿2017

Where award disposed of claim of temporary disability, and no claim of permanent disability had been made, and no tendered issue had been left undetermined, a claim of permanent disability after expiration of 245 weeks from date of injury could not be entertained as one with respect to which the Commission had reserved jurisdiction and had deferred decision, though the award for temporary disability did provide for payment of disability benefits in future during such time as claimant might not be receiving full earnings. Labor Code, §§ 5410, 5803, 5804.

8. Workmen's compensation ⚿2016

Under statute permitting injured employee to institute proceedings for collection of compensation within 245 weeks after date of injury upon ground that original injury has caused new and further disability, Commission cannot entertain jurisdiction after expiration of period unless at time 245 week period expires there is pending and undetermined a proceeding previously instituted for new and further disability. Labor Code, § 5410.

Proceeding under the Workmen's Compensation Act by Joseph Smith, claimant, opposed by the Broadway-Locust Company, Inc., employer, and the Columbia Casualty Company, insurance carrier, on a claim of permanent disability. To review an award by the Industrial Accident Commission in favor of claimant, the employer and insurance carrier appeal.

Award annulled.

Kearney, McCartney, Scott & Clopton, Los Angeles, for petitioners.

Tipton and Weingand, Los Angeles, Leonard, Hanna & Brophy, Burbank, Laumeister & McFarland, San Francisco, E. Herbert Herlihy, F. George Herlihy, Katherine Adams Stoll, Thomas E. Ryan, Los Angeles, W. N. Mullen, San Francisco, amici curiæ on behalf of petitioners.

T. Groezinger, San Francisco, for respondent Industrial Accident Commission.

SHINN, Presiding Justice.

This is a proceeding to review an award made by the Industrial Accident Commission upon a claim of permanent disability, following an award for temporary disability. On August 7, 1942, Joseph Smith sustained an injury while in the employ of Broadway-Locust Company, Inc. On October 29, 1942, he filed an application for compensation with the Industrial Accident Commission; and on December 18, 1942, the commission made findings of temporary total disability from August 7, 1942 to October 25, 1942, resulting from a hernia and phlebitis of the left leg. During that period applicant had received his full earnings. An award was made for medical treatment. On May 28, 1947, applicant filed a petition seeking a rating for permanent disability resulting from the same injury. On September 15, 1947, a hearing was had upon the petition. On October 27, 1948, the commission determined that the injury resulted in permanent disability of 19 per cent and awarded the applicant $1,786.76.

The petition for permanent disability rating was filed 250 weeks after the date of the injury. The question for decision is whether the jurisdiction of the commission to entertain a proceeding for additional benefits expired 245 weeks after the date of the accident. The following sections of the Labor Code are pertinent to our decision:

Section 5404: "Unless compensation is paid or an agreement for its payment made within the time limited in this chapter for the institution of proceedings for its collection, the right to institute such proceedings is barred. The timely filing of an application with the commission for any portion of the benefits prescribed by this division renders this chapter inoperative as to all further claims of any person for compensation arising from the same transaction, and the right to present such further claims is governed by sections 5803 to 5805, inclusive."

Section 5410: "Nothing in this chapter shall bar the right of any injured employee to institute proceedings for the collection of compensation within 245 weeks after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the commission in such cases shall be a continuing jurisdiction at all times within such period. This section does not extend the limitation provided in section 5407."

Section 5803: "The commission has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the commission may rescind, alter, or amend any such order, decision, or award, good cause appearing therefor.

"Such power includes the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this division, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished, or terminated."

Section 5804: "No award of compensation shall be rescinded, altered, or amended after 245 weeks from the date of the injury."

Sections 5410 and 5803 read together cover the entire subject of the continuing jurisdiction of the commission to award compensation for a new disability resulting from the original injury or for an increase of the disability for which compensation has been awarded or paid voluntarily. Section 5410 relates to new and further disability resulting from the original injury; section 5803 relates to disability that has either recurred, increased, diminished or terminated. Any claim of disability for which benefits are sought in addition to those previously awarded or paid voluntarily would necessarily fall within one section or the other. The limitation of jurisdiction to 245 weeks is all inclusive. If the disability for which increased compensation is sought is a new and further disability the jurisdiction of the commission is extended, and is also limited, by section 5410 to proceedings instituted within 245 weeks from the date of the injury. If it is one that has recurred or increased the jurisdiction retained in the commission by section 5803 to rescind, alter or amend the former order, decision or award, is limited by section 5804 to the period of 245 weeks from the date of injury.

[1] It has been held that where an award for temporary disability has been made or compensation voluntarily paid, permanent disability resulting from the injury is a new and further disability within the meaning of section 5410 and that the proceedings are governed by that section. Gobel v. Industrial Acc. Comm., 1 Cal.2d 100, 33 P.2d 413; Furness Pac., Ltd., v. Industrial Accident Comm., 74 Cal.App.2d 324, 168 P.2d 761; Cowell Lime & Cement Co. v. Industrial Acc. Comm., 211 Cal. 154, 294 P. 703, 72 A.L.R. 1118, and cases cited.

[2] The present proceedings is upon a claim of new and further disability arising out of the same injury. If it is prosecuted under section 5410, of which we have no doubt, it necessarily follows that the commission acted in excess of its jurisdiction in making an award upon a petition which was filed more that 245 weeks after the date of the injury. But the commission now advances a novel theory, concurred in by a majority of its members, under which section 5410 would be inapplicable in the present case. It takes the position that where a prior award has been made, the code sections quoted above place no time limit upon its jurisdiction to make additional awards for new and further disability. The contention is founded upon an untenable construction of the applicable statutes and a disregard of controlling case law.

[3] Chapter 2, division 4, part 4, secs. 5400–5410, inclusive, of the Labor Code, sets up time limitations for proceedings for workmen's compensation benefits. Section 5404 provides: "The timely filing of an application with the commission for any portion of the benefits prescribed by this division renders this chapter inoperative as to all further claims of any person for compensation arising from the same transaction, and the right to present such further claims is governed by sections 5803 to 5805, inclusive." The commission construes these provisions to mean that in all cases where a previous timely application has been filed, section 5410 is to be disregarded; and, consistently, construes section 5410 as being applicable only to cases in which compensation has previously been paid voluntarily and a claim is made for new and further disability. Accordingly, it maintains that by the express terms of section 5404, "only the provisions of sections 5803 to 5805, inclusive, govern the employee's rights herein; the provisions of section 5410 may not be judicially ingrafted thereon." Upon these premises, the commission concludes that once a timely original application has been filed, its continuing jurisdiction to award further benefits arising from the same transaction, is unlimited as to time, provided the later award is a new one as distinguished from an alteration or a modification of the former award. Stated somewhat differently, its position is that the extension of its jurisdiction granted by section 5803 is not limited to ordering, altering or amending former awards but extends to all proceedings on claims of new and further disability where a former award has been made. Hence it is contended section 5804 does not apply to the ward here, which is a new one, and not an alteration or amendment of an earlier award.

The argument is fallacious. It has been held that section 5410 is controlling in a proceeding upon a claim of permanent disability following an award for temporary disability. Gobel v. Industrial Acc. Comm., supra; Furness Pac., Ltd., v. Industrial Acc. Comm., supra. Respondent says that in these cases the court overlooked or gave no consideration to section 5404. The statement is scarcely accurate. It is shown by the record in the Furness case, where the award for permanent disability followed one for temporary disability, that the employer contended the second award was merely an amendment of the first and that the 245 weeks limitation of section 5804, incorporated in section 5404, applied. The commission, contrary to the position it now takes, there contended that section 5410 controlled. The court said [74 Cal.App.2d 324, 168 P.2d 762]: "In the instant proceeding the commission did not alter or amend its former award, Labor Code, sec. 5804, but made a new award for a disability for which compensation had not been previously allowed. Section 5410 of the Labor Code is the applicable provision and section 5404 is not." An examination of the record in the Gobel case, and a reading of the court's opinion therein, likewise reveal that the effect of both sections 5404 and 5410 was argued to and carefully considered by the court.

[4] The theory which the commission now advances has not been discussed in previous cases. It is clearly based upon a forced and false contruction of the code sections. Both sections 5410 and 5803 extend the jurisdiction of the commission to 245 weeks in the different situations to which they relate. They purport, as we say, to cover all classes of claims to further benefits, whether the disability be determined to be a new one or the increase of an old one, and whether the award be classified as a new one, or the alteration or amendment of a previous award. There is nothing in the language of section 5410 which indicates that it relates only to awards made after the voluntary payment of compensation. That there may be a new and further disability following the making of an award, as well as one following the voluntary payment of compensation, is settled by the cases cited above. See also Pacific Indem. Co. v. Industrial Acc. Comm., 85 Cal.App.2d 490, 193 P.2d 117; Hines v. Industrial Acc. Comm., 215 Cal. 177, 190, 8 P.2d 1021.

Furthermore, a comparison of sections 5404 and 5410 leads to a conclusion exactly contrary to the one contended for by the commission. Section 5410, and not 5404, is controlling as to the time limitations applicable to claims for new and further disability. The section so states, since it is expressly made paramount to the other sections of chapter 2, including section 5404. This conclusion is supported by the fact that section 5404 ties in with sections 5803 to 5805 which relate in terms solely to the rescission, alteration or amendment of previous orders or decisions. Thus, the 245 week period within which the commission must act under sections 5803 and 5804 is made applicable to all proceedings on claims for further benefits other than those for new and further disability, which are governed by section 5410.

[5] The time limitations now found in sections 5410 and 5803-5804 have been in effect since 1917 when the present Workmen's Compensation Law was adopted. It is conceded by all parties that for more than 30 years the law has been administered under a common understanding of the commission and the public that the powers of the commission expire 245 weeks after the injury except as to proceedings then pending based upon claims of new and further disability or claims which have been recognized as valid by the employer and have not been finally settled. Only recently the commission has questioned the scope of the time limitations upon its jurisdiction. It would seem that if, in all of these years, the present theory of the commission has occurred to any student of the act he did not think well enough of it to urge it upon a court. This long continued interpretation by the commission of its own powers has necessarily led industry to recognize and adjust itself to liabilities and responsibilities consistent with well understood limitations as to time. Experience furnishes the basis upon which the Insurance Commissioner fixes minimum rates for compensation insurance as required by section 11732 of the Insurance Code. It is important for this reason, and many others, that the overall cost of workmen's compensation insurance should be ascertainable with reasonable certainty in order that business operations may be adjusted accordingly and state agencies, including the administrators of the State Compensation Insurance Fund, may be enabled to operate with the greatest measure of efficiency and competency. Contingent liability unlimited as to time for which the commission now argues would result in great confusion. No employer or his insurance carrier would know what claims might emerge from cases long since settled and written off. Statistical data of the state agencies and the interested public based upon long experience would be of doubtful value for future use. It is a proper situation for application of the rule that in the interpretation of the powers of a public body, considerable weight

should be given to the manner in which they have been interpreted and administered over a long period of time. Nelson v. Dean, 27 Cal.2d 873, 881, 168 P.2d 16, 168 A.L.R. 467; State Compensation Ins. Fund v. Industrial Acc. Comm., 56 Cal.App. 2d 443, 448, 132 P.2d 890; Colonial Mutual Compensation Ins. Co., Ltd., v. Mitchell, 140 Cal.App. 651, 657, 36 P.2d 127; 23 Cal.Jur., secs. 151–152, pp. 775–777.

If the commission was permitted, without regard to time, to entertain and allow claims for new and further disability, once a proceeding had been instituted, and was compelled to reject applications offered after the expiration of 245 weeks in cases where compensation had been paid voluntarily, the result would be discriminatory both as to employers and employees. This would be wholly unjust and unreasonable. We are satisfied that the legislature intended the law to operate uniformly as to employers and employees, and that with respect to the jurisdiction of the commission to make awards no class of claimants has been given rights not granted to others who are similarly situated.

[6] A final answer to the commission's claim of continuing jurisdiction is that the theory relied upon defeats itself. Having denied that its continuing jurisdiction is derived from section 5410 respondent is obliged to seek for it in section 5803. But whatever powers to alter or amend an award are granted the commission by section 5803 are limited by section 5804 to a period of 245 weeks. In order to avoid this limitation, the commission says, correctly, that the award in question was not an alteration or amendment of the previous award. This being true however, it would follow that the claim of jurisdiction under section 5803 necessarily fails, for jurisdiction is continued only for the exercise of the powers granted, namely, to alter, amend or terminate a previous award and the limitation of time is clearly coextensive with such grant of power. The commission's argument overlooks the significant fact that in the original act, Stats. 1917, ch. 586, what is now section 5803 was contained in subdivision (d) of section 20, and the present section 5804 was a limiting proviso thereto. Their separation into separate code sections effected no change of meaning and they should be read not piecemeal, but as a single enactment. Labor Code, sec. 2.

[7, 8] The commission suggests that Smith's petition for a permanent disability rating was merely a request for the determination of an issue impliedly presented by his application of October 30, 1942. Citing as authority Douglas Aircraft Co. v. Industrial Acc. Comm., 31 Cal.2d 853, 193 P.2d 468, the commission states, "[d]eferment of an issue presented to the Commission in a claim for compensation benefits until a time subsequent to the expiration of 245 weeks from the date of injury is within the power of the Commission." This argument is unsound. The first award disposed of the pending issue, namely, the claim of temporary disability. No claim of permanent disability had been made, no evidence of permanent disability had been presented and no issue that had been tendered was left undetermined. The award did provide for the payment of disability benefits in the future during such time as the applicant might not be receiving full earnings. This cannot be construed as an attempt to defer decision of any pending claim, much less of an issue that was not even before the commission. In any view of the proceedings the claim that the commission, in some manner, reserved jurisdiction would be untenable. Jurisdiction is determined by the statute. Section 5410 clearly contemplates that the continuing jurisdiction of the commission to make awards for new and further disability shall be exercised only where at the time the 245 week period expires there is pending and undetermined a proceeding previously instituted claiming new and further disability. At the time an original award is rendered, the commission obviously cannot by its mere ipse dixit extend that continuing jurisdiction to include proceedings instituted after the period limited by statute. In the Douglas case, the employee timely filed a petition pursuant to section 5410 for permanent disability. A subsequent award for permanent disability made after the expiration

of the 245 weeks period was upheld upon the authority of Gobel v. Industrial Acc. Comm., supra. The only basis for the decision in the Douglas case, namely, the pendency of a proceeding under section 5410 when the time limitation expired is absent here.

The award is annulled.

WOOD and VALLÉE, JJ., concur.

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92 Cal.App.2d 296

In re SLOOT'S GUARDIANSHIP.

Civ. 7602.
Sac. 5980.

District Court of Appeal, Third District. California.

June 8, 1949.

Rehearing Denied July 7, 1949.

Hearing Denied Aug. 4, 1949.

1. Guardian and ward 🔑13(7)

An order appointing a great uncle as guardian of two and one-half year old son of divorced parents would be reversed and court directed to award custody of child to mother in absence of finding that appointment of guardian was necessary or convenient or that mother was not fit person to have custody of son. Civ.Code, § 197.

2. Parent and child 🔑2(4)

Before a court can deprive mother of right to custody of minor child and give child into charge of strangers, there must be a finding that mother is unfit person to have custody of child. Civ.Code, § 197.

◆

Appeal from Superior Court, Stanislaus County; H. L. Chamberlain, Judge.

Proceeding in the matter of the application of Lorne A. Campbell to be appointed the guardian of the person of Billy Harold Sloot, a minor, opposed by Imogene Campbell Gates. From an order granting letters of guardianship to the applicant, Imogene Campbell Gates appeals.

Order reversed with direction.

Campbell, Hayes & Custer, Austen D. Warburton, San Jose, for contestant & appellant Imogene Campbell Gates.

Griffin & Cardozo, Herbert E. Paul, Modesto, for respondent.

ADAMS, Presiding Justice.

This is an appeal from an order of the Superior Court of Stanislaus County, granting letters of guardianship of the person of Billy Harold Sloot, aged about two and one-half years, to Lorne A. Campbell, great-uncle of the boy. Appellant, who is the mother of said child, opposed the application of petitioner. The court made no findings.

The testimony shows that on January 17, 1947, an interlocutory divorce decree was entered in Santa Clara County, in an action between appellant and her former husband, Henry Sloot, which decree awarded the custody of the child to his mother, and ordered Sloot to pay her $20.00 per month for its support. Two days later Sloot called respondent to come to Mountain View, where the Sloots had been living, and get the child, which he did. On this proceeding respondent testified that he consented to take the child only on condition that he should adopt it. Sloot then secured the attorneys who had represented him in the divorce proceedings to start adoption proceedings on behalf of respondent, and they secured appellant's consent to such proceedings within the next five days. However, in July following, appellant refused her consent to such adoption, and the proceedings were never completed.

On May 19, 1947, Mrs. Sloot, having established residence in Nevada, obtained a decree of divorce from Henry Sloot, and shortly thereafter she married Alfred E. Gates, in Nevada. She and her husband then returned to California and sought to secure the child from respondent. They were refused, and Mrs. Gates, and her mother who accompanied her to respondent's home, were refused permission to see the child. Respondent even called the sheriff who came but took no action.

On August 15, 1947, Mrs. Gates sought, by habeas corpus proceedings brought in Santa Clara County, to secure possession of her child, but the proceedings were dismissed for lack of jurisdiction. On September 10, 1947, she began a similar proceeding in Stanislaus County but the writ was discharged for reasons not shown by the record before us. On December 2, 1947, this proceeding was begun and resulted in the issuance of letters of guardianship to respondent.

[1] As previously stated, the trial court made no findings; there is, therefore, no finding that it was necessary or convenient that a guardian be appointed, and no finding that appellant, the child's own mother, is not a fit and proper person to have his custody. And it may be well said that there is nothing in the record before us which could sustain such a finding. Under these circumstances the judgment must be reversed. Section 197 of the Civil Code provides that: "The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings."

[2] In numerous decisions the appellate courts of this state have held that before a court can deprive a mother of her right to the custody of a minor child and give it into the charge of strangers, there must be a finding that the mother is an unfit person to have the custody of her child. In Roche v. Roche, 25 Cal.2d 141, 152 P.2d 999, the court reviewed cases so holding. It cited Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229, where it was held that a court was not justified in awarding the custody of a minor to its grandparents, even though its own father consented, without a finding that its mother was an unfit person for the custody; Newby v. Newby, 55 Cal. App. 114, 202 P. 891, in which case no finding was made as to the unfitness of either parent, and though the trial court found that the best interests of the child required that custody be awarded to a stranger, such order was reversed on appeal on the theory that if either parent was a fit and proper person to have such custody, a stranger might not usurp that right; In re Guardianship of Mathews, 169 Cal. 26, 145 P. 503, in which, after a finding that the mother of a minor child was "an unfit, incompetent, and improper person to have the care, custody, or control" of a minor, a decree appointing a stranger as guardian was reversed on the ground that the evidence did not support such finding as to the mother. Other cases are cited in the Roche case, including In re White, 54 Cal. App.2d 637, 129 P.2d 706, in which this court said that the law presumes that the interest of a child will be best subserved by awarding its custody to a parent, unless such parent is unfit to have its care; that the law regards the parents as the natural guardians of their children, citing section 197 of the Civil Code; that the right of a parent to the care and custody of a child cannot be taken away merely because the court may believe that some third person can give the child better care and greater protection; and that one of the natural rights incident to parenthood, a right supported by law and sound public policy, is the right to the care and custody of a minor child, and this right can only be forfeited by a parent upon proof that the parent is unfit to have such care and custody. Also see Robertson v. Robertson, 72 Cal.App.2d 129, 164 P.2d 52, and In re Estate of Lindner, 13 Cal.App. 208, 109 P. 101.

For the reasons above set forth it is ordered that the order of the trial court granting letters of guardianship of the person of Billy Harold Sloot to Lorne A. Campbell be reversed; and said court is directed to award the care and custody of said minor child to appellant, his mother.

PEEK and THOMPSON, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

92 Cal.App.2d 244

BLANCHARD v. PAULEY.

Civ. 16785.

District Court of Appeal, Second District, Division 2, California.

June 7, 1949.

Hearing Denied Aug. 4, 1949.

1. Brokers ⊂⇒43(3)

Offer to exchange realty written by defendant to third person which was sent to broker in an envelope addressed to her and letter of broker written to defendant requesting execution of exclusive sales authorization with suggestion that defendant make an offer for an exchange of realty to third person did not sufficiently show employment of broker so as to comply with statute of frauds requiring that an appointment of a broker to sell realty for a commission be in writing. Civ.Code, § 1624, subd. 5.

2. Brokers ⊂⇒43(3)

In a suit by a broker to recover realty commission, in order to show compliance with statute of frauds, writing signed by party to be charged or his agent must unequivocally show on its face the fact of employment of broker. Civ.Code, § 1624, subd. 5.

3. Brokers ⊂⇒43(1)

In order for a broker to recover commission for sale of realty, proof of employment must be in writing to satisfy statute of frauds. Civ.Code, § 1624, subd. 5.

4. Brokers ⊂⇒43(3)

Naked act of owner of realty in fixing a price at which he is willing to sell or exchange it, given in writing at request of a broker, does not constitute an employment of such broker by owner sufficient to satisfy statute of frauds requiring that such employment be in writing or bind owner to pay a commission for sale of realty. Civ.Code, § 1624, subd. 5.

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Action by Bessie E. Blanchard against Edwin W. Pauley to recover broker's commission in connection with sale of realty. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Michael F. Shannon, Thomas A. Wood, Los Angeles, for appellant.

Orris R. Hedges, Los Angeles, for respondent.

WILSON, Justice.

This is an action to recover for services rendered in connection with the sale of real property. From a judgment in favor of defendant after the sustaining of a demurrer without leave to amend, plaintiff appeals.

The sole question for us to determine is whether plaintiff's cause of action is barred by subdivision 5 of section 1624 of the Civil Code.[1]

The material allegations of the complaint are as follows: That plaintiff, a licensed real estate broker, was employed orally by defendant in August of 1946 in connection with the sale or exchange of real property owned by defendant; plaintiff submitted for defendant's consideration the exchange of the latter's property for property owned by one Charles K. Huthsing; on September 11, 1946, plaintiff wrote defendant as follows:

"Dear Mr. Pauley:

"I am enclosing herewith an exclusive sales authorization for your signature. I want to have the cooperation of other brokers in the sale of your house and for this reason it is necessary that I have the exclusive.

"I am advertising your property this week-end in hopes of starting the ball a rolling and still feel that it would be smart to make Mr. Huthsing an offer on the

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[1] Civil Code, sec. 1624: "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: * * * 5. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission; * * *."

Sunset house while things are down, for the minute the market starts up again, he will become a tough customer.

"If you will call me upon receipt of this exclusive listing, I shall drop by and pick up same.

"Very truly yours,
Bess Blanchard"

Thereafter conversations continued between plaintiff and defendant regarding the exchange of the two properties and on the ninth day of January, 1947, defendant "authorized plaintiff in writing" to submit to Huthsing for and on behalf of defendant a proposal of exchange which was signed by defendant and mailed to plaintiff, and which read as follows:

"Dear Mr. Hutshing:

"I offer to you my property, free of encumbrances and exclusive of household furnishings, at 9550 Heather Road, Beverly Hills, plus $60,000.00 in cash for your property, exclusive of household furnishings and free of encumbrances, at 9521 Sunset Boulevard, Beverly Hills.

"It is understood, of course, that if my offer is accepted by you, an escrow in the usual form and providing for proper instructions, title search and insurance, and any additional conditions or agreements between us will be entered into.

"This offer is good for ten days.

"Very truly yours,
Edwin W. Pauley"

Plaintiff delivered this letter to Huthsing, who on January 26, 1947, wrote to plaintiff with reference to defendant's offer; plaintiff and defendant continued to discuss the exchange of these properties until October, 1947, when plaintiff was advised by defendant's wife that defendant, was not going to dispose of his property; thereafter defendant, without plaintiff's knowledge, exchanged his property for the Huthsing property.

[1, 2] It is the contention of plaintiff that when considered with her letter of September 11, 1946, to defendant, the letter dated January 9, 1947, written by defendant to Huthsing and sent to plaintiff in an envelope addressed to her was an authorization in writing sufficient to comply with the requirements of subdivision 5 of section 1624 of the Civil Code. This contention is untenable. The rule is settled that in a suit by a broker to recover a real estate commission in order to show compliance with the statute the writing signed by the party to be charged or his agent must unequivocally show on its face the fact of employment of the broker; that is, it must show an authority to act or negotiate a sale of the property for the owner. Herzog v. Blatt, 80 Cal.App.2d 340, 342, 180 P.2d 30; Morrill v. Barneson, 30 Cal.App.2d 598, 603, 86 P.2d 924; Patterson v. Torrey, 18 Cal.App. 346, 348, 123 P. 224; Kleinsorge & Heilbron v. Liness, 17 Cal.App. 534, 536, 537, 120 P. 444.

[3, 4] The letter signed by defendant and addressed to Huthsing constituted merely an offer to the latter to exchange property on certain terms and conditions. There is nothing contained in the writing expressly or impliedly authorizing plaintiff or anyone else to sell or negotiate the sale or exchange of the property. Nor does plaintiff's letter to defendant or the fact that the offer to Huthsing was mailed to plaintiff in an envelope addressed to her confer any such authority. The cases are clear that there must be proof, in writing, of the employment. Toomy v. Dunphy, 86 Cal. 639, 642, 25 P. 130; Morrill v. Barneson, supra; Kennedy v. Merickel, 8 Cal.App. 378, 380, 97 P. 81. As stated in Patterson v. Torrey, supra [18 Cal.App. 346 123 P. 225], "The naked act of an owner of real estate in fixing a price at which he is willing to sell or exchange the same, given in writing at the request of a broker, does not constitute an employment of such broker by the owner, or bind him to pay the broker a commission for making a sale of the property."

The cases cited by plaintiff do not support her contention. In Toomy v. Dunphy, supra, 86 Cal. 639, at page 640, 25 P. 130, there was a memorandum giving the plaintiff the authority to arrange the sale which was held to be a sufficient memorandum of employment although it did not specify the commission or compensation. In the case of Moore v. Borgfeldt, 96 Cal.App. 306, 273 P. 1114, it was held that the agreement to pay a commission contained in the memorandum implied an authority to act and the identity of the agent could be shown by parol. In Kennedy v. Merickel there was a letter addressed to the broker. In the instant case the writing was not addressed to plaintiff but to Huthsing. There was no mention of a commission or the employment of a broker. There was nothing addressed to plaintiff except the envelope which was of no more effect than if defendant had personally delivered to plaintiff the offer addressed to Huthsing. The case of Searles v. Gonzales, 191 Cal. 426, 216 P. 1003, 28 A.L.R. 78, is not in point.

Judgment affirmed.

MOORE, P. J., concurs.

Hearing denied; GIBSON, C. J., not participating.

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92 Cal.App.2d 214

SALDANA v. CITY OF LOS ANGELES.

Civ. 16842.

District Court of Appeal, Second District, Division 1, California.

June 6, 1949.

Hearing Denied July 28, 1949.

1. Statutes 🔑212, 212.1

Legislature enacting statute must be presumed to have been familiar with decisions construing previous, similar statutes, and Legislature cannot be deemed to have intended anything other than clearly indicated in title and body of the later statute.

2. Municipal corporations 🔑741(1)

Under statute requiring that claim for damages caused by negligence or carelessness of a public officer or employee be filed with officer or employee and clerk or secretary of legislative body within ninety days, action for personal injuries and property damage allegedly caused by negligent operation of a motor vehicle by city employee could be maintained against city though claim was filed only with the city clerk and not with the negligent employee, and notwithstanding that without such notice to the employee, the city's right of subrogation to recover over from the employee might be adversely affected or destroyed. Government Code, § 1981; Vehicle Code, § 400.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Anna R. Saldana against the City of Los Angeles for personal injuries and property damage. Judgment for plaintiff and defendant appeals.

Affirmed.

Ray L. Chesebro, City Attorney, Bourke Jones, Asst. City Attorney, by Edwin F. Shinn, Deputy City Attorney, Los Angeles, for appellant.

David C. Marcus, William Jerome Pollack, Los Angeles, for respondent.

DORAN, Justice.

According to appellant's brief this is an appeal by the defendant city "from a judgment in favor of the plaintiff for damages for bodily injuries and property damage caused by a collision between plaintiff's automobile and motor vehicle driven by an employee of the defendant within the scope of his employment. The sole question involved is whether the plaintiff complied with the statutory requirements for the filing of a claim as a condition precedent to the maintenance of the action". The action herein was against the city, not against the employee.

The complaint, as amended at the trial, substantially alleges that the collision in question, resulting from the employee's negligence, occurred on November 22, 1945; that on November 26, 1945, respondent filed a written claim for damages with the City Clerk, specifying the name and address of respondent, the nature of the injury and damage, and a description of the manner in which the collision occurred. It is not alleged, however, that any claim was filed with the employee.

It appears from the record that the employee, Oscar Gartrell, while driving a loaded rubbish truck in a southerly direction on Los Angeles Street near Commercial Street in Los Angeles, struck the rear of plaintiff's automobile. Shortly thereafter, according to appellant's brief, "respondent's daughter was given the name and address of the driver of the rubbish truck and thereafter talked to the driver on the telephone." The driver was not a party to the action, and, as hereinbefore indicated, the only written claim was that filed with the City Clerk.

The trial court found that the collision and respondent's damage were proximately caused by the employee's negligent operation of the truck while the latter was acting within the scope of employment; further, that the claim was duly filed with the City of Los Angeles as alleged in the complaint. Judgment was entered for the respondent in the sum of $2,500.00 for personal injuries, $477.00 for medical and hospital expenses, and $160.00 for damage to respondent's automobile.

Only one question is presented by this appeal, stated as follows in the brief filed by the appellant City: "May an action for damages caused by the negligent operation of a motor vehicle by an employee of a municipal corporation acting within the scope of his employment, be maintained against the municipal corporation when it is neither alleged nor proved that a written verified claim for damages was presented to and filed with such negligent employee within ninety days after the negligent act was committed?"

Section 1981 of the Government Code, on which appellant's argument is predicated, is a part of Chapter 6 entitled "Liability of Officers and Employees", and reads as follows:

"Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of any officer or employee, within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. In the case of a State officer the claim shall be filed with the officer and the Governor."

It is appellant's contention that "Section 1981 * * * must be complied with by an injured party before a cause of action * * * can be maintained against the appellant (city); that Section 1981 * * requires that a verified claim be filed with *both* the negligent employee and with the appellant's clerk". Appellant further argues that "If Section 1981 * * * does not apply to actions against a municipal corporation", the action herein "nevertheless cannot be maintained * * * unless the claim is filed with such employee in the manner and within the time provided by Section 1981". In reference to the latter contention, appellant argues that unless such notice to the negligent employee be required, the city's right of subrogation to recover from such employee the amount of any judgment recovered by the injured party against the municipality, as provided for in Section 400 of the Vehicle Code, may be adversely affected or destroyed.

The respondent's position as set forth in its brief, is that Section 1981 of the Government Code, "is the offspring of Act 5150, Deering's General Laws", and that "It has been clearly and definitely determined every time the question has been raised that Act 5150 applied only to actions against *public officers and employees.* Jackson v. City of Santa Monica, 1936, 13 Cal.App.2d 376, 57 P.2d 226; Jackman v. Patterson, 1940, 42 Cal.App.2d 255, 108 P. 2d 682; Dillard v. County of Kern, 1943, 23 Cal.2d 271, 274-275, 144 P.2d 365, 150 A.L. R. 1048. A persuasive factor in the determination of these cases was the fact that the title to Act 5150 prevented the act from being applicable to actions against governmental employers. We have the identical situation with regard to the title to Section 1981 as amended of the Government Code". Respondent also calls attention to the fact that "The Appellate Department of the

Superior Court of Los Angeles County has twice decided this identical question against the appellant" in Bertha Rubin v. City of Los Angeles,[1] Civil Appeals 6762, which is reprinted as an appendix to respondent's brief, and in John Richard Anderson v. City of Los Angeles,[1] Civil Appeals 6814 in which latter case no written opinion was filed.

The facts in the case of Bertha Rubin v. City of Los Angeles, Appellate Department of Superior Court, Los Angeles County,[1] Civil Appeals No. 6762, cited by respondent, are practically identical with those of the instant case. The action in the Rubin case was for damages sustained as a result of negligent driving of a city car by a city employee. The plaintiff there as here, had filed a claim only with the City Clerk, and not with the city employee. The city there as here contended that Section 1981 required that plaintiff's claim be filed with both the city and the employee although the action was against the city only. After reviewing the legislative and judicial history in reference to Section 1981 and the preceding enactments, the court came to the conclusion that "section 1981 does not apply to claims made against a city".

In order to understand the purport of Section 1981 it is necessary to note that in 1931 two statutes were passed, namely Act 5149, Deering's General Laws,—"An act relating to the liability in damages of *municipalities";* and Act. 5450,—"An act relating to the liability in damages of *officers* of municipalities". Italics added. In Jackson v. City of Santa Monica, 13 Cal. App.2d 376, 386, 57 P.2d 226, 231, the distinction between the two acts is judicially recognized. A municipal employee was there claimed to have negligently operated a city bus, and in the trial court the city successfully defended upon the ground that claim had not been filed with both the city clerk and the negligent employee. Reversing the judgment the reviewing court commented on the title of the Act and the apparent legislative intent, and concluded that "the purposes of Act 5150 were to prescribe rules of procedure for the enforcement of claims against officers. * * Therefore, under the acts in question, where a city, but not an officer thereof, is charged with liability, a claim need be filed with the city only in the cases specified in Act 5149".

Although attempts were made to correct the title of Act 5150, the appellate court again refused to extend the application of this act in Jackman v. Patterson, 42 Cal. App.2d 255, 108 P.2d 682. And in Dillard v. County of Kern, 23 Cal.2d 271, 144 P.2d 365, 150 A.L.R. 1048, it was held, quoting the headnote, that Act 5150, as amended in 1937, "applies only to actions against officers or employees of the agency and not to actions against the agency". These and other cases are discussed in the Rubin case hereinbefore mentioned.

[1] As set forth in respondent's brief, Section 1981, the basis of the present contention, "is the offspring of Act 5150". In the enactment of the statute the legislature must be presumed to have been familiar with the decisions construing previous, similar statutes. Nor can the law making body be deemed to have intended anything other than clearly indicated in the title and body of the later enactment.

Appellant's contention that plaintiff's action must fail because claim therefor was not filed with both city and employee notwithstanding the action was against the city only, finds support neither in reason nor in any of the cases cited. Huffaker v. Decker, 77 Cal.App.2d 383, 175 P.2d 254, cited by appellant, decides nothing more than that an action against *an employee* for alleged negligent operation of a motor vehicle, must be preceded by the filing of a verified claim as required by Section 1981. Since the present action is not against the employee but against the city, the Huffaker case furnishes no authority for appellant's contention.

[2] The further arguments of appellant to the effect that unless notice is given to the city as well as to the employee, the city's right to subrogation will be imperiled; hence, that such notice should be required even if Section 1981 be inapplicable to the case at bar, is without merit. Judicial review cannot take the

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[1] No opinion for publication.

place of legislative function; disposition of the present appeal must rest upon a reasonable interpretation of the law as it now exists.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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92 Cal.App.2d 282

ANGUS et al. v. LONDON.

CALIFORNIA BANK v. ANGUS et al.

LONDON v. ANGUS et al.

Civ. 16655, 16656.

District Court of Appeal, Second District,
Division 3, California.
June 8, 1949.

1. Principal and agent 🔑117(1)

Written authority is required to alter an executed contract involving real property. Civ.Code, § 2309.

2. Parent and child 🔑12
Principal and agent 🔑14(1)

The relationship of father and child, standing alone, does not prove the agency of either.

3. Principal and agent 🔑103(2, 7)

Agency to negotiate a sale or purchase of realty does not authorize the agent to bind his principal by contract.

4. Brokers 🔑7

A real estate broker was agent of vendors and not of purchaser, so that vendors must bear consequences of broker's tampering with purchaser's escrow instructions, notwithstanding that purchaser was broker's son, where vendors were to pay broker's commission on consummation of sale.

5. Vendor and purchaser 🔑16(1)

Purchaser's signature on escrow instructions containing new conditions differing in material respects from conditions contained in vendors' instructions was not unqualified acceptance of vendors' offer to sell but was a new offer. Civ.Code, § 1585.

6. Vendor and purchaser 🔑16(1)

The deletion by vendors' agent of a condition written into escrow instructions by purchaser did not disclose such lack of meeting of minds of vendors and purchaser as would prevent a contract, where purchaser's instructions contained a similar condition. Civ.Code, § 1585.

7. Vendor and purchaser 🔑16(1)

Negotiations for sale of realty did not ripen into contract where purchaser made material written alterations in escrow instructions submitted by vendors and vendors' agents without knowledge of purchaser but with knowledge of vendor deleted such alterations. Civ.Code, §§ 1585, 2309.

◆

Appeals from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action for damages for alleged breach of contract to buy land by John Angus and others against Howard M. London, and interpleader action by the California Bank, a corporation, against John Angus and others and Howard London, wherein the latter filed a cross-complaint. From the judgments, John Angus and others appeal.

Affirmed.

Ibanez & Snider and Alvin G. Greenwald, Los Angeles, for appellants.

N. Stanley Leland, Los Angeles, for respondent.

SHINN, Presiding Justice.

John Angus and others, herein referred to as plaintiffs, brought an action against Howard M. London for the recovery of $4,500 damages for the alleged breach of a contract to buy two vacant residential lots. The amended complaint alleged an agreement in the form of escrow instructions to a bank. Defendant answered; denied that he had entered into a written agreement of purchase; denied that the copy of the escrow instructions pleaded had been executed by him and alleged that plaintiffs had fraudulently misrepresented the location of one of the lots. An escrow was opened with a bank, $2,500 was deposited by defendant on account of the purchase of the lots for $13,500, and the bank, after the deal fell through, brought an action in interpleader and deposited in court $2,314.50, the amount remaining in its hands after the deduction of certain charges and expenses. The respective defendants answered and laid claim to the money. In the interpleader action London also filed a cross-complaint for rescission upon the ground of fraud. The two actions were consolidated and were tried on the same evidence. The trial resulted in a judgment of nonsuit in plaintiffs' action. No further evidence was received and the issues in the interpleader action were decided in London's favor, findings and conclusions were filed and London was awarded the money on deposit with the court. Plaintiffs appeal.

The basis of the court's determination that no agreement of sale was entered into was that the sellers' escrow instructions and those of the buyer differed in material respects. The instructions of both parties were prepared in duplicate by the bank. They were printed on both sides of a single sheet of paper. The buyer's instructions, as prepared by the bank, were complete as to price, terms and conditions. The sellers signed both copies of their instructions and the bank gave one copy to Henry London, a realty broker, who was defendant's father and was acting as broker in the transaction. The sellers' instructions called for payment to Henry London at close of escrow of a commission of $675 from funds due plaintiffs. Henry took the instructions to Howard and the latter made an insertion in handwriting reading as follows: "The seller to furnish a policy of title insurance at their cost." The instructions read, in part, "A set of Plans and Blueprints for a building for this property as previously submitted by the Seller and approved by the Buyer is to be given to the Buyer (consideration for same included in the above sale price) fully paid for. * * *" Howard altered this writing in ink so that it called for plans and blueprints for two buildings instead of one and signed the instructions. Henry returned the altered instructions to the bank where he was told they would not be accepted and acted upon without the approval of the sellers. Henry then inked out the writing which Howard had inserted, including the word "two" before the word "buildings." The escrow officer advised plaintiff John Angus as to what had taken place with respect to the buyer's copy of the instructions. However, he did not advise Howard London that the changes made by the latter had been deleted by Henry. Howard later delivered his check for $11,000 to Henry and it was deposited in the escrow. The instructions were interpreted by the escrow officer as calling for the delivery of the plans and blueprints through the escrow, and he deemed it his duty to see that they were properly delivered. He prepared an additional instruction for Howard to sign acknowledging that he had received the plans and blueprints called for by his instructions. However, before this instruction was requested of Howard, he had stopped payment on his check for $11,000, and had made the claim to plaintiffs that he had been shown a wrong lot. He refused to go through with the purchase.

There was no evidence whatever that Henry London had been authorized by his son Howard to delete the alterations which the latter had written into the instructions, nor was here any evidence that Howard knew they had been deleted when he sent in his check for $11,000. The fact that Henry had crossed out the alterations inserted by Howard was made known to plaintiffs, but they did not communicate with Howard concerning it. Henry was not shown to have been Howard's agent.

An agent's authority to bind his principal by a contract which is required to be in writing must be in writing. Civ.Code, § 2309.

[1] Written authority is required to alter an executed contract involving real property. California Savings & Commercial Bank v. Wheeler, 216 Cal. 742, 16 P.2d 737.

[2] The relationship of father and child, standing alone, does not prove the agency of either. 46 Cal.Jur., p. 1329; 2 C.J.S., Agency, § 23, p. 1048.

[3] Agency to negotiate a sale or purchase of real property does not authorize the agent to bind his principal by contract. Mason v. Mazel, 82 Cal.App.2d 769, 187 P.2d 98.

[4] The only evidence of the agency of Henry is found in the provision of the escrow instructions that plaintiffs were to pay him a commission upon consummation of the sale. Upon this evidence, and in the absence of any other, the court could only conclude that Henry was the agent of plaintiffs, and not of his son Howard, and that plaintiffs should bear the consequences of Henry's tampering with the instructions.

[5] It is clear, then, that if Howard's instructions imposed terms differing in material respects from those contained in the sellers' instructions, Howard's signature upon the copy which contained such new conditions was not an unqualified acceptance of plaintiffs' offer to sell, but was a new offer. Civ.Code, § 1585.

[6] The contention of defendant that there was no meeting of the minds because plaintiffs failed to accept the condition written in by defendant that a policy of title insurance was to be furnished at the expense of plaintiffs ignores the clear terms of the printed instructions. They called for a policy of title insurance showing title in defendant, with certain exceptions agreed to by the parties. Plaintiffs' instructions directed the bank to have the title company begin search of title at once and bound plaintiffs to pay for assurance of title. The handwritten alteration added nothing to the instructions and its deletion by Henry did not alter the meaning of the writing.

Plaintiff Angus was questioned as follows: "By Mr. Greenwald 'Did you deliver a set of plans for a proposed building? A. I did.'" There was no other evidence on the subject nor any evidence that any plans and blueprints were delivered to defendant or into escrow. No contention was made that plans and blueprints for two buildings were furnished or offered to defendant or that they had even been prepared. Defendant presumably intended to construct two buildings and expected to receive separate plans and blueprints for them. Plaintiffs were offering only plans and blueprints for one building and they failed to accept defendant's counter offer. If they were mistaken as to Henry's authority to alter Howard's instructions it was due to their failure to make inquiry when they were informed of the alterations.

[7] The negotiations did not culminate in a contract. Plaintiffs' proof was insufficient to justify a recovery based upon breach of a contract to purchase the property. Upon the findings, which settled the issues in the interpleader action, it was proper to enter judgment in favor of defendant for the sum on deposit with the court.

The judgments are affirmed.

WOOD and VALLÉE, JJ., concur.

92 Cal.App.2d 316

BIGGS v. TOURTAS et al.

Civ. 16806.

District Court of Appeal, Second District,
Division 1, California.

June 9, 1949.

Rehearing Denied June 27, 1949.

Hearing Denied Aug. 4, 1949.

1. Appeal and error 🔑996, 1012(1)

It is province of trial court to give to evidence that weight to which, in its judgment, it is entitled and to draw all reasonable inferences therefrom.

2. Conspiracy 🔑19

A conspiracy may be proved by circumstantial evidence.

3. Conspiracy 🔑6

Where two or more persons are sued for a civil wrong, it is civil wrong resulting in damage, and not the conspiracy, which constitutes cause of action.

4. Conspiracy 🔑13

In action for damages resulting from acts of conspirators, conspiracy has effect of rendering each participant responsible as a joint tortfeasor for all damages ensuing from the wrong irrespective of whether he was a direct actor and regardless of degree of his activity.

5. Conspiracy ⇨13

Where conspiracy exists, none of the conspirators are to be exonerated merely because means employed to accomplish common purpose were unknown or unanticipated in beginning, or because they did not join in or know of acts of their coconspirators, or because object accomplished differs from one originally contemplated.

6. Conspiracy ⇨3

The essence of a conspiracy is that parties have a common purpose or design.

7. Conspiracy ⇨21

In action for damages alleged to have resulted from a conspiracy, whether defendants conspired together for any purpose, and, if so, what that purpose was, were questions for trier of fact.

8. Appeal and error ⇨931(1), 989

An Appellate Court in reviewing evidence in support of judgment must accept as true that which is most favorable to respondents and disregard unfavorable evidence as not having sufficient verity to be accepted by trier of fact.

9. Conspiracy ⇨13

Under findings by trial court, supported by substantial evidence, that defendants wrongfully, unlawfully, fraudulently and maliciously conspired together to evict plaintiff and her family from a dwelling house and that such eviction was accomplished through use of great physical force and violence resulting in injury and damage to plaintiff, each defendant, as a participant in conspiracy, became liable for all damage ensuing from wrong regardless of degree of his activity.

10. War and national defense ⇨222

Evidence that house from which plaintiff was evicted and for which he had paid $200 in rent had been previously rented for $125 per month and had never been registered with rent control office was a sufficient basis for court to determine a maximum rental under OPA and make an award to plaintiff for excessive rent.

11. Appeal and error ⇨1004(1)

The fact that comment made by trial judge at the time of denial of defendants' motion for a new trial indicated an erroneous belief at that time that one of the defendants bit plaintiff rather than scratched her was not an indication that amount of damages awarded at conclusion of trial had any basis in such belief and was not a ground for holding that judgment was excessive.

12. Appeal and error ⇨1004(1)

Reviewing court will not set aside verdict or finding of trial judge as to damages as excessive unless it appears that amount awarded is so grossly disproportionate as to shock sense of justice and raise a strong presumption that award was based on prejudice or passion.

13. Landlord and tenant ⇨180(4)
War and national defense ⇨222, 223

Award of $2,000 compensatory and $500 exemplary damages for unlawful eviction; of $4,000 compensatory and $1,000 exemplary damages for personal injuries inflicted in the course of such eviction and award under Rent Control Act of $225 as trebled excessive rent plus $50 attorney's fees was not excessive.

Appeal from Superior Court, Los Angeles County; Paul Vallee, Judge.

Action by Hallie H. Biggs against Demitrios Tourtas and others, for damages for unlawful eviction, for personal injuries sustained in an assault and battery committed upon plaintiff by defendants, and for treble damages for excess rent, wherein defendant Helen Tourtas cross-complained. Judgment for plaintiff and defendants appealed.

Affirmed.

John C. Miles and Sanford Sill, Los Angeles, for appellants.

Holcomb & Kempley, Los Angeles, for respondent.

DRAPEAU, Justice.

This is an action to recover damages for unlawful eviction; for personal injuries sustained in an assault and battery committed upon plaintiff by defendants in furtherance of the eviction; and for treble damages for excess rent paid by plaintiff.

The amended complaint alleges in substance that plaintiff rented the house from defendants, and that while in lawful possession thereof, the defendants conspired to unlawfully evict her therefrom; that they accomplished such eviction and in the course thereof plaintiff received severe personal injuries. Said complaint further alleges that defendants demanded of her and she paid rental to the extent of $75 in excess of the ceiling fixed by the rules and regulations of the Office of Price Administration.

The answer denies the allegations of the amended complaint, and sets up a cross-complaint seeking to recover damages on behalf of Helen Tourtas for personal injuries therein alleged to have been unlawfully inflicted upon her by the plaintiff.

The court found in favor of plaintiff on all issues and against defendants on the issues raised by their cross-complaint.

This appeal is prosecuted from the judgment which awards the sum of $7,775 to plaintiff, to wit:

On the unlawful eviction: $2,000 compensatory and $500 exemplary damages;

For personal injuries: $4,000 compensatory and $1,000 exemplary damages;

Excessive rent $75 trebled: $225, plus $50 attorney's fees allowable under the Rent Control Act.

Appellants rely upon the following propositions for a reversal of the judgment:

(1) That there is an absence of any evidence that Demitrios Tourtas or Theodore Tourtas (a) were present at the alleged assault, or aided, abetted, encouraged or conspired in it; (b) encouraged or conspired in the alleged eviction;

(2) That there was no eviction of respondent for the reason that she vacated the premises voluntarily before her lease went into effect;

(3) That the tender of the $200 to respondent prior to the time the lease went into effect cured any possible violation of the Rent Control Act;

(4) That the judgments rendered for the alleged assault and eviction in the form of a compensatory and exemplary damages are excessive and not supported by the evidence.

Appellants are father, mother and son. The house involved was owned originally by the son, who at the time of his induction into the army during the late war, deeded it to his father. The father and mother operated a cafe at Santa Monica, where respondent lived, and they became acquainted about a month prior to April 25, 1946. On that date, respondent rented appellants' house, paying $200 cash for the rent for one month beginning May 1, 1946, and the father gave her a receipt therefor. At this time, Mr. and Mrs. Tourtas invited respondent to take possession of the house at once, because the glass in the back door was broken and the place was unprotected. Respondent told them she would move in if she could get someone to help her clean the place. As a result, she did take possession of the house on April 26th with the help of a Mrs. Haverly and Mrs. Tourtas.

The son, Ted Tourtas, arrived at the house that afternoon while respondent was unloading her personal effects from a trailer, and he later rode to Santa Monica with respondent where she went to get additional keys to the house which Mrs. Tourtas had neglected to give her. Ted did not say anything to respondent that day about her renting the house because he wanted to talk to his father and mother first.

On Saturday morning, April 27, 1946, Mrs. Tourtas came into the kitchen of the house between 9:30 and 10 o'clock and asked respondent for the rent receipt, stating: "My son is in the yard and you know we don't own this house and he would like to see your receipt, to see how to spell your name." Whereupon respondent turned the rent receipt over to Mrs. Tourtas, who then left, but shortly after returned and asked respondent for the door keys, so that her son could have duplicates made. Respondent got the keys and gave them to Mrs. Tourtas who again went out of the house into the yard. A few moments later Ted, Mrs. Tourtas, and her son-in-law, Mr. Morgan, came in and Ted said to respondent: "Mrs. Biggs, my mother and father rented the house, and I don't want you here, and I will give your $200 back." Respondent refused to take the money and said, "Ted, if you don't want me here, I won't stay here, but I have to have time to find another place to move, so I will just take my receipt back. And he said, 'No, you cannot have the receipt back * * * I am going to call my lawyer and see if I cannot have you arrested for gaining entrance * * * Because you have nothing to show you have a right to be here.' * * * I said, 'I have to find a place to stay, I have to stay long enough to find a place to move, I cannot just move out now', and I was very nervous and upset. * * * Then he took the $200 and then they all three left the house."

Five or ten minutes later, Mrs. Tourtas returned to the house and picking up a child's high chair walked out to the front of the house; when respondent and Mrs. Haverly reached the front hallway, Mrs. Tourtas "had a box and the high chair sitting on the front porch and the electric percolator and the waffle iron under her arm" as she proceeded through the front door. Respondent said, "Mrs. Tourtas, what are you doing"; to which the latter replied: "I am throwing you out. * * You have nothing to show you have a right to be here, and we have a truck out in front * * * and I said 'You cannot throw me out like this' * * * And she turned and came toward me with the electric percolator raised to the air, and as she came down with it I blocked the blow, and that knocked the percolator to the floor, broke it, and I stooped over to pick the percolator up, and as I straightened up she hit me on the side of the face with her fist, and I said, 'Mrs. Tourtas, don't do that, don't hit me again,' and walked past her and set the high chair back into the house. * * * and then I closed the door, and then she grabbed me by the head of hair on the back of the head and there the tussle started. * * * she pulled hands of hair; and she grabbed me, and the first place she bit me was on the hand, the big part of the hand. * * * she bit my wrist, she bit my arm in several places. * * * She bit me, the big part of the thumb off; * * * a big hunk out at the wrist; * * * she bit pieces out of my elbow, two hunks, * * * Then there were places where she had grabbed hold of me and the teeth would not sink in."

Pictures taken at the police station showing respondent's injuries were introduced in evidence, and respondent exhibited to the court scars of the places where she was bitten on the hand and arm.

During the struggle, the two women fell to the floor, and respondent, who was "trying to jar loose with my elbow" asked Mrs. Haverly to go for help. The latter went out on the porch and screamed, whereupon Ted Tourtas, Mr. Morgan and a strange man came in, and Ted helped the women to their feet, whereupon in the words of respondent: "She (Mrs. Tourtas) made one dive at me, and that was when she made the laceration on my breast with her fingers. * * * she made two or three bad lacerations on my right breast. * * * Then I asked Blanch (Haverly) to help me upstairs and lock us in a room with the babies and go for help. From then on my memory is very dull up to the time when I came to myself, she was wiping my face with a white cloth and Mrs. Tourtas and Ted were standing in the bedroom, they had followed us up the stairs."

Respondent's daughter was summoned from her place of business and took her mother to a doctor for medical treatment.

On the evening of April 27th, Mr. Tourtas, Ted and other members of the family returned to the house, walking in without knocking or ringing the doorbell, at which time Ted Tourtas ordered respondent and her family to vacate the house. Mr. Tourtas told respondent he would give her until 8 o'clock Monday evening to get her things out. She moved on Sunday, April 28th but no part of the $200 rental was ever returned to her. Respondent further testified that her "arm hung limp, useless, for better than three months," and that she was not able to do anything for "better than a year."

Dr. J. de Costa Meyer testified that he examined respondent around 11 o'clock on April 27, 1946, and found multiple lacerations on the left wrist, forearm and elbow which appeared to have been made by tooth marks. On the right breast the lacerations were parallel and looked more like long scratch marks. In addition there were multiple contusions, and the patient was in a state of acute nervous collapse; that he took preliminary care of the injuries by means of antisepsis and dressing and by tetanus inoculation, also phenobarbital and sedation for acute nervousness; that the patient returned on June 1, 1946, at which time she still had residual symptoms of nervousness, and considerable aching in the left scapular, lower neck and left shoulder and arms; that he took a series of x-rays which were negative for any bone pathology; that his assumption at the time was that he was dealing with a probable ligamentous strain, rather severe, but simple, and one which would eventually subside entirely; that he advised her on the telephone from time to time and on June 10th, he made note that she was definitely improving; that the patient made four visits to his office for which she paid him $51.

Appellant Ted Tourtas gave his version of the occurrence of April 27th as follows: That he told his mother to go in to the house and give the respondent the money and get the receipt, so he could confer with the OPA; that he found out that she had moved in before the time, and he wanted to contact his attorney; that his mother returned with the receipt but said respondent refused to take the money; that he asked his folks about the rental on Friday night and his mother told him she had heard that respondent was going to make a rooming house out of the place, and that was the reason he went there on Saturday morning. That he made two telephone calls at a neighboring market, and as he was returning to the house with his brother-in-law, a neighbor, Clyde Barmore, called to them and said, "There's trouble down there, help me!" That the witness started running to the house to see what had happened, and as he walked in he saw respondent "had my mother straddled, she had her two fists full of hair and she was banging her head into the floor." That he picked both women up and asked respondent what she had done to his mother; that respondent said, "Ted, I had to fight to get back what I gave you willingly"; that he gathered his mother up and took her to a doctor.

The participants in the affray both contend that the other was the aggressor, appellant Helen Tourtas claiming that she received much more serious injuries than respondent.

[1,2] As was stated in Campbell v. Birch, 19 Cal.2d 778, 789, 122 P.2d 902, 908: "The trial court is the exclusive judge of the weight of the evidence and the credibility of the witnesses. It is its province to give to the evidence that weight to which, in its judgment, it is entitled, and to draw all reasonable inferences therefrom, and if, in its judgment, the evidence is entitled to no weight it may disregard such evidence altogether. 24 Cal.Jur. 886, § 135. The cases have frequently taken notice of the fact that it is next to impossible to secure direct evidence of a conspiracy, unless one of the participants has confessed, and that the proof must usually be inferential and circumstantial. Thus, in Johnstone v. Morris, 210 Cal. 580, 590, 292 P. 970, 975, it is stated: '* * * The jury may infer the conspiracy from all the circumstances, and, if the inference is a reasonable one, it will not be disturbed on appeal. These principles have repeatedly been recognized by this court. In Revert v. Hesse, 184 Cal. 295, at page 301, 193 P. 943, 946, this court, quoting from a Georgia case. (Woodruff v. Hughes, 2 Ga.App. 361, 58 S.E. 551), said: '"The law recognizes the intrinsic difficulty of proving a conspiracy. The allegations with reference to conspiracy are treated as matters of inducement leading up to a more particular description of the acts from which the conspiracy may be inferred. * * * The conspiracy may sometimes be inferred from the nature of the acts done,

the relation of the parties, the interest of the alleged conspirators, and other circumstances." * * *'"

[3, 4] Moreover, it is a general and well-settled principle of law that "where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action. * * * In an action for damages resulting from acts of conspirators, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity." 5 Cal.Jur. 528, 530, secs. 29 and 30.

[5] Again, in Wells v. Lloyd, 6 Cal.2d 70, 82-83, 56 P.2d 517, 523, it is stated: "It is to be conceded, that where a conspiracy exists, none of the conspirators are to be exonerated merely because the means employed to accomplish a common purpose were unknown or unanticipated in the beginning, or because they did not join in or know of the acts of their coconspirators, or because the object accomplished differs from the one originally contemplated. * * *

[6, 7] "It is the essence of a conspiracy that the parties should have a common purpose or design. Whether the defendants conspired together for any purpose, and, if so, what that purpose was, were questions of fact."

[8] As is usual in cases of this character, the testimony of the parties is conflicting in many respects. However, it is well established that an appellate court in reviewing the evidence in support of the judgment must accept as true that which is most favorable to the respondent and disregard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact. In re Estate of Teel, 25 Cal.2d 520, 527, 154 P.2d 384.

[9] An examination of the evidence presented at the trial herein and very briefly recited in the foregoing resume, discloses that the findings of the trial court to the effect that the appellants wrongfully, unlawfully, fraudulently and maliciously conspired together to evict respondent and her family from the said dwelling and that such eviction was accomplished through the use of great physical force and violence resulting in injury and damage to respondent,—are amply supported by such evidence. It follows that under the principles of law heretofore enunciated, each participant in the conspiracy became liable for all damages ensuing from the wrong regardless of the degree of his activity. 5 Cal.Jur. 530, sec. 30.

[10] With respect to appellants' contention that there was no basis for the trial court to determine a maximum rental under the rules and regulations of the Office of Price Administration, there was direct evidence that the house had been rented previously for $125 per month, and that it had never been registered with the rent control office.

[11] In connection with their final point that the judgment is excessive, appellants urge that they do not wish to imply that the trial judge was influenced by passion or prejudice, but rather that he was laboring under a misapprehension of the facts, i. e., that Mrs. Tourtas "actually bit Mrs. Biggs right in the breast." While it is true that this comment was made at the time of the denial of appellants' motion for a new trial, that is no indication that the amount of damages awarded at the conclusion of the trial had any basis in such belief.

[12] Apropos of this phase of the case, the following appears in Willoughby v. Zylstra, 5 Cal.App.2d 297, 302, 42 P.2d 685, 687: "In respect to appellants' claim of excessive damages, it is the recognized rule in this state that before a reviewing court may set aside a verdict as excessive it must appear that the amount awarded by such verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment. Ware v. McPherson, 213 Cal. 120, 1 P.2d 433; Hart v. Farris, 218 Cal. 69, 21 P.2d 432. The fact that the trial court denied a

motion for new trial on the ground of excessive damages, among others, is persuasive and confirms us in our conclusion from a review of the record that the verdicts herein may not be declared excessive."

[13] Tested by this rule and taking into consideration the facts disclosed by the record herein, the award of damages in this case is not excessive.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur. Hearing denied; SCHAUER, J., dissenting.

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92 Cal.App.2d 222

EAGLE INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14050.

District Court of Appeal, First District, Division 2, California.
June 7, 1949.

1. Workmen's compensation 🔑1935

In reviewing an award rendered by the Industrial Accident Commission, the Appellate Court must indulge in all reasonable inferences to support the commission's finding.

2. Insurance 🔑95

The knowledge possessed by agent who executed insurance policy on behalf of insurer is imputed to insurer, even though knowledge was acquired prior to the time when agent was specifically appointed to execute such policy.

3. Workmen's compensation 🔑1070

Evidence sustained Industrial Accident Commission's reformation of workmen's compensation policy which excluded air pilot having title of secretary of insured on ground of unilateral mistake by employer and knowledge or suspicion of it by insurer. Civ.Code, § 3399.

4. Workmen's compensation 🔑1062

Where employer made no warranties in an application for workmen's compensation insurance and relied solely on the agent to procure coverage desired employer was not required to read the policy and its endorsements but was entitled to rely upon agent's performing his duty of procuring a contract in conformity with information given.

5. Insurance 🔑95

The insurer was charged with knowledge of general agent though workmen's compensation policy provided that no condition or provision of the policy should be waived or altered except by endorsement and that notice to an agent or knowledge possessed by an agent should not be held to effect a waiver or change any part of the contract.

6. Reformation of instruments 🔑1, 17(1)

Reformation cannot be ordered so as to create a new and different contract for the parties, but, when through a mistake of one party which the other knew or suspected a written contract does not truly express the intention of the parties the contract which was intended by the party acting under unilateral mistake known or suspected by the other, is, as a matter of law, the contract of the parties. Civ.Code, § 3399.

◆

Petition by Eagle Indemnity Company, to review an award of the Industrial Accident Commission of the State of California for the death of Clarence Abernathy.

Award affirmed.

R. P. Wisecarver, San Francisco, for petitioner.

T. Groezinger, San Francisco, Robert Ball, San Francisco, for respondent.

DOOLING, Justice.

Clarence Abernathy, acting as a pilot for Nat's Air Transportation Service, was, on October 17, 1946, killed in an airplane crash. In addition to his duties as pilot, Abernathy was secretary of Nat's Air Transportation Service, a corporation, but received no remuneration for performance of the secretary's duties. The employer's insurance carrier, petitioner, denies liability on the ground that an endorsement attached to the policy of workmen's compensation insurance excluded Abernathy's death from coverage because of the following language: "It is agreed that, anything in this policy to the contrary notwithstanding, this policy does not insure: As respects (death) sustained by any person having the title of * * * Secretary * * * of this employer, irrespective of the work performed by such person, unless specifically included by statement in the Schedule of Operations of the Declarations or specifically insured by Endorsements attached to this policy." Pilots were included, as a class, in the schedule of operations but petitioner asserts that Abernathy was not "specifically included" therein. We will assume that the words "unless specifically included by statement in the Schedule of Operations" refer to a designation in some manner of the particular person having the title of Secretary and that, therefore, Abernathy was not included within the schedule of operations so as to satisfy the provision of the endorsement.

Even though coverage by the terms of the policy was not extended to include Abernathy, the person appointed by petitioner as general agent to effect execution of the policy testified that when the employer sought workmen's compensation insurance it intended to acquire full coverage for Abernathy. The Commission, in its decision after rehearing, as a finding of fact, stated: "The evidence discloses that it was the intent of the employer and the agent * * * of a carrier to procure and to issue a policy of workmen's compensation which would include the executive officers of the corporation while performing such duties as are ordinarily undertaken by a superintendent, foreman or workman. (The restrictive endorsement) as contained in said policy does not conform to the intent of the parties, and said policy should, ought to be, and is reformed so as to strike from said endorsement the paragraph contained (in said endorsement)." Petitioner contends that the evidence is insufficient to warrant the commission's order that the policy be reformed.

Civil Code sec. 3399 states that reformation may be had "(w)hen, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties." Reformation in the instant proceeding was apparently based upon the theory that the contract did not accurately express the intent of the parties, through a mistake on the part of the employer to the effect that it had obtained full coverage for executive officers, a mistake which was known or suspected by the petitioner through knowledge admittedly possessed by its agent. Following the express language of the code such a unilateral mistake known or suspected by the other party will support a judgment of reformation. 22 Cal.Jur. 721. The agent testified that Abernathy was to be covered by the terms of the policy and that pursuant to his understanding with the employer's treasurer "we were to write up a policy of workmen's compensation * * * covering all employees."

[1] Petitioner contends that the striking of any portion of the endorsement from the policy is contrary to the evidence because it was shown that the parties intended to attach the endorsement to the policy. An examination of the evidence as set forth above illustrates that at least one party, the employer, had no intention to have executive officers excluded from coverage and it is reasonably inferable therefrom that the employer, when it obtained the policy, operated under the impression that no endorsement to the policy would exclude coverage which it intended to receive. In reviewing an award rendered by the Industrial Accident Commission it is the duty of this court to indulge in all reasonable inferences to support the commission's finding. California Casualty Indemnity Exchange v. Industrial Acc. Comm., 21 Cal.2d 751, 135 P.2d 158. Therefore, within the meaning of Civil Code sec. 3399, supra, there was a mistake of one party and if the party against whom reformation was ordered, the petitioner, knew or suspected that the employer was operating under a mistake the finding con-

cerning reformation must be upheld. Petitioner denies that it knew or suspected that, at the time of the issuance of the policy, the employer desired coverage extended to executive officers.

Petitioner asserts that the knowledge possessed by its agent cannot be imputed to it because the agent was appointed solely for the purpose of signing the contract on petitioner's behalf. The record discloses that the agent received the actual written appointment to execute this policy on May 7, 1946, that he executed it on May 20, 1946, but that he had been petitioner's state agent for 11 years. Further, the agent testified, petitioner requested him to attempt to obtain business for peitioner other than the policy involved herein. The testimony of the agent in none of these respects was refuted or contradicted. Thus, it appears that the person who signed the policy on behalf of petitioner was more than an agent appointed for the sole purpose of executing the policy. Civil Code sec. 2332 states: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."

[2] The knowledge possessed by the agent who executed the policy on behalf of petitioner is imputable to petitioner even though acquired prior to the time when he was specifically appointed as agent to execute the policy. In Bogart v. George K. Porter Co., 193 Cal. 197, 210, 223 P. 959, 964, 31 A.L.R. 1045, the following rule is enunciated: "'Knowledge *possessed* by an agent while he occupies that relation and is executing the authority conferred upon him, as to matters within the scope of his authority, is notice to his principal, *although such knowledge may have been acquired before the agency was created,* if it appears that such knowledge was present in his mind at the time he acted for the principal.' Cooke v. Mesmer, 164 Cal. 332, 338, 128 P. 917, 920; Christie v. Sherwood, 113 Cal. 526, 530, 45 P. 820."

[3] In Hanlon v. Western Loan & Bldg. Co., 46 Cal.App.2d 580, 116 P.2d 465, where, as in the instant case, the agent admitted that he possessed the knowledge, attempted to be imputed to the principal, at the time he acted on behalf of the principal, the court held that knowledge acquired by the agent prior to the time he acted on behalf of the principal was imputable to the latter. Thus, petitioner is chargeable with that knowledge possessed by its agent, and the theory upon which reformation was presumably based, i. e., unilateral mistake of one party known or suspected by the other party, had sufficient evidentiary support.

Petitioner argues that the burden rested upon the employer to read the policy and its endorsements and then, if it discovered that it had not received that insurance which it requested and desired, to request that petitioner attach an additional endorsement to the policy insuring executive officers. In this connection petitioner cites McCormick v. Orient Insurance Co., 86 Cal. 260, 24 P. 1003 and Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 P. 51, 52. In the McCormick case the court simply stated that the facts upon which reformation of an insurance policy was sought were not supported by the findings and that no attack had been made on the findings. In the Madsen case a soliciting agent for the defendant carrier solicited insurance from plaintiff, a deaf person, filled in the warranties of the application for the policy and stated, knowing the statement to be false, that plaintiff was not deaf. Plaintiff did not sign the application but kept the policy, issued in conformity with the application, in his possession for six years after which time he was involved in an accident and attempted to enforce the policy. Relief was denied and the court held that "'by accepting and retaining the contract without objection, plaintiff was bound by its terms and cannot now be heard to say that he did not read it or know its terms.'" In Golden Gate Motor Transp. Co. v. Great American Indemnity Co., 6 Cal.2d 439, 58 P.2d 374, the plaintiff instituted suit against defendant carrier on the ground that the latter had not issued policies of insurance extending to plaintiff the coverage desired. Defendant relied upon the Madsen case, supra, but the court disposed of it and a companion case, Burch v.

Hartford Fire Ins. Co., 85 Cal.App. 542, 259 P. 1108, through the following language, 6 Cal.2d at pages 443–445, 58 P.2d at page 376:

> "'Those cases involved statements made by the insured in their written applications. In neither one did it appear that there was no written application and that, after the insured had made a request for full coverage, the insurer delivered a document which it represented covered the demand as made. If defendant contends that the plaintiff may not recover because it did not read the policy, such contention may not be sustained. * * * "It must be presumed, ordinarily, that persons are familiar with the terms of written contracts to which they are parties, and in the absence of fraud they are justly bound by the provisions therein, but the rule should not be strictly applied to insurance policies. It is a matter almost of common knowledge that a very small percentage of policy holders are actually cognizant of the provisions of their policies and many of them are ignorant of the names of the companies issuing the said policies. The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous—the one before us covering thirteen pages of the transcript—and in their numerous conditions and stipulations furnishing what sometimes may be veritable traps for the unwary. The insured usually confides implicitly in the agent securing the insurance, *and it is only just and equitable that the company should be required to call specifically to the attention of the policy holder such provisions as the one before us.*" (Raulet v. Northwestern Nat. Ins. Co., 157 Cal. 213, 107 P. 292.) * * * In McElroy v. British American Assur. Co., 9 Cir., 94 F. 990, at page 1000, the court said: "It may be said that the insured should have ascertained the correctness of the policy upon receiving it. * * * The insured had a right to rely upon the agent's performing his duty of making the contract in conformity with the information given; and the agent's failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured."'"

[4] For the same reasons that the doctrine stated in Madsen v. Maryland Cas. Co. was inapplicable in Golden Gate Motor Transp. Co. v. Great American Indemnity Co., supra, it is inapplicable in the principal case, since the employer made no warranties in an application and relied solely upon the agent to procure for it the coverage desired.

[5] In conclusion, petitioner urges that it was not chargeable with knowledge possessed by its agent due to the following provision of the policy: "No condition or provision of this Policy shall be waived or altered except by endorsement hereon * * *; nor shall notice to any agent, nor shall knowledge possessed by any agent * * * be held to effect a waiver or change in any part of this contract." In this connection petitioner cites Fidelity & Casualty Co. v. Fresno Flume & Irrigation Co., 161 Cal. 466, 119 P. 646, 37 L.R.A., N.S., 322, a case holding that, where the policy of insurance provided that no condition could be altered by an agent without written consent of the company, a *local* agent of the company could not effect a waiver unless the company consent thereto in writing. Cf. Arnold v. American Insurance Co., 148 Cal. 660, 668, 84 P. 182, 25 L.R.A.,N.S., 6; Bank of Anderson v. Home Ins. Co., 14 Cal.App. 208, 214, 111 P. 507; and Mayfield v. Fidelity & Casualty Co., 16 Cal.App.2d 611, 61 P.2d 83, all of which hold that a *general* agent has the power to effect a waiver notwithstanding a provision to the contrary in the policy. Since the instant proceeding involves the question of whether knowledge acquired by a general agent is imputable to his principal, the authority cited by petitioner is not controlling.

In United Zinc Cos. v. General Acc. Assur. Corp., 144 Mo.App. 380, 128 S.W. 836, precisely the same language as herein questioned, i. e., "nor shall notice to any agent, nor shall knowledge possessed by any agent * * * be held to effect a waiver or change in any part of this contract", was held to be unreasonable. In Schuler v. Metropolitan Life Ins. Co., 191 Mo.App. 52, 176 S.W. 274, 280, the court said:

> "The knowledge of the local agents who negotiated the contract is the knowledge of the company. (Citations.) And this is so even in the face of a contrary provision in the application or policy. James v. Mutual Reserve Fund Life Ass'n, 148 Mo. 1, loc. cit. 10, 49 S.W. 978."

In Prudential Ins. Co. v. Saxe, 77 U.S. App.D.C. 144, 134 F.2d 16, 31, certiorari denied 319 U.S. 745, 63 S.Ct. 1033, 87 L.Ed. 1701, the following was stated:

> "It should be * * * held (that the insurance company had notice), regardless of the provision that (the agent) had no power 'to bind the Company by * * * accepting any * * * information.' National Life Ins. Co. v. Grady, 1923, 185 N.C. 348, 117 S.E. 289; cf. New York Life Ins. Co. v. Eggleston, 1878, 96 U.S. 572, 577, 24 L.Ed. 841. If this were legally effective, there would be no way in which the company could acquire knowledge or be given notice of facts adverse to its interest. The only way such facts could be made legally effective against it would be by endorsement of waiver on the policy by one of the officers authorized to do this. Until that should be done, it could not be regarded in law as even knowing of the matter. Such a result would be absurd on its face. While a corporation may, within limits, bound the authority of officers and agents to make contracts, waivers or representations, whether promissory or of fact, it cannot disable itself entirely to receive information or notice of facts affecting its interests, as the clause depriving all agents of such power attempts to do. Otherwise it would become an incorporeal being, not only 'invisible, intangible, existing only in the *contemplation* of the law,' but one legally deaf and blind as well. There is no such legal creature."

This seems to be the only tenable view and to hold otherwise would allow the carrier, which drew the policy, to prevent reformation of the policy even though its agent failed to procure for the insured the type of coverage desired and even though the insured operated under the misconception that the policy which it had obtained extended to it the coverage the agent knew it expected. Therefore, reformation as ordered by the commission was proper on the theory that the employer had made a mistake known, through imputation of the agent's knowledge, to the petitioner and the award must therefore be affirmed.

[6] Petitioner argues that the commission by ordering reformation of the policy created a new contract for the parties. Of course, reformation cannot be ordered so as to create a new and different contract for the parties, 22 Cal.Jur. 710, but where, as here, the case falls within the language of Civil Code sec. 3399, "(w)hen, through * * * a mistake of one party, which the other * * * knew or suspected, a written contract does not truly express the intention of the parties * * *" the contract which was intended by the party acting under unilateral mistake known or suspected by the other, is, as a matter of law, the contract of the parties. Bank of America v. Granger, 115 Cal.App. 210, 220, 1 P. 2d 479. Petitioner cites Zurich General Accident & Liability Ins. Co. v. Stadelman, 208 Cal. 151, 280 P. 687, to the effect that the employer, in order to receive the coverage desired, was obligated to take the action required by the policy, and, having failed to do so, cannot be granted coverage other than is allowed by the terms of the policy. The Zurich case, however, was not an action for reformation and the employer made no claim that the policy as written did not conform to the contract as intended. The authority therefore has no application to the instant proceeding.

Award affirmed.

NOURSE, P. J., and GOODELL, J., concur.

92 Cal.App.2d 250

PEOPLE v. HOSHOR.

Cr. 4316.

District Court of Appeal, Second District,
Division 2, California.
June 7, 1949.

Hearing Denied July 7, 1949.

1. Licenses ⚷18½(10)

Courts charged with determining whether particular instrument is a "security" within corporate securities act must look through form to substance and determine whether transaction contemplates conduct of an enterprise by persons other than investor who is to share in its profits and finally in its proceeds, as an interest in such an enterprise is a "security" which under the act may not be sold by issuer without first obtaining permit from corporation commissioner. Gen.Laws, Act 3814, § 2(a) 7.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Security".

2. Licenses ⚷18½(10)

A "security" within corporate securities act, which requires permit for sale, is an instrument which creates a present right to a present or future participation in either income, profits or assets of a business carried on for profit. Gen.Laws, Act 3814.

3. Licenses ⚷18½(5)

"Company" within provision of corporate securities act forbidding sale by a "company" of any security without obtaining permit from commissioner, includes partnerships and individuals engaged in selling or negotiating for sale of securities of their own issue. Gen.Laws, Act 3814, § 2(a) 3, 6, §§ 3, 18.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Company".

4. Licenses ⚷18½(3, 5)

Purpose of corporate securities act, requiring permit for sale of securities, is to protect public against purchase of worthless securities and to that end the legislature has made an individual liable as a "company" when he is the issuer. Gen.Laws Act 3814, § 2(a) 3, 6, §§ 3, 18.

5. Licenses ⚷18½(5, 14)

Promoter who, as a general partner, sold interests in seven limited partnerships, and as an individual sold certificate of interest in business of which he was sole proprietor, without first having obtained permits to do so, was liable as a "company" and was guilty of violating the corporate securities act. Gen.Laws, Act 3814, § 2(a) 3, 6, §§ 3, 18.

6. Licenses ⚷18½(22)

Under corporate securities act forbidding sale of securities without permit, sales initiated by advertisement were forbidden to same extent as direct offer to sell without permit. Gen.Laws, Act 3814, § 2(a) 8.

7. Licenses ⚷42(4)

Evidence that promoter as a general partner sold interests in seven limited partnerships and as an individual sold certificate of interest in business of which he was sole proprietor, without first having obtained permits to do so, sustained conviction of violating corporate securities act. Gen.Laws, Act 3814.

8. Constitutional law ⚷230(1)
Licenses ⚷18½(2)

Corporate securities act construed so as to prohibit sale without permit of interests in limited partnerships and of certificate of interest in business of which promotor was sole proprietor, did not violate right of due process of law or of equal protection of the law. Gen. Laws, Act 3814; U.S.C.A.Const. Amend. 14.

9. Licenses ⚷18½(2)

Corporate securities act requiring permit for sale of securities, in effort to prohibit dishonest business, is not unconstitutional because honest business may be burdened and inconvenienced. Gen.Laws, Act 3814.

10. Licenses ⚷18½(2, 4)

Corporate securities act requiring license for sale of securities is not unconstitutional in any sense, and deprives no one of right to acquire, own or sell property but merely constrains conduct for purpose of protecting public against speculative schemes and plans for piracy, fraud and unjust enrichment. Gen.Laws, Act 3814; U.S.C.A.Const. Amend. 14.

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Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

John Hoshor was convicted of violating the corporate securities act and he appeals.

Affirmed.

Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Kent C. Rogers, Deputy Attorney General, for respondent.

MOORE, Presiding Justice.

Having been convicted by the court without a jury of eight violations of the Corporate Securities Act, Deering's General Laws, Act 3814, appellant demands a reversal of the judgments on two grounds, to wit, (1) the evidence is insufficient and (2) the act as construed by the trial court violates due process of law and equal protection of the law guaranteed by the 14th amendment to the federal constitution.

The Charge

It was charged that about September, 1947, appellant sold certificates of "beneficial interest in title to property, profits and earnings, more particularly described as a one-half interest in ownership and profits of a fresh fruit and vegetable juice bar, a business to be operated for profit * * * and a 10 per cent interest in the profits of any additional juice bars to be operated for profit and known as Fountain of Youth, without having first applied for and received * * * a permit so to do." The eight counts are substantially identical. In two of them the interest sold was less than half. The domicile of each business was at a separate location. The attention of each investor was attracted by an advertisement in a newspaper of general circulation, except in the case of the victim named in count 2 and he was introduced by his father to appellant about 30 days after the father had made his own investment. In each instance appellant entered into a limited partnership agreement in form similar to that on the margin hereof[1] with appellant as a general partner and the investor as a limited partner, to operate a

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[1] Exhibit 6 is the articles of copartnership with R. W. Bennett. Its applicable provisions are in substance or literally as follows:

1. Agreement to enter into a partnership for the manufacture and sale of juices.
2. Provides for the term of the partnership.
3. Provides for the firm name, to wit, "Fountain of Youth."
4. The street location of the business.

"5. John Hoshor has contributed services and will contribute further services towards the partnership, and R. W. Bennett has contributed the sum of Twenty-five Hundred Dollars ($2500) to the partnership business, payment of which is acknowledged by John Hoshor.

"As consideration for the contribution of R. W. Bennett, he shall receive a one-half interest in the capital and assets of the store situated at 5034 Hollywood Boulevard, Hollywood, California, and shall receive fifty per cent of the profits accruing at said store, and John Hoshor shall receive fifty per cent of the profits from said store.

"It is understood that additional stores may be opened from time to time, and R. W. Bennett shall receive ten per cent of the profits received by John Hoshor from any other or additional juice bars. It is expressly understood and agreed that R. W. Bennett shall be a limited partner and shall not be required to contribute any services towards the partnership business, and his liability shall, in no event, exceed the amount of his investment to the amount of Twenty-five Hundred Dollars ($2500)."

"6. John Hoshor shall be entrusted with the general management and control of the business and shall keep a true and correct account of all business transacted and shall diligently employ himself in the business of the partnership and be faithful to the other in all transactions relating to the firm and give, whenever required, a true account of all business transactions arising out of or in connection with the conducting of the business of the partnership. John Hoshor shall furnish a weekly accounting to R. W. Bennett in connection with the store at 5034 Hollywood Boulevard, Hollywood, California, and juice bar at a designated location, the latter to receive a share in the profits and an interest in the business. In one instance (count VIII) the investor was to receive a share in the profits only and that agreement was in form not one of a limited partnership but merely a receipt dated December 17, 1946, for $50.00 "for ½ profits in following accounts, statement and check in payment to be made starting once a week December 29." This is followed by a list of the names and addresses of 23 several concerns. Appellant's failure to issue a certificate of limited partnership to him may explain the meager sum of $500 received as contrasted with the $2,500 to $3,800 taken from the parties named in the first seven counts. In no instance did a purchaser recover a substantial part of his investment. Two or three received small sums for "salary." Under most of the agreements no juice bar was opened.

The Applicable Provisions

[1, 2] The issuance of the certificate of a limited partnership in a manner not authorized by the Civil Code, §§ 2478 and 2501,[2] is one of the acts denounced by the Corporate Securities Act which provides in section 2(a), paragraph 7, that "The word 'security' shall include any stock, bond, * * * certificate of interest or participation, certificate of interest in a profit-sharing agreement * * * beneficial interest * * * or earnings * * *." Whether any particular instrument is a security must be determined by its own contents and language. No definition has yet been formulated that will apply to every case. Courts must look through form to the substance and determine whether the transaction contemplates the conduct of an enterprise by persons other than the investor who is to share in its profits and finally in its proceeds. An interest in such an enterprise is a security which under the act is not to be sold by the issuer without his first having obtained a permit from the corporation commissioner. People v. Davenport, 13 Cal.2d 681, 684, 91 P.2d 892. A security has been defined as an instrument which creates a present right to a present or a future participation in either the income, profits or assets of a business carried on for profit. People v. Oliver, 102 Cal.App. 29, 36, 282 P. 813.

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shall furnish a periodic accounting of the business transacted from any future store.

"The partnership books shall be kept at the principal place of business of the partnership, and each partner shall have the right at all times to inspect and copy any of them and to have, on demand, true and full information of all things affecting the partnership affairs whenever circumstances render it just and reasonable.

"Money received by the partnership shall be deposited in a bank or banks to be selected by John Hoshor, and he may withdraw sums on deposit by his signature alone."

7. Inhibits the partner from selling, assigning or hypothecating his interest in the store without the written consent of the other. If Hoshor opens other stores he may admit other limited partners to share in them only.

"8. It is understood and agreed that John Hoshor shall not receive a salary or wage for his services, but his entire compensation shall be his share of the profits as aforesaid. It is contemplated by the parties hereto that the business might hereafter be incorporated. In the event that the business is incorporated as aforesaid, John Hoshor shall continue to devote his time and knowledge to the best of his ability to the business of the corporation, and his entire compensation shall be dividends and he shall not receive any salary or wage."

9. Requires the surviving party in the event of the death of one of them to allow the personal representative of the decedent to participate in the conduct of the business until the interest of the decedent has been ascertained.

10. Provides that if Hoshor engages in the manufacture of juices he shall provide them to the partnership at the manufactured cost.

11. Bennett is granted an option to select a one-half interest in any future store opened by Hoshor in connection with the partnership business provided that upon his acceptance of the one-half interest in another store, his share of the profits in the first store shall be reduced from 50 per cent to 10 per cent.

[2] Section 2478 of the Civil Code provides for the contents of a certificate of a limited partnership to be filed in the county clerk's office. Section 2501 makes provision for the amendment and for cancellation of certificates of partnership and for the filing of same in the offices where the certificate is filed and recorded.

[3, 4] Section 3 of the act forbids the sale by a "company" [3] of any security without first having obtained from the commissioner a permit, and section 18 makes a violation of section 3 a felony. Section 2(a) also makes "partnerships of every kind" a "company," whereby they are included within the inhibition of secton 3. Not only is a partnership included as a "company," but an individual is also when he sells or negotiates for the sale of a security of his own issue. Sec. 2(a), paragraph 6 of Corporate Securities Act [4]; People v. Woodson, 78 Cal.App.2d 132, 136, 177 P.2d 586. The purpose of the act is to protect the public against the purchase of worthless securities and to this end the legislature made the individual liable as a "company" when he is the issuer. People v. Craven, 219 Cal. 522, 525, 27 P.2d 906.

The Evidence

[5] It follows that appellant was liable as a "company" when he sold the certificate of interest as an individual (count VIII) as well as when he sold the partnership interests (counts I to VII) and issued certificates therefor. Having, as general partner, sold an interest in seven limited partnerships and in a business of which he was sole proprietor (count VIII) without first having obtained permits to do so, his guilt is clearly established. People v. Woodson, supra. The latter decision is a convincing precedent. On the investor's answering Woodson's advertisement, the latter stated that he had a lease on a ranch which was to be operated by a club with members and that he desired to sell 1/5 interest therein. On his payment of $2,000 the purchaser was to receive 20 per cent interest in all transactions of Woodson and a monthly salary of $300. At the same time he should receive Woodson's note for $2,000 and a certificate of limited partnership showing the investor to be the special partner and Woodson as the general partner. Notwithstanding Woodson's protestations and his ingenious efforts to conceal the true nature of his agreement the court held it to be a violation of the act.

Appellant's sales do not materially differ from those of Woodson or of Dutton, see 41 Cal.App.2d 866, 869, 107 P.2d 937. Theirs were not ordinary commercial transactions. Neither were they investors lending money at specified rates. Their contracts were of the same character as those of the victims named in the first seven counts herein.

[6, 7] The evidence of the interests sold by appellant is the written contracts of special partnerships; they were offered for sale to the public by advertisements in newspapers; they were sold to constituents of the public; they evidenced the investors' rights to participate in the profits and assets of the partnerships; and the profits were to be realized by means of the efforts of others and not through the buyers' industry or skill. The sales in every case were initiated by an "advertisement" which is forbidden to the same extent as is a direct offer to sell. Sec. 2(a), paragraph 8 of the Corporate Securities Act.

Appellant's Authorities

The authorities cited by appellant in support of his contention that the judgments are not supported by the evidence or by a reasonable interpretation of the act, People v. Davenport, 13 Cal.2d 681, 91 P.2d 892; Buttrick v. Seines, 209 Cal. 567, 289 P. 616; Staples v. Leidecker, 216 Cal. 604, 15 P.2d 514; Creasy Corporation v. Enz Bros. Co., 177 Wis. 49, 187 N.W. 666; People v. Steele, 2 Cal.App.2d 370, 36 P.2d 40, are readily distinguishable by their facts. None of them parallels the Woodson or the Dutton decisions. Neither are their facts similar to those at bar. Davenport was accused of selling securities "in the form of a series of agreements" for the sales of properties, the deferred payments to bear seven per cent interest. Buttrick v. Seines was prosecuted under the act as it read in 1917 and before an individual issuer was required to secure a permit. Staples v. Leidecker, decided in 1932, involved a preorganization agreement, made and accepted upon the condition that the corporation would with reasonable diligence procure a permit. In People v. Steele the contract provided that the investor should work. In the instant action seven contracts provided that the work should be done by appellant and the investor's only return was to be a percentage of the profits while the eighth investor (count VIII) was to do nothing but receive the "return from the half interest" of a juice bar business.

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[3] Deering's Gen.Laws, Act 3814. Corporate Securities Act. Section 2(a), paragraph 3. "The word 'company' includes all domestic and foreign private corporations, associations, syndicates, joint stock companies and partnerships of every kind, trustees as hereinafter defined, and also individuals as hereinafter defined."

[4] "The word 'individual' insofar as it is included in the definition of a 'company," includes only persons selling, offering for sale, negotiating for the sale of or taking subscriptions for any security of their own issue."

No Violation of Due Process

[8, 9] The contention that the right of due process of law and of equal protection of the law are violated by the act as applied has been completely answered by People v. Eiseman, 78 Cal.App. 223, 249, 248 P. 716, 727. The court there held that while it is true that the act burdens honest business, such burden is for the very good and only reason that "under its forms dishonest business may not be done." To defeat the latter the state cannot rely upon its own declarations of policy or upon the mere promises of operators. Conditions must be imposed and their performance enforced notwithstanding inconveniences caused to honest men. For sovereignty to abandon its watch care of society and to confess its inability to guard honest men against the plunderers because, forsooth, an occasional good citizen might be inconvenienced, would be to signify its utter helplessness to protect the very men who constitute the state. Merrick v. N. W. Halsey & Co., 242 U.S. 568, 585, 37 S.Ct. 227, 61 L.Ed. 498; Agnew v. Daugherty, 189 Cal. 446, 449, 209 P. 34. The corporate securities act was conceived for the purpose of providing a procedure "for enforcement of constitutional safeguards to the purchasing public." Not only is it a bulwark against fraudulent practices of those who seek to gain from the ruin or expense of others but is a companionate guide for honest brokers and investors in the issuance and sale of securities to, and purchases by, the public. Daugherty v. Riley, 1 Cal.2d 298, 305, 34 P.2d 1005; People v. Kuder, 93 Cal.App. 42, 50, 269 P. 198, 202, 630.

Appellant quotes generously from People v. Pace, 73 Cal.App. 548, 561, 238 P. 1089, in support of his claim that the act violates the fourteenth amendment. That decision does not apply. The securities Pace sold were his in bona fide ownership and were sold for his own personal benefit. Moreover, subdivision 3 of section 2(c) of the act was amended after the reversal of People v. Pace. Later decisions upheld the new provisions which require the individual owner of securities to obtain a permit before offering them for sale. People v. Claggett, 130 Cal.App. 141, 19 P.2d 805; People v. Shafer, 130 Cal.App. 74, 19 P.2d 861; Black v. Solano Co., 114 Cal. App. 170, 299 P. 843.

[10] The Corporate Securities Act is not unconstitutional in any sense. It deprives no one of his right to acquire, own or sell property, but merely constrains conduct for the purpose of protecting the public against speculative schemes and plans for piracy, fraud and unjust enrichment. The prevention of loss or injury to the innocent by the ruthless will of the enemies of society or of the archaic-minded is an obligation of the state whose judgment is supreme. Hall v. Geiger-Jones Co., 242 U.S. 539, 551, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643; Barnhill v. Young, D.C., 46 F.2d 804, 805.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

92 Cal.App.2d 210

KAZANJIAN v. PACIFIC GREYHOUND LINES.

Civ. 16727.

District Court of Appeal, Second District, Division 1, California.

June 6, 1949.

1. Negligence ⚿136(14, 26)

Only when facts are clear and indisputable and when no other inference than that of negligence or contributory negligence can be drawn from facts, does issue become one of law and not of fact.

2. Appeal and error ⚿996
Trial ⚿142

When honest difference of opinion between men of average intelligence arises as to effect of evidence, a question of fact arises, and finding of triers of fact becomes conclusive upon appellate tribunals.

3. Carriers ⚿318(7)

Evidence that bus driver left depot at 5 miles per hour in darkness with headlights on, that lights of truck approaching bus' left in narrow alley were not burning, that driver heard no horn and stopped immediately when he saw truck, but that slight impact resulted, supported verdict for bus company as against claim of passenger for injuries resulting from jarring. Civ.Code, § 2100; Vehicle Code, § 553.

4. Damages ⚿208(2)

In passenger's action against bus company for injuries, whether painful spinal condition was entirely anatomical or result of shaking in collision between bus and truck was for the jury. Civ.Code, § 2100; Vehicle Code, § 553.

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Appeal from Superior Court, Los Angeles County; Ray P. Brockman, Judge Assigned.

Action by Margaret Kazanjian against Pacfiic Greyhound Lines, a corporation, for personal injuries sustained in a bus and truck collision. From the judgment, plaintiff appeals.

Affirmed.

Armend H. Gizir, Los Angeles, for appellant.

W. I. Gilbert, Jr., and Reginald I. Bauder, Los Angeles, for respondent.

DRAPEAU, Justice.

This appeal is prosecuted by plaintiff from a judgment entered on the verdict of the jury in favor of the defendant, and is presented upon the judgment roll and a settled statement on appeal.

From such statement it appears that appellant was a passenger on a bus owned and operated by respondent, and as the bus was leaving the Cahuenga station at 4:30 A.M. of September 6, 1946, it collided with a rubbish truck. At the time of the impact, appellant was resting her head on her arms on the back of the seat in front of her and was suddenly awakened from a half sleep by being thrown about and striking her back against the protruding right arm rest of her seat. She did not see how the accident occurred, but noticed a truck in the alleyway in front of the bus. She felt a sharp pain in her back at the time of the accident, but thought it was not serious. After leaving the bus at the terminal in Los Angeles, appellant's back was hurting to such an extent that she took a taxi to her place of business, where she also resided, and thereafter was disabled for several months during which time she was under medical care and for ten days was in a hospital. Because of her disability she was unable to operate her cleaning and pressing business which she disposed of in January, 1947.

At the trial, appellant's doctors testified that her disability was caused by the accident and that its prolonged and severe character was due to traumatic aggravation of pre-existing arthritis and a ruptured intervertebral disc, such opinions being based upon examination and treatment of appellant and upon X-ray negatives.

Respondent's doctor, basing his opinion upon a study of the X-ray introduced in evidence, testified that the condition of the intervertebral spaces was entirely anatomical and not the result of trauma, and that there was no evidence of injury or trauma.

The driver of the rubbish truck testified that after picking up rubbish, he pulled over to the left of the 20 foot alley, in which he was driving the truck at a speed of eight or ten miles an hour, so that he could make a right-hand turn into a 15 foot alley (which formed an L with the 20 foot alley, above referred to) for another rubbish pickup. After he started his right turn he saw respondent's bus commencing a left turn out of the station into the 20 foot alley at a speed of 10 or 12 miles per hour. The witness reduced his speed and stopped and the bus continued until the witness sounded his horn, whereupon the bus stopped quickly but not before the left front thereof collided with the left front of the rubbish truck. At the time of the impact it was dark, the lights of both vehicles were lighted and the damage to both vehicles was slight.

The driver of the Greyhound bus testified that he had worked for respondent three years and had driven out of the Cahuenga station numerous times during hours of darkness; that a three foot wall forming part of the station building juts out into the west line of the 20 foot alley and marks the north end thereof, and therefore in making a left-hand turn out of the station yard it is necessary to watch the right side for clearance from this wall; hence at the time in question he looked to the right as he made the turn to avoid the wall. He also testified that his headlights shone down the alley a distance of 50 or 75 feet; that he heard no horn and the lights of the rubbish truck were not on; that he saw the truck after entering the alley and stopped almost immediately; that he had been traveling about 5 miles per hour; that the impact was slight and occurred four or five feet in the alley; that he first saw the truck when his bus was about four feet from it; and that the truck was stopped at the time of the impact.

The brothers Kelley, passengers seated in the front seat of respondent's bus, testified that just prior to the collision the bus was traveling very slowly and was as far to the right as it could possibly be, when suddenly the truck drove up and both vehicles stopped immediately, the collision being very slight; that the left front fender of each vehicle collided, leaving only a small dent in each, and that the "jar did not disturb the passengers at all nor did anyone complain of injury."

Appellant urges that while negligence and proximate cause are ordinarily questions of fact for the jury, in the instant cause respondent's bus driver was guilty of negligence as a matter of law because of the degree of care owed by a common carrier to its passengers pursuant to section 2100 of the Civil Code. That section provides that "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

In this connection it is argued that said driver violated (1) the statutory duty imposed by section 553 of the Vehicle Code; (2) the general duty to anticipate the presence of vehicles in the public alley, arising from past knowledge; and (3) that he failed or neglected to look where his headlights disclosed the presence of danger in sufficient time to avoid it.

[1, 2] As stated in Continental Insurance Co. v. Pacific Greyhound Lines, 43 Cal.App.2d Supp. 877, 882, 111 P.2d 37, 440, quoting from McQuigg v. Childs, 213 Cal. 661, 3 P.2d 309: " 'It is only when the facts are clear and indisputable, and when no other inference than that of negligence or contributory negligence can be drawn from the facts, that the issue becomes one of law and not of fact. * * * When honest difference of opinion between men of average intelligence arises as to the effect of the evidence, a question of fact arises and the finding of the triers of fact becomes conclusive upon appellate tribunals.' " Continuing, the court there held that "It was for the court to determine what would have been the conduct of a person of ordinary prudence under the circumstances of the case, as well as to determine whether or not the facts show negligence."

[3] Likewise in the case under review, the jury was entitled to believe the bus driver's version of the accident, to-wit: that he was traveling at a speed of 5 miles

per hour; that the lights of the truck were not on and that he heard no horn and that he stopped immediately when he saw the truck. Moreover, the jury was also entitled to give due weight to the testimony of other passengers that the sudden stopped by the slowly moving bus "did not disturb the passengers at all nor did anyone complain of injury."

[4] As heretofore shown there was a direct conflict in the testimony of the doctors with respect to appellant's injury; hence that also became a question for the determination of the jury and such determination is binding upon this court.

An examination of the entire record discloses sufficient evidence in support of the verdict and the judgment in that it showed affirmatively that respondent exercised the "utmost care and diligence" as well as a reasonable degree of skill for the safety of its passengers and to avoid the accident.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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92 Cal.App.2d 378

RICH v. RIVERBANK CANNING CO.

Civ. 7570.

District Court of Appeal, Third District, California.

June 14, 1949.

1. Appeal and error 🔑994(3), 1012(1)

In action tried to court, weight of evidence and credibility of witnesses were for trial court, and on appeal, though testimony was conflicting, District Court of Appeal would consider the evidence in aspects most favorable to winning party and findings of trial court.

2. Sales 🔑181(13)

In action for failure to take and pay for a crop of tomatoes grown by plaintiff, for purchase of which defendant cannery had contracted, evidence justified judgment for defendant on ground that defendant was excused from performance in full under contract because of a labor shortage beyond defendant's control, which permitted defendant to operate only a small part of its canning facilities, and that defendant under the contract was not required to accept more of plaintiff's tomatoes than defendant did accept.

Appeal from Superior Court, Yolo County; C. C. McDonald, Judge.

Action by J. M. Rich against Riverbank Canning Company, a corporation, for failure of defendant to take and pay for a crop of tomatoes grown by plaintiff, for the purchase of which defendant had contracted. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

A. G. Bailey, John A. Young, Woodland, for appellant.

Johnson and Davies, Sacramento, F. M. Brack, Modesto, Robert H. Schwab, Jr., Woodland, for respondent.

ADAMS, Presiding Justice.

Appellant Rich sued defendant Riverbank Canning Company to recover damages for the failure of defendant to take and pay for a crop of tomatoes grown by appellant in 1944, for the purchase of which defendant had contracted. It was alleged in plaintiff's complaint that defendant had agreed to furnish plaintiff with picking boxes at his field, but had failed to furnish a sufficient number, and that as a result 1289 tons of plaintiff's tomatoes were undelivered, resulting in a loss to him of some $20,624.00, for which sum he prayed judgment.

Defendant, in its amended answer, incorporated the contract between the parties, denied that it had failed to furnish picking boxes, alleged that it had taken from plaintiff more than his pro rata share of the total amount of tomatoes defendant could handle, and set up as a further defense that by reason of a shortage of labor it had been unable to pack the entire quantity of tomatoes which its existing facilities would otherwise have been adequate to handle, and that, by reason of the provisions of the contract, it was excused from accepting delivery of more tomatoes from plaintiff than it actually did accept.

Section 13 of the contract which defendant relied upon provided: "In case of fire, strikes or other labor disturbances, lack of transportation facilities, * * * *shortage of labor* or supplies, * * * or any unavoidable casualty or cause beyond the control of Buyer, affecting in any way the conduct of Buyer's business or canning operations, including any obligation on Buyer's part to transport the tomatoes covered hereby, *or to furnish boxes therefor,* Buyer will be excused from performance hereunder during the period that Buyer's business or canning operations are so affected, and Buyer may, during such period, accept such portion of such tomatoes as Buyer, in its judgment, can economically handle." (Italics added.)

After trial of the issues raised by the pleadings the trial court rendered judgment for defendant pursuant to findings in its favor. The findings recite that defendant furnished plaintiff boxes for the delivery of 1248.543 tons of tomatoes, but that it was not true that it "wholly failed, neglected and refused to deliver any greater number of boxes though often requested and demanded by the plaintiff"; also, "That it is not true that except for defendant's refusal to furnish picking boxes the plaintiff would have delivered to the said defendant more than 1289 tons of tomatoes over and above the 1248.543 tons so delivered as aforesaid at the contract price of $25.00 per ton, or $32,225.00 worth of tomatoes; that it is not true that the plaintiff's cost of picking, harvesting, and delivering said tomatoes to the defendant at his roadside would not have exceeded $9.00 per ton, or $11,601.00; that it is not true that plaintiff, as a direct and proximate result of defendant's refusal, neglect and failure to deliver said picking boxes as aforesaid has suffered loss and damage in the sum of $20,624.00, or in any other sum or at all."

The court then found that because of a shortage of labor defendant was able to operate only a small part of its canning facilities; that it could, with sufficient labor, have packed 141,000 tons of tomatoes but was only able to pack 40,434 tons; that it took delivery of more than plaintiff's pro rata share of the total amount of tomatoes of which it accepted delivery, and that by reason of section 13, of the contract it was excused from accepting delivery of more tomatoes than it did accept.

There was also a finding that defendant gave plaintiff notice that because of labor shortage it could not take delivery of plaintiff's whole crop; that other canneries were seeking tomatoes, and defendant requested plaintiff to sell to others such of his tomatoes as defendant could not take, and brought to plaintiff a representative of another cannery who offered to buy plaintiff's excess, but that plaintiff refused to sell even though he knew defendant could not take all of his crop, a portion of which was spoiling; that it was plaintiff's duty to sell to others when opportunity was presented and thus minimize defendant's damages, and that had plaintiff done so he would have suffered no damage. And, finally: "That it is true that defendant was excused from performance in full of said contract because of said labor shortage at the Cannery which was beyond the control of defendant; that it is true that defendant did everything humanly possible to obtain the necessary labor and exercised due and proper diligence to comply with all of its obligations under said contract."

On this appeal plaintiff contends first that the Fifth finding of the trial court is in fact two findings in the form of negative pregnants which will not support the judgment rendered; second, that the evidence does not support the defense of labor shortage; and, third, as to the finding that plaintiff should have sold to others and mitigated damages, that defendant refused to give plaintiff a written release, that it was itself glutting the market leaving none for plaintiff, that defendant at no time advised plaintiff of the extent of its inability to furnish boxes, but instead kept promising plaintiff it would do better, and that the contract provided that title to plaintiff's tomatoes passed to defendant on the signing of the contract.

Respondent replies that, while the first portion of the fifth finding might, standing alone, constitute a negative pregnant, as a whole it does not, because of the latter portion; that other findings show that plaintiff lost nothing by virtue of any act or failure to act by defendant; that if it be assumed that by reason of the negative pregnant there is a finding that plaintiff lost $20,624.00 there is no finding that it was caused by defendant's acts or conduct, since the other findings show it was not; and that, at most, the negative pregnant findings are on an immaterial issue.

We are constrained to agree with respondent on this latter point; for if, as the court found, complete performance on the part of respondent was excused because of an acute labor shortage, which, by the very terms of the contract, constituted a valid excuse for incomplete performance, it is immaterial that appellant suffered financial loss by reason of respondent's failure to take his entire crop. The important question then is whether there is evidence in the record to support the finding regarding such alleged labor shortage and the finding that respondent took delivery of a fair pro rata share of appellant's crop.

[1] The weight of the evidence and the credibility of the witnesses were matters for the determination of the trial court, and, on this appeal, though the testimony is conflicting, we are compelled to consider it in the aspects most favorable to the winning party and the findings of the trial court. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; In re Estate of Teel, 25 Cal.2d 520, 527, 154 P.2d 384; Fackrell v. City of San Diego, 26 Cal. 2d 196, 207, 157 P.2d 625, 158 A.L.R. 773.

Thus considered it shows that Riverbank, in 1944, installed additional equipment which increased its potential capacity; that thus equipped it could have processed 1800 tons of tomatoes daily; that it had more than enough picking boxes; that because of a labor shortage it was never able to operate its plant to capacity; that the principal reason for the labor shortage was the general manpower shortage during the war, which was particularly felt in agricultural regions where laborers could secure work in agricultural pursuits and were not subject to deductions for various taxes imposed in industrial pursuits; that Riverbank used all reasonable means to secure necessary labor by hiring cars and buses for transportation from towns, securing delay in the opening of at least one high school in order to employ its students, tried to secure enlisted men from army camps, kept in touch with U. S. Employments Services, inserted advertisements in publications, distributed printed dodgers, set up contests for prizes for employees who remained two weeks or longer, and employed housewives; that the labor shortage limited not only its canning output, but affected its handling of tomatoes arriving at the plant so that large quantities of them accumulated on trucks and loading platforms and thus delayed emptying of boxes and their return to growers; that it attempted to distribute boxes equitably among the growers as the needs of each demanded where such needs varied from time to time; and that it diverted some of the tomatoes contracted for to other canneries, and released some, and offered to release other growers, including plaintiff, so they might sell some of their crop to others.

[2] While there is evidence contradictory of some of the foregoing testimony, and it may well be said that respondent contracted for tomatoes which it should have foreseen it would be unable to utilize, and that many of the growers with whom it had contracted, including plaintiff, sustained losses because defendant did not take their available crops, since the trial court has found that defendant was excused from performance in full of said contract because of said labor shortage which was beyond its control, and that it did everything humanly possible to obtain necessary labor, and that it exercised due and proper diligence to comply with all of its obligations to plaintiff under its contract, this court must abide by such findings, there being no lack of testimony to sustain them.

Since the findings of the trial court establish that respondent was excused from performance of its contract because of labor shortage and appellant is therefore not entitled to recover any damages from respondent, the amount of plaintiff's losses and the question whether he took proper steps to mitigate damages become immaterial on this appeal; and it need not be determined whether or not the findings claimed to be in the form of negative pregnants are construed as findings that appellant could have delivered more or less tomatoes had it been furnished more boxes, or as constituting findings of the amount of appellant's loss.

The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.

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92 Cal.App.2d 325

In re RIDGWAY'S ESTATE.

RIDGWAY et al. v. RIDGWAY.

Civ. 16817.

District Court of Appeal, Second District,
Division 1, California.

June 9, 1949.

Rehearing Denied June 27, 1949.

Hearing Denied Aug. 4, 1949.

1. Wills 🔑41, 47

Old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent-mindedness and mental confusion do not show lack of "testamentary capacity."

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Testamentary Capacity".

2. Trial 🔑165, 178
Wills 🔑326, 327

A nonsuit or directed verdict may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence proper value, and indulging in every legitimate inference deducible therefrom, evidence is insufficient to support verdict for plaintiff, and such rule is applicable in will contests.

3. Wills 🔑55(1)

Mere proof of testator's mental derangement or even of insanity in medical sense is not sufficient to invalidate a will, but contestant is required to go further and prove either such complete mental degeneration as denotes utter incapacity to know and understand those things which law prescribes as essential to making of a will, or existence of a specific insane delusion which affected making of the will.

4. Wills 🔑324(2, 3)

Evidence was insufficient to present question for jury as to whether will executed by 85 year old testator making certain provisions for his second wife for life, after property settlement had been previously entered into at time of marriage under which all of testator's property should go to his adult children by prior marriage, was invalid either on ground of lack of testamentary capacity or on ground of undue influence exerted by second wife.

5. Wills 🔑155(1)

Will cannot be set aside for "undue influence" unless there is proof of a pressure which overpowered the mind and bore down volition of testator at very time will was made.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Undue Influence".

6. Wills 🔑166(12)

Undue influence invalidating will may be established by indirect and circumstantial evidence, but such proof, whether direct or circumstantial, must be of a substantial nature, and conjecture will not suffice.

Appeal from the Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding in the matter of the estate of John L. Ridgway, deceased, wherein Loretta Ridgway, as executrix and legatee, petitioned for probate of a testamentary instrument dated March 18, 1947, and Claude A. Ridgway petitioned for probate of a previous will dated May 3, 1941, and Claude A. Ridgway and others filed objections to probate of later will. From order admitting later will to probate, the contestants appeal.

Affirmed.

Rinehart, Merriam, Parker & Berg, Pasadena, Launer, Chaffee & Launer, Walter B. Chaffee, Leland C. Launer, Fullerton, for appellants.

Roland Maxwell, Paul H. Marston, Pasadena, for respondent.

DORAN, Justice.

The testator, John L. Ridgway, died on December 17, 1947, aged 85; Loretta Ridgway, a second wife, survived, together with testator's five adult children by a previous marriage, contestants and appellants herein. The respondent, Loretta Ridgway, petitioned for probate of a testamentary instrument dated March 18, 1947. Contestant Claude A. Ridgway then petitioned for probate of a previous will dated May 3, 1941, and all contestants filed objections to the probate of the later will, claiming that said instrument was not executed in proper legal form; that decedent was of unsound mind, and that the instrument had been procured through undue influence exercised by the respondent, testator's second wife.

The two petitions for probate were consolidated; the case was tried before a jury, and at the conclusion of contestants' evidence the trial court granted a nonsuit as to all grounds of the contest. Both testamentary instruments were admitted to probate. Contestants appeal from the whole of such order excepting that portion thereof which admits to probate the will dated May 3, 1941.

It appears from the record that on May 3, 1941, testator's first wife, Anise Ridgway, and Mr. Ridgway, after being married some fifty years, executed certain deeds in favor of the children, which deeds were not recorded until 1947. On the same day that the deeds were executed, May 3, 1941, testator also executed the earlier of the two wills admitted to probate. That will, in the language of appellants' brief, "left everything which had not been deeded to the children to Anise Ridgway with a proviso that if she were not living at the time of the testator's death that the property should be divided among the children * * * so that the testamentary share plus the deeded share of each child would be equal". Anise Ridgway, the first wife, died in June, 1942.

Testator was married to the respondent, Loretta Ridgway, on January 1, 1943, who was eighteen years younger than the testator. "On May 11, 1943", quoting from appellants' brief, "they entered into a property settlement agreement whereby, in return for $10,000.00 and certain furniture and furnishings of their home, Loretta Ridgway waived and relinquished 'all right, title and interest in and to all the property and estate of which the said L. J. Ridgway may die seized or possessed or in which he may have an interest; or any right which I may have to inherit from my said husband, or to administer upon his estate in case of his death'." Theretofore, testator had written the children that a settlement with the new wife would be made and that the deeds and will previously made would not be affected.

The properties for which deeds had been made out to the children on May 3, 1941, included the Glendale family residence where testator and the second wife continued to live until Mr. Ridgway's death on December 17, 1947. Other properties conveyed to the children were, a six-unit apartment and a four-unit apartment, both in Long Beach; an oil lease on Long Beach property; two residences in Long Beach and another parcel there located; 15 acre ranch in Tulare County, and certain shares of stock.

According to appellants' brief, "Although the testator had been gradually failing mentally over a considerable period of time, it was not until November of 1946 that it became obvious to his children that testator was not normal mentally. * * * he was hospitalized from February 1 to February 10, 1947". In that month the son and contestant Claude A. Ridgway, instituted guardianship proceedings, serving testator with a citation therein. On March 17, 1947, testator signed a complaint in an action to secure return of the properties previously deeded to the children; signed an agreement with the wife cancelling the property settlement agreement, and executed the will which appellants attack.

The will of March 18, 1947, gave to the surviving wife, Loretta Ridgway, "a life interest in and to the property now occupied by us as our residence at 1953 West Mountain Street, Glendale, California", with the direction "that there shall be paid to her from my estate for the rest of her life sufficient moneys to pay for all taxes and upkeep of said property * * * I further desire that she have a family allowance to be fixed by the Court, separate and distinct from this legacy and bequest".

It is further stated in said will that certain recorded documents, namely the deeds testator had previously made to the children, "were never intended by me to be transfers of present title or to be effective during my lifetime or to convey any right, title or interest whatsoever but were intended by me as testamentary dispositions", but stated that "Subject to the provisions of this Will, I desire my property to go as set forth in said documents". If any person "directly or indirectly seeks to have said documents declared to be deeds or assignments", etc. "I leave to such persons, in lieu of any other provision, the sum of One Dollar ($1.00) and no more".

It is appellants' contention that "Substantial evidence was presented at the trial below to support contestants' allegation that testator was incompetent to make a will on March 18, 1947", for the reason that "Testator was not able to understand and carry in mind the nature and situation of the property"; was not capable "of understanding the act he was doing"; and at the time of executing the will, was "suffering from a delusion". Appellants also assert that "There was substantial evidence of undue influence" on the part of the wife, Loretta Ridgway. Appellant therefore argues that the nonsuit granted by the trial court constitutes reversible error.

The record discloses evidence to the effect that from December, 1946, through March 18, 1947, the testator was weak, physically and mentally; that his memory was faulty but better for events that happened many years ago than in respect to recent events; that the attitude towards testator's children fluctuated from anger to affection. During pendency of the guardianship proceedings a specialist appointed by the court examined John L. Ridgway, and as to testator's history was given "a fairly connected story". A physical examination revealed hardening of the arteries, low blood pressure and marked deterioration. On subsequent examinations, testator "was unable to recall some of the details I had asked him at first"; and "was unable to give me more than four or five parcels of his property". At the trial of the present action three of decedent's sons expressed the opinion that the father was of unsound mind, based upon the latter's childishness, inability to engage in satisfactory conversation, absence of any idea of values; that the father could not understand simple business transactions, etc.

[1] The respondent's brief points out, however, that, as stated in Re Estate of Selb, 84 Cal.App.2d 46, 49, 190 P.2d 277, 279, "It has been held over and over in this state that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity". Respondent also calls attention to the fact that the later will represents a perfectly natural disposition in that testator therein provides for the support and housing of the surviving wife, with the remainder going to the children at the wife's death.

[2] On an appeal from an order granting a nonsuit, the rule in this state is set forth in Re Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579, 580, as follows: "A nonsuit or directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.'" The foregoing means that the conflict, or the fact that there is a conflict, must be disregarded. The rule is as applicable in will contests as it is in other

forms of litigation. In re Estate of Ricks, 160 Cal. 450, 117 P. 532. In the present controversy there is no disagreement in respect to the applicable rule; the question to be determined is simply whether, in the trial court, contestants presented substantial evidence of the testator's incapacity and of undue influence on the part of testator's second wife. Only if such evidence is disclosed by the record was the trial judge in error in granting a non-suit.

[3] "It is well settled", states the court in Re Estate of Arnold, 16 Cal.2d 573, 585, 107 P.2d 25, 32, "that mere proof of mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will, but the contestant is required to go further and prove either such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a will, or the existence of a specific insane delusion which affected the making of the will in question."

[4-6] Giving to the contestants' evidence "all the value to which it is legally entitled", as required by the rule governing nonsuits, it falls far short of suggesting either the "complete mental degeneration" or any "specific insane delusion" specified in Re Estate of Arnold, quoted above. All that the record does disclose, indeed, is that an aged man, suffering from general senile deterioration both mental and physical, subject to forgetfulness, and leaving the conduct of business matters to a much younger second wife, has executed a will intended to provide for such wife during the latter's lifetime. Testator did not disinherit the children; nor can it be said that the wife "benefited unduly". As respondent's brief asserts, "decedent was doing the natural thing in providing for his wife for her lifetime".

Neither in respect to testator's alleged incompetency, nor on the issue of undue influence claimed to have been exercised by the respondent wife, does the record disclose substantial evidence which should have been passed upon by the jury. In reference to the matter of undue influence, it is said in Re Estate of Arnold, 16 Cal.2d 573, 577, 107 P.2d 25, 27, " 'The unbroken rule in this state is that courts must refuse to set aside the solemnly executed will of a deceased person * * * unless there be proof of "a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made." ' In re Estate of Gleason, 164 Cal. 756, 765, 130 P. 872, 876 * * *." Conceding that a confidential relation existed between the testator and the respondent wife, and that testator was aged and in poor health, the contestants' evidence again falls far short of showing undue influence as that term is defined in the above and other cases. Although it is true, as argued in appellants' brief, that undue influence may be established by indirect and circumstantial evidence, such proof, whether direct or circumstantial, must be of a substantial nature; —conjecture will not suffice. And appellants' brief has cited no case in any way comparable to the present situation, which furnishes support for the contentions herein.

The order appealed from is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER, J., dissenting.

92 Cal.App.2d 173

In re SILVER'S ESTATE.

SILVER v. SILVER.

Civ. 16815.

District Court of Appeal, Second District,
Division 2, California.

June 3, 1949.

Hearing Denied July 28, 1949.

1. Executors and administrators 🔑194(7)

A beneficiary of a testamentary trust was entitled to appeal from an order granting a family allowance.

2. Appeal and error 🔑151(2)

A beneficiary under a trust created by will is an "aggrieved party" and entitled to an appeal from an order which adversely affects his interest.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Aggrieved Party".

3. Executors and administrators ⚿194(3, 7)

Where issue presented was whether any sum was necessary for the support and maintenance of petitioner during the administration of the estate, exclusion of evidence that petitioner had received $76,000 from the estate and had a substantial income from the monies which she had invested and that there was $19,000 being held which had been offered to her and which she had refused, was prejudicial error. Probate Code, §§ 680, 682.

4. Executors and administrators ⚿194(5½)

On petition for family allowance unsworn statement of petitioner's attorney that petitioner could not spend or use certain funds mentioned in offer of proof was not "evidence" and could not be considered by trial court in making its findings. Probate Code, §§ 680, 682.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Evidence".

5. Trial ⚿396(4)

Unsworn statements of counsel not intended to be and not amounting to stipulations of fact do not constitute evidence which may be considered by trial court in making its findings of fact.

◆

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Proceeding in the matter of the estate of Isidor Silver, deceased, on the petition of Helen Silver, for a family allowance, which was contested by Marc Silver and Joseph Shemanski. From an order granting the petition, Marc Silver appeals.

Order reversed.

Bodkin, Breslin & Luddy, S. V. O. Prichard, and Henry G. Bodkin, Los Angeles, for appellant Marc Silver.

Joseph W. Ryan and Kenneth J. Murphy, Los Angeles, for respondent Helen Silver.

McCOMB, Justice.

Marc Silver, a beneficiary under a testamentary trust created by the will of Isidor Silver, deceased, appeals from an order of the superior court awarding Helen Silver, decedent's widow, a family allowance.

Facts: By the last will and testament of Isador Silver he created a testamentary trust of which Marc Silver (appellant) was a beneficiary. Helen Silver, decedent's widow, filed a petition for a family allowance alleging that $1500.00 per month was a reasonable amount to be allowed her and was necessary for her support and maintenance during the administration of the estate. The executor of the estate filed an answer denying the foregoing allegations. Appellant filed his objections to the granting of the petition in which he (1) denied that $1500.00 a month or any other sum was necessary for the support and maintenance of decedent's widow, and (2) alleged that she had been paid since decedent's death the sum of $76,000, which she had invested and from which she derived the income.

Offer of Proof: At the time of the hearing appellant through his attorney made the following offer of proof to which the objection of petitioner was sustained:

"Mr. Bodkin: Your Honor, we offer at this time to prove that this lady received $76,000 in cash February 28, 1946. She received $50,000 at that time. She has received $26,000 in payments thereafter. There is $19,000 being held, offered to her, which she has refused. She can have it any time she will accept it. We offer to prove further she has had a substantial income from the monies which were invested, and we are offering that to show the lack of necessity.

"Mr. Murphy: The offer is objected to on the ground that the funds mentioned have been impounded and set aside pursuant to stipulation made in open court, and that she cannot spend or convert those funds at all. They may have to go back into this probate estate. We don't know.

"Mr. Bodkin: If your Honor please, I am making that offer, and I don't agree that there was such a stipulation; but whether there was such a stipulation or not, it would only be during the pendency of that action.

"The Court: I deny the offer of proof."

Findings: The trial court found in part as follows:

"* * * that it is true that the sum of $600 per month can be paid to said Helen Silver during the administration of the estate without detriment or prejudice to any of the beneficiaries or claimants of the estate.

"That it is not true that said Helen Silver has a reasonable maintenance derived from other property, nor that she has sufficient personal means for her support and maintenance."

Order awarding a family allowance: Predicated upon its findings the trial court awarded petitioner the sum of $600 per month as a family allowance.

Preliminary question: Is Marc Silver a proper party to appeal from the order granting a family allowance?

[1, 2] This question must be answered in the affirmative. A beneficiary under a trust created by a will is an aggrieved party and entitled to appeal from an order which adversely affects his interest. In re Estate of Plaut, 27 Cal.2d 424, 425 et seq., 164 P.2d 765, 162 A.L.R. 837; In re Estate of Fay, 145 Cal. 82, 87, 78 P. 340, 104 Am.St.Rep. 17. In the instant case Marc Silver was a beneficiary under a testamentary trust created by the will of decedent. Should the order for a family allowance be valid it would obviously affect his interest in an adverse manner since the corpus of the trust estate would be less than otherwise. Therefore, under the above stated rule, he was entitled to appeal.

Issue: Did the trial judge commit prejudicial error in sustaining an objection to appellant's offer of proof?

[3] This question must also be answered in the affirmative. Section 680 of the Probate Code reads: "*Right to allowance: Preference.* The widow and minor children are entitled to such reasonable allowance out of the estate *as shall be necessary* for their maintenance according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent." Section 682, Probate Code reads: "*Where parties have other support.* If the widow or any minor child has a *reasonable maintenance derived from other property,* and there are other persons entitled to a family allowance, the allowance shall be granted only to those who have not such maintenance." (Italics added.)

Petitioner alleged that "$1500 per month" was "a reasonable amount and an amount" required by her for her support and maintenance during the administration of the estate. The executor in his answer denied this allegation and appellant in his objections also denied it. Hence these issues were presented to the trial court for determination: (1) Was any sum necessary for the support and maintenance of petitioner during the period of the administration of decedent's estate? The court failed to make a finding on this issue. Such failure constituted reversible error. (2) If a sum was necessary for her support and maintenance what was a reasonable amount to allow her? Clearly if petitioner had $76,000 invested from which she was deriving a substantial income which was available for her immediate use, such fact was material and relevant for the trial court to consider in determining the above issues, and its failure to permit appellant to introduce evidence in support of his offer of proof was prejudicially erroneous.

[4, 5] The unsworn statement of petitioner's attorney that she could not spend or use the funds mentioned in the offer of proof was not evidence and could not be considered by the trial court in making its findings. The rule is established that unsworn statements of counsel not intended to be, and not amounting to, stipulations of fact do not constitute evidence which may be considered by the trial court in

making its findings of fact. (People v. Robin, 56 Cal.App.2d 885, 891, 133 P.2d 436.)

In view of our conclusions it is unnecessary to consider other points argued by counsel.

The order is reversed.

MOORE, P. J., and WILSON, J., concur.

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92 Cal.App.2d 201

ROBERTSON et al. v. NICHOLS et al.

Civ. 16621.

District Court of Appeal, Second District, Division 1, California.
June 6, 1949.

1. Covenants ⚷68

Under statute providing that every covenant in grant of estate in realty, which is made for direct benefit of the realty, or some part of it then in existence, runs with the land, a burdensome covenant contained in deed which does not benefit the conveyed realty is not binding upon transferees of grantee. Civ. Code, § 1462.

2. Covenants ⚷69(1)

Where subsequent to establishment and creation of tract by filing and recording of a map and plan thereof, owner conveyed by grant deed all lots in tract, and deeds provided that conveyance was subject to restrictions, and provided that the therein stated conditions should operate as covenants running with the land for benefit of owners of all lots in tract, and that breach could be enjoined, by appropriate proceedings by any lot owner, deeds created an equitable servitude in favor of each lot owner against the others.

3. Covenants ⚷73

Where original restrictions contained in deeds to lots in tract constituted valid equitable servitudes in favor of each lot owner against the others, release by successor in interest of original grantor and subdivider of tracts, to predecessor in title of plaintiff lot owners, of successor's right under deed to reversion of lots for breach of restrictions, could not operate to prejudice of an owner of a lot in tract by precluding owner from enforcing the restrictions against owner of other lots..

4. Covenants ⚷84

Where original conveyance from subdivider of tract of land recited restrictions on use of land, title of grantee of successor of original grantee was subject to the restrictions of record contained in original deed from subdivider, even though restrictions were not mentioned in deed to grantee of successor of original grantee.

5. Appeal and error ⚷1009(1)

Findings of fact of trial court in action to quiet title and to have set aside restrictions imposed upon use of lots by original subdivider, if based on any substantive evidence, would be final, and his conclusions, sitting as a chancellor in equity, would be entitled to great weight on appeal.

6. Covenants ⚷122

Evidence justified enforcement of restriction imposed upon all lots in tract by original subdivider, limiting use of lots to single family residence purposes, as against contention that restriction should not be enforced because, by reason of change in character of surrounding neighborhood, as well as of the tract, enforcement would only injure plaintiffs as owners of some of the lots without benefiting defendant owners of other lots in the tract.

7. Covenants ⚷108(2)

Fact that owners of some lots in tract had broken restriction placed upon all lots by original subdivider limiting use of lots to single family residence purposes, did not preclude enforcement of the restriction as to other lots in tract where the purpose of the restriction had been achieved and could be maintained.

8. Covenants ⚷72

Fact that because of growth of city, lots upon which original subdivider of tract had placed restriction limiting use of lots to single family dwellings, could be more profitably used if restriction was not enforced, did not justify failure to enforce restriction where original purpose of restriction could still be realized.

9. Covenants ⚷72

Circumstances did not give rise to a public policy which would require lifting of restriction upon lots in tract of land imposed by original subdivider, which limited use of lots to single family residence purposes.

10. Appeal and error ⚷949

Discretion exercised by trial judge in denying requested equitable relief in action to quiet title and to have set aside restriction imposed upon lots in tract in which plaintiffs' lots were situated, which limited use of lots to single family residence purposes, would not be disturbed on appeal where discretion was not clearly abused.

◆

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action by W. E. Robertson and Max Maltzman, doing business as W. E. Robertson Co., and Aetna Construction Co., a California Corporation, against J. Norton Nichols and others, to quiet title to realty and for declaratory relief. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

George W. Burch, Jr., Los Angeles, Pacht, Pelton, Warne, Ross & Bernhard, Beverly Hills, for appellants.

Biby & Biby, Wm. K. Young, Benjamin & Kronick, Pat A. McCormick, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiffs and appellants, purchasers of five lots in the "Henry J. Brown Wilshire Terrace Tract" in the City of Los Angeles, upon which they desired to erect apartment houses, brought an action to quiet title and for declaratory relief against some of (but not all) the owners of other property in the tract, seeking to have set aside restrictions to single family residence purposes which had been placed on all the lots in the tract by the original subdivider. The trial court upheld the restrictions and entered judgment accordingly, from which judgment this appeal is prosecuted.

The restrictions provided that no structure should be erected on any lot except a "first class private residence of at least two stories in height, with or without the customary outbuildings, including a private stable"; that such residence should cost not less than $3,500 and be set back 30 feet from the front line of the lot and should face the front line of the lot. It was futher provided that a breach of the restrictions should cause the premises to revert to the grantor; that the restrictions should operate as covenants running with the land for the benefit of owners of all lots in the tract; and that a breach might be enjoined, abated or remedied by appropriate proceedings by any of such owners.

The tract in question, subdivided in 1908 by Los Angeles Trust Company, is bounded on the West by Bronson Avenue, on the North by Fifth Street, on the East by the rear property line of lots on the East side of Wilton Place, and on the South by Wilshire Boulevard. The tract is traversed east and west by Sixth Street and north and south by Norton Avenue and Van Ness Avenue. The area thus comprises six square blocks plus the lots on the east side of Wilton Place. At the time of the subdividing, the condition of the surrounding area was substantially as follows: The area immediately adjacent on the west was undeveloped and unsubdivided acreage, which was later subdivided as the Windsor Square Tract, containing very rigid building restrictions which have been strictly observed. The undeveloped acreage to the north was subsequently subdivided as the Van Ness Avenue Square Tract; the area to the east was then a residential subdivision known as the Westminster Place Tract. The area to the south of Wilshire Boulevard, then sparsely improved with residences, was in succeeding years rapidly built up with substantial residences which in the more recent years have been used for business and residential income purposes.

Plaintiffs alleged that the original restrictions had become ineffective because with the growth of the city in the intervening years conditions had changed within and adjacent to the tract, in that Wilshire Boulevard and Sixth Street had become two of the most congested streets in the city with vehicular traffic, including bus lines on Wilshire Boulevard; that automatic traffic signals operate on Wilshire Boulevard; that Crenshaw Boulevard, running north and south 1½ blocks west of the tract, is also a heavily congested street; that "there has been a change in the use of the property located in the same tract and block as that of the plaintiffs, in that lots 20, 21 and 22, facing on Bronson Avenue, and being immediately adjacent to the plaintiffs' property on the south, is improved with a garage building * * * lots 1, 2 and 3 of said tract are improved with the Los Altos Apartment House, and lots 4, 5 and 6, * * * with a 'Thriftymart' public market * * *."

It was further alleged that the Planning Commission of the City of Los Angeles, prior to 1932, adopted a zoning ordinance by which the property on which the apartment house and market are located and the lots on the east side of Bronson, including the lots of plaintiffs, were placed in an R-4, or residential income, zone. In addition to the foregoing changes, many apartment houses and other commercial structures, it was alleged, have been erected outside the tract and in the neighborhood of the property of the plaintiffs and defendants.

Plaintiffs further alleged that when they purchased the property in 1945, all the foregoing changes were in existence and that they purchased on the representation of the record owner that the lots could be used for the erection of an apartment house; that if the building restrictions are enforced the lots are not worth more than $2,500 apiece, but as sites for apartment houses they are worth in excess of $7,000 each.

It was further alleged that by reason of the changes in the uses to which the property in the tract and in the neighborhood is being put, plaintiffs' property is no longer residential, and it would be oppressive and inequitable to give effect to the building restrictions, and would irreparably damage plaintiffs; that relieving plaintiffs' property from such restrictions will not deprive defendants of the use of their properties for residence purposes or lessen the value thereof. The trial court found that the restrictions were valid and enforceable; that although 17 lots in the tract along Wilshire Boulevard are now used for business purposes, the balance of the tract, approximately 100 lots, has been improved, used and occupied for residence purposes in accordance with the restrictions; that although by reason of the location of plaintiffs property and the growth westward of the city, their property has become more valuable for other than single family residences, nevertheless the property of both plaintiffs and defendants is suitable and desirable for single family residential purposes in accordance with the restrictions.

Appellants contend first that the restrictions as originally imposed did not create enforceable equitable servitude in favor of each lot owner against the others, and second, that assuming the validity of the restrictions, the changed conditions in the tract itself and the surrounding neighborhood render their enforcement inequitable and oppressive.

[1] Appellants assert that the restrictive covenants in the instant case are not such as run with the land under section 1468 of the Civil Code, as such covenants run only as between the original grantor and grantee, but are governed solely by section 1462 of the Civil Code, (relating to covenants contained in a grant) and in such latter case "a burdensome covenant contained in a deed which in no way benefits the property conveyed is not binding at law upon the transferees of the grantee." Marra v. Ætna Construction Co., 15 Cal.2d 375, 377, 378, 101 P.2d 490, 492. It is next asserted that the restric-

tive covenants here in no way benefit the property of plaintiffs, and that the fact that the property has never been built upon shows that the existence of the restrictions has deprived the property from being used for the only practical use to which it could be put. Testimony is referred to that as far back as 1928 the property was not suitable for single family residences. This argument is fallacious, in that it assumes to determine the validity of the restrictions, when imposed, in the light of conditions as they now exist, rather than in the light of conditions and the plan and purpose of the subdivider in 1908. It may be assumed, as contended, that these lots were less desirable than others in the tract, and hence remained vacant, but this by no means warrants a conclusion that the restrictions when imposed did not benefit them. The same argument could as well be made as to any lot in any tract which happened to remain vacant and with the passing of the years became more desirable from a dollar standpoint if it could be used contrary to the restrictions.

[2] Appellants' contention that no equitable servitude was created must be rejected. As found by the trial court, subsequent to the establishment and creation of the tract by the filing and recording of a map and plan thereof, "the owner of said property sold, transferred and conveyed by grant deed each and all of said 117 lots, and each and all of said deeds expressly provided that said transfer and conveyance was subject to and bound by each and all of said restrictions, conditions and covenants * * *." Each deed provided that "the above-mentioned conditions shall operate as covenants running with the land for the benefit of owners of all such lots in said tract, * * * and the breach * * * may be enjoined, abated or remedied by appropriate proceedings by any or either of such owners * * *." The facts adequately disclose a reference to a common plan of restriction and a designation of the dominant tenement, as required by Werner v. Graham, 181 Cal. 174, 183 P. 945, and Wing v. Forest Lawn Cemetery Ass'n, 15 Cal.2d 472, 480, 101 P.2d 1099, 130 A.L.R. 120.

[3] It is contended that the restrictions are invalid for the reason that in 1925 Genevieve E. Brown and Pacific Southwest Trust & Savings Bank, successors to the original grantor and subdivider, Los Angeles Trust Company, executed an instrument whereby they released and quitclaimed to one of plaintiffs' predecessors in title their reversionary rights under the restrictive covenants. This point is, of course, without merit if the restrictions as originally imposed created, as intended, enforceable equitable servitudes in favor of each lot owner against the others. The quitclaim by the holder of the right of reversion or re-entry for breach of a condition obviously could not operate to the prejudice of the owner of a lot in the tract, if, as we hold, the original restrictions constituted valid equitable servitudes.

[4] Appellants seemingly contend further that it was not intended to create servitudes in favor of each lot against the others because lots 23 and 24 were acquired in 1922 by the McCarthy Company by virtue of a deed which did not mention the restrictions. The McCarthy Company resubdivided the two lots as Lots 1, 2, and 3 of Tract 3854 and conveyed the same with a new set of restrictions expiring in 1940. This property is now owned and occupied by the defendants Elizabeth Von Eltz and J. Norton Nichols, and is located on the north side of Sixth Street facing the property of plaintiffs. This fact cannot aid appellants. The original conveyance from the subdivider recited the restrictions, and the McCarthy Company acquired title by a deed from a successor of the original grantee, and its title was subject to the restrictions of record whether they were mentioned in the deed to it or not.

We come now to a consideration of appellants' contention that the restrictions should not be enforced because, by reason of a change in the character of the surrounding neighborhood as well as in the tract itself, it would be inequitable and oppressive to give the restrictions effect, as their enforcement would only harass or injure the plaintiffs without benefiting the defendants. This, of course, is a question that must be determined upon the facts peculiar to each case presented. Downs v. Kroeger, 200 Cal. 743, 749, 254 P. 1101; Fairchild v. Raines, 24 Cal.2d 818, 825, 151 P.2d 260; Strong v. Hancock, 201 Cal. 530, 551, 258 P. 60.

The tract as originally subdivided contained 117 lots. One hundred of the lots are improved with single-family residences, all of them 25 or more years old, except one built in 1939. At the northeast corner of Wilshire and Bronson (the southwest corner of the tract) there is located a seven-story apartment house; immediately to the east of the apartment building is a public market, and then a parking lot. Behind the apartment building, three lots on Bronson contain a tennis court and a garage. The five lots of plaintiffs are immediately to the north of the garage, front to the west on Bronson, and extend to Sixth Street, having a total frontage of approximately 240 feet.

[5, 6] The findings of fact of the trial court in a case such as this are entitled to the same weight as in any other case. Its findings of fact, if based on any substantial evidence, are final, and his conclusions, sitting as a chancellor in equity, are entitled to great weight. Downs v. Kroeger, supra; Strong v. Hancock, supra, 201 Cal. at page 551, 258 P. 60. The trial judge heard the expert evidence of real estate men and the testimony of residents of the tract who considered it residentially desirable. He also personally viewed the tract. The record before this court, complete as it is with photographs of the area, including an aerial view, affords no ground for disagreemnet with the conclusions of the trial judge, but on the contrary supports his decision. Despite the unparalleled growth of the city since the tract was laid out, the devolopment of Wilshire Boulevard and adjacent parallel streets as heavily traveled thoroughfares, the intrusion of business structures along Wilshire Boulevard, and the breaking down of residential restrictions in adjoining neighborhoods (except to the west), the tract in question remains an area of approximately 100 substantial, well-kept homes, increasingly desirable by the very fact of their "close-in" location.

[7, 8] It is true that the restrictions have been broken along Wilshire Boulevard, but as stated in Fairchild v. Raines, 24 Cal.2d 818, 828, 151 P.2d 260, 265, "The fact that all the lots in the tract are not subject to the covenant is not conclusive of the issue. Even if restrictions are not enforcible as to every lot in an area originally covered by an agreement they may be upheld as to a part of that area if such part is of sufficient extent and so located that the original purpose of the restrictions can be accomplished." See also Downs v. Kroeger 200 Cal. 743, 749, 254 P. 1101. With respect to the Wilshire frontage, the situation created by the growth of the city and the development of the Boulevard could be said to have rendered enforcement of the restrictions impracticable and inequitable. But as to the remainder of the tract, the purpose of the restrictions has been achieved and can continue to be maintained. While the presence of the business frontage on Wilshire Boulevard may or may not have, to some extent, diminished the desirability of the lots in the tract for residence purposes, it has not rendered them unsuitable therefor. True, the lots of plaintiffs are not perhaps so desirable as those to the north and east which have been built upon, but the trial court's finding that plaintiffs' property is suitable and desirable for residence purposes is supported by substantial evidence. The fact that unrestricted use of the property would be more profitable does not warrant failure to enforce the restriction if the original purpose of the covenant can still be realized. Fairchild v. Raines, supra, 24 Cal.2d at page 827, 151 P.2d 260; Marra v. Ætna Construction Co., 15 Cal.2d 375, 378, 101 P.2d 490.

Enforcement of the restrictions will result in substantial benefit to the defendants, and will not, as contended, only serve to injure and harass the plaintiffs without benefiting defendants. This is not the case of a party who had long owned a piece of property and found that because of circumstances beyond his control, he could no longer use the property for a permitted use. Plaintiffs here purchased their lots in 1945, after the character of the tract had long been established, and with at least constructive knowledge of the restrictions of record. So far as damage to the defendants is concerned, construction of the multiple units proposed by plaintiffs would result in thirty-five families occupying the area directly across the street from defendant Nichols' property, nor is there any assurance, were the restrictions broken, that plaintiffs would not erect a height-limit apartment building.

Aside from the restriction violations along Wilshire Boulevard, plaintiffs point out violations within the tract with relation to setback lines and the facing of houses, as well as the fact that the residences of defendants Von Eltz and Nichols are in violation of the original restrictions in that they are located on lots 1, 2 and 3 which were created from lots 23 and 24 of the original plat. We think that what has heretofore been said is a sufficient answer to appellants' contention that the right to enforce the restrictions has been waived, that is, that the essential purpose of the restrictions has been maintained, and the asserted violations have not so destroyed the value of the restrictions as to justify failure to enforce them.

[9, 10] Finally, appellants make the suggestion that public policy requires that the restrictions be lifted. It is pointed out that the restrictions by their terms have no expiration date but purport to be perpetual. "All of the properties," it is asserted, "and the uses thereof in the block in which the plaintiffs' properties are located, * * * have either expressly violated building restrictions or have as previously indicated signed waivers and relinquishments of the building restrictions as to the plaintiffs' properties." We are not impressed that the situation here presented calls for application of the considerations referred to in the concurring opinion of Mr. Justice Traynor in Fairchild v. Raines, supra. No question of public policy is at present involved. The nature of the tract is settled as a residential area with a fringe of commercial property along Wilshire Boulevard. The question is whether the residential area shall be protected against further encroachment. The line must be drawn somewhere, and the trial court has drawn it by placing plaintiffs' properties within the restricted area. Conditions at some later date may warrant lifting the restrictions, but under the circumstances and evidence considered by the trial judge, it cannot be held that his findings as of the time of trial are without substantial evidentiary support, and the discretion exercised by him ought not, except in case of clear abuse, be disturbed upon appeal. Downs v. Kroeger, 200 Cal. 743, 254 P. 1101; Strong v. Hancock, 201 Cal. 530, 551, 258 P. 60.

The judgment is affirmed.

DORAN, J., concur.

DRAPEAU, J., did not participate.

92 Cal.App.2d 188

ROSS v. BOARD OF RETIREMENT OF ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASS'N et al.

No. 14110.

District Court of Appeal, First District,
Division 1, California.
June 6, 1949.

1. Officers 🔑100(1)

Constitutional provision authorizing suspension during war emergency of constitutional provision prohibiting increase of compensation of any county, township or municipal officer after election or during his term of office applied to counties governed by charter as well as to other counties. Const. art 11, § 5.

2. Municipal corporations 🔑120
Statutes 🔑181(2)

If a statute or ordinance is susceptible of different interpretations and its validity may be supported by a reasonable construction, such construction should receive favorable consideration.

3. Municipal corporations ⚷120
Statutes ⚷212

In construing a statute or ordinance, it may be assumed that each clause was inserted for a useful purpose.

4. Municipal corporations ⚷106(1)

The date of "adoption" of an ordinance is the date of passage thereof.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Adoption".

5. Municipal corporations ⚷120
Statutes ⚷255

An ordinance or statute does not become of actual force and power, that is, "effective", on the date of its adoption or passage unless the enactment specifically so declares.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Effective".

6. Municipal corporations ⚷120
Statutes ⚷259

The effective date of a statute or ordinance may depend upon the happening of a contingency.

7. Counties ⚷69(3)
Officers ⚷100(1)

County ordinance adopted October 21, 1947, accepting provisions of Retirement Law became "effective" 30 days after its adoption, as expressly provided therein, though ordinance provided that Retirement Law should become operative January 1, 1948, and hence right to retirement benefits commencing January 1, 1948, became an integral part of contemplated compensation of every eligible county officer and employee not later than November 20, 1947, which was within the period of suspension of constitutional provision prohibiting increase of compensation of any county, township or municipal officer after his election or during his term of office. Government Code, §§ 25123, 25127, 31450, 31500, 31501, 31553; St. 1947, p. 477; Const. art. 4, §§ 16, 31, art. 11, § 5.

8. Counties ⚷69(3)

The operative date of Retirement Law in a particular county as fixed by ordinance accepting provisions of the Law is merely a date of convenience to officers in charge of retirement system, for bookkeeping, retirement or other reasons and the right to future retirement benefits vests in eligible officers and employees on effective date of the ordinance. Government Code, §§ 25123, 25127, 31450, 31500, 31501, 31553; Const. art. 4, § 16.

9. Statutes ⚷259

After a law becomes effective, its operation may be postponed if it is made dependent upon a contingency which may occur in the future.

10. Counties ⚷69(3)

Under county ordinance which accepted provisions of Retirement Law and became effective during period of suspension of constitutional provision prohibiting increase of compensation of any county, township or municipal officer after his election or during his term of office, incumbent county auditor could receive his rights under retirement system without waiting for a new term of office to begin. Government Code, §§ 31450, 31500, 31501, 31553; St. 1947, p. 477; Const. art. 4, § 31, art 11, § 5.

◆

Proceeding in mandate by Horace P. Ross, county auditor of the County of Alameda, State of California, against Board of Retirement of the Alameda County Employees' Retirement Association and others to establish petitioner's right to membership in respondent association.

Permanent writ of mandate issued in accordance with opinion.

Hubert W. Bryant, Oakland, for petitioner.

J. F. Coakley, Dist. Atty. Alameda County, R. Robert Hunter, Deputy Dist. Atty. Alameda County, Richard H. Klippert, Deputy Dist. Atty., Oakland, for respondents.

WARD, Justice.

This proceeding in mandate involves the right of petitioner to become a member of the Alameda County Employees' Retirement Association. Specifically it requires a determination of the question whether an elective officer has a right to membership and subsequent retirement under the provisions of the retirement law and the Constitution. If this question is answered in the affirmative then the date of the county's acceptance of a constitutional privilege plays a part in the legal rights of the petitioner. In brief, does the date of effectiveness or the date of operation of an ordinance providing for retirement privileges control?

The petition sets forth that petitioner has been continuously in the service of the County of Alameda since March 1, 1905 and that since April 21, 1931 he has been the duly qualified and acting auditor of the county. He was last elected as such official on June 4, 1946 and his current term as auditor began January 6, 1947. The compensation for his services is paid by the county.

The Constitution of California, Article IV, section 31, provides, "The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State * * * nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever." Article XI, section 9, of the Constitution formerly provided that the compensation of a municipal officer should not be increased after his election or during his term of office. A retirement benefit constitutes compensation. Section 9 was repealed in 1933 and a similar provision inserted in Article XI, section 5, which reads, "The compensation of any county, township or municipal officer shall not be increased after his election or during his term of office, nor shall the term of any such officer be extended beyond the period for which he was elected or appointed. The Legislature by a two-thirds vote of the members of each House may suspend the provision hereof prohibiting the increase of compensation of any county, township or municipal officer after his election or during his term of office for any period during which the United States is engaged in war and for one year after the termination of hostilities therein as proclaimed by the President of the United States." The Legislature has provided methods of accepting the above constitutional provision which will be mentioned later.

[1] In Holland v. Byram, 28 Cal.2d 567, 170 P.2d 937, justices of the peace successfully sought a writ of mandate directing certain county officers to approve and pay their increased salaries as enacted by ordinance during their term of office. The respondent county officers relied upon the California constitutional provisions quoted above. The Supreme Court quoted the arguments on the proposed passage of the amendment suspending the provisions against increase of compensation during a term of office which were submitted to the voters of the state at the general election in 1944. The Supreme Court stated: "It is clear therefore that the constitutional amendment was intended to declare a statewide policy authorizing for a limited period the removal of restrictions prohibiting salary increases during terms of office. The article thus amended contains the section which grants to counties having freeholders' charters the power to adopt the restrictive provision contained in the Los Angeles County charter. Inasmuch as the effect of the constitutional amendment and the legislative act adopted pursuant thereto was to suspend the constitutional restriction for the designated period, it is only reasonable to suppose that the same effect was intended with respect to the charter provision. Obviously, the necessity for the wartime suspension was equally applicable to all counties in the state, including counties with freeholders' charters. In other words, the conditions brought about by the war generally affected all public officers and were of concern to the state as a whole." 28 Cal.2d at pages 568-569, 170 P.2d at page 938. Thus the policy authorizing the increases of salary for elective officers during their term of office has received judicial approval. The rule applies equally to counties governed by charter provision.

In pursuance of the constitutional limitation expressed in Article XI, section 5, certain Government Code sections were added to the "County Employees Retirement Law of 1937." Government Code, § 31450. Government Code section 31500 provides that, "A retirement system is established in any county for eligible officers and employees by the adoption of an ordinance, accepting this chapter, by: (a) A majority vote of the electors voting on the proposition at a special or general election; or (b) A four-fifths vote of the board of supervisors." Under the 1937 Act officers holding an elective position could become eligible for retirement by filing application for membership at the commencement of each term of office for which he was elected. Stats.1937, p. 1902, § 44. In 1945 the section was changed to provide for membership on the first day of the month after filing application, but the declaration or application must be filed 90 days after certain designated events or periods. A similar provision was placed in Government Code section 31553 which now reads, "Elective officers become members of the retirement association on the first day of the month after filing a declaration with the board to become a member. The declaration shall be filed within 90 days after: (a) First taking office. (b) The *effective* date of a system established pursuant to this chapter." (Italics added.) Section 31501 provides that, "This chapter becomes operative in any county on either January 1st or July 1st following the adoption of the ordinance, as specified in the ordinance, but not sooner than 60 days after its adoption." In 1947 the Legislature extended the period of suspension until one year after the termination of hostilities. It is admitted that war hostilities were terminated by presidential proclamation on December 31, 1946 at 12 o'clock noon.

Section 14 3/4 of the Charter of Alameda County gives the Board of Supervisors authority to provide for participation in the State Employees Retirement System of all persons in the service of the county who are eligible for membership by enactment of an ordinance by a four-fifths vote of the members of the Board of Supervisors. By the passage and adoption of Ordinance 446 the Board of Supervisors accepted the provisions of the Retirement Law of 1937 on October 21, 1947. Section 2 of the ordinance provides that the Retirement Law "shall become operative" on January 1, 1948 and section 3 provided that "This Ordinance shall take effect thirty days from and after the date of its passage, * * *"

It is conceded by respondent board that, from a factual standpoint, petitioner has complied with all formalities and performed all acts prescribed for membership in the retirement system. The main and final question in this case is whether the effective date or the operative date is the controlling one in determining whether the petitioner is entitled to membership and the resultant benefits upon retirement. Respondent board frankly admits that if the effective date, November 20, 1947, is controlling then respondent's objections to the petition are not well founded.

Government Code section 31501 purports to give alternative dates, January 1 or July 1, "following the adoption of the ordinance, as specified in the ordinance" when the system becomes "operative". If the dates and time limit mentioned in section 31501 are controlling then it should be determined that the operative date mentioned in the ordinance, January 1, 1948, is without the provision of chapter 4 of the Statutes of 1947, page 477, declaring that the provisions of the Constitution, Article XI, section 5, are to continue suspended until one year after hostilities terminate. In brief, such conclusion would eliminate January 1, 1948 as the date that the ordinance could become operative as to elective officers. If this is true and it is necessary to fix an operative date then the ordinance should have been passed and adopted at a period that would have fixed July 1, 1947 as the operative date, "but not sooner than 60 days after its adoption." Add to this the usual thirty days between the passage or adoption and the "effectiveness" of an ordinance and it is found that upon the facts of this particular case approximately nine months would be a dead period in the year 1947, during which time the benefits of the suspension period would not be available to those otherwise eligible to membership in the retirement association. That this result is not in accordance with the expressed reasons given by the Legislature appears from chapter 4 of the Statutes of 1947 extending the time limit to increase the salary of elective officers during incumbency which was approved January 30, 1947. The reason set forth in the act is that "These officers are being compelled to curtail their manner of living drastically and are rapidly exhausting their savings to provide themselves and their families with the common necessities of life. In order to enable the Legislature, counties, and cities to take the necessary steps to relieve the distress of these officers, who in many cases have faithfully served the public over a period of many years, it is necessary that this act take effect immediately." Page 478.

Another circumstance appears in relation to the history of the passage by the state Legislature of acts applicable to acceptance by a county or other branch of government of the rights under the retirement system which indicate that the operative date from a practical standpoint is merely an adjunct of convenience designating a method of procedure to operate the substantive law—the constitutional provision, Article XI, section 5. The Legislature acting pursuant to the authority granted by the Constitution in 1945 suspended the provisions of Article XI, section 5, of the Constitution for a period of six months. Stats.1945, Chap. 5, p. 316, "commencing upon the effective date of this act", which was January 24, 1945, and continuing for six months after hostilities terminated in the war in which this country was then engaged. If respondent's contention in relation to the suspension of the one year period is correct, that ordinance 466 and its provisions are of no avail because January 1, the claimed operative date, is without the period of suspension, then July 1 would have been unavailable under the 1945 act. Stats.1945, Chap. 5, p. 317.

[2, 3] If a statute or ordinance is susceptible to different interpretations and if its validity may be supported by a reasonable construction such should receive favorable consideration. It may be assumed that each clause was inserted for a useful purpose. 23 Cal.Jur. 757.

[4] Should the phrase "but not sooner than 60 days after its *adoption*" (italics added) be controlling without reference to either January 1 or July 1 as the date upon which the establishment of the system becomes "operative" Government Code, § 31501, then it should be determined that the system became operative prior to the noon hour on December 31, 1947 as the date of "adoption" is the date of passage of the ordinance. The date of adoption was October 21, 1947—more than 60 days elapsed between October 21, 1947 and December 31, 1947.

[5] However, the date of "adoption" or passage of an ordinance or statute is not the date the enactment becomes of actual force and power, that is, effective, unless the enactment should specifically so declare. Vol. 2, Words and Phrases, Perm.Ed. pages 483, 485.

[6-8] The effective date of a statute or ordinance may depend upon the happening of a contingency, Busch v. Turner, 26 Cal.2d 817, 161 P.2d 456, 171 A.L.R. 1063, but the effectiveness of the present ordinance is not dependent upon the arrival of January 1, 1948. The ordinance announced the date of its effectiveness as thirty days after the date of its passage. It was passed and adopted on October 21, 1947. At least on and after November 20, 1947, the date the ordinance became effective, it was part of every eligible officer or employee's contract that starting on January 1, 1948 he would be entitled to certain retirement benefits. However, the operative date is merely a date of convenience to the officers in charge of the retirement system for bookkeeping, retirement or other reasons. Otherwise the operative date is a false factor—the key or controlling date is the "effective" date. From the effective date the retirement right became an integral portion of contemplated compensation. The *right* to future retirement vested on the date of the effectiveness of the ordinance. The court in Kern v. City of Long Beach, 29 Cal.2d 848, 853, 855, 179 P.2d 799, 802, said, "Since a pension right is 'an integral portion of contemplated compensation' (Dryden v. Board of Pension

Com'rs, 6 Cal.2d 575, at page 579, 59 P.2d 104), it cannot be destroyed, once it has vested, without impairing a contractual obligation. Thus the courts of this state have refused to hold, in the absence of special provision, that public employment establishes tenure rights, but have uniformly held that pension laws such as the Long Beach Charter provision establish contractual rights."

"Insofar as the *time* of vesting is concerned, there is little reason to make a distinction between the periods before and after the pension payments are due. It is true that an employee does not earn the right to a full pension until he has completed the prescribed period of service, but he has actually earned some pension rights as soon as he has performed substantial services for his employer. See Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 579, 59 P.2d 104; French v. French, 17 Cal.2d 775, 777, 112 P.2d 235, [134 A.L.R. 366]. He is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made at a future date. While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due. Clearly, it cannot do so at any time after a contractual happened, and in our opinion it cannot do so at any time after the contractual duty to make salary payments has arisen, since a part of the compensation which the employee has at that time earned consists of his pension rights." See Holt v. Board of Police etc. Com'rs, 86 Cal. App.2d 714, 196 P.2d 94; Hunter v. Sparling, 87 Cal.App.2d 711, 197 P.2d 807.

The method of enacting a law is set forth in the Constitution, Article IV, section 16. Unless the Constitution provides to the contrary the Legislature indicates the effective date of acts. The same rule applies to the legislative bodies governing municipalities or counties unless restricted by charter provision, Government Code, § 25127, which does not appear to be the case in this proceeding. Except in Election Code provisions "* * * no ordinance passed by the board shall take effect within less than 30 days after its passage." Government Code, § 25123, based on former Pol. Code, § 4057.

In Board etc. Trustees v. Supervisors, 99 Cal. 571, 34 P. 244, Orange County accepted by ordinance the advantages of an act of the Legislature to establish a law library. The act provided that suitable room for such library should be provided by the board of supervisors. Suitable space was not provided and there was an attempt to repeal the ordinance. At page 573 of 99 Cal., at page 245 of 34 P. the court said, "It is also plain that the attempted repeal of the ordinance declares Orange county within the provisions of the act was of no avail. When Orange county once came within the provisions of the act, it was there for all purposes; as fully and completely there as if it had passed directly under its provisions at the date of the enactment. We do not perceive how it can evade the force and effect of the statute of the state (which, after the passage of ordinance No. 14, applied to it) in any different manner or to any greater extent that it can escape the force and effect of any other statute of the state."

[9, 10] After a law becomes effective its operation may be postponed if it is dependent upon a contingency which may occur in the future—for instance upon the starting of a new term of office—if the Constitution or a statute so provide, but in the present matter no such contingency was imposed. Petitioner could receive his rights under the retirement system in view of the suspension of the provisions of Article XI, section 5, of the Constitution without waiting for a new term of office to begin. The ordinance was a "perfect law". County of Los Angeles v. Lamb, 61 Cal. 196. There is nothing in Callahan v. City and County of San Francisco, 68 Cal.App.2d 286, 156 P.2d 479, 480, that

holds to the contrary. In the Callahan case the proposed amendment to the charter provided that it "shall become *effective*" (italics added) upon a contingency that was not a mere selection of an arbitrary date but rather upon a contingency with a sound basis—when funds would be available within a given period.

In the present case "the time of vesting" was November 20, 1947 without legal restraint. After that time petitioner was privileged to avail himself of the benefits of the retirement system.

Let a permanent writ of mandate issue commanding respondents to accept the legally fixed contribution of petitioner to the Alameda County Employees' Retirement Association and to accord him the privileges and benefits therein provided.

PETERS, P. J., and BRAY, J., concur.

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92 Cal.App.2d 177

TEMPLE v. HORRALL, Chief of Police, et al.

Civ. 16887.

District Court of Appeal, Second District, Division 2, California.

June 3, 1949.

Hearing Denied July 28, 1949.

1. Municipal corporations 🔑184(4)

A provision of city charter requiring an employee, claiming to have been unlawfully suspended, laid off, or discharged, to file a demand for reinstatement within a specified time as a condition precedent to an action for reinstatement, is applicable to resignations obtained under coercion or duress.

2. Municipal corporations 🔑184(4)

Provision of charter of city of Los Angeles making a failure to file demand for reinstatement within 90 days, when unlawful suspension or discharge is claimed a bar to action to compel reinstatement, is applicable to a resignation of police officer allegedly obtained by fraud and duress, so that former police officer of city of Los Angeles could not maintain action in equity to have resignation canceled on ground that resignation was not his free and voluntary act, without having filed a demand for reinstatement within the 90-day period provided by city charter. St.1937, p. 2858, § 112½.

3. Action 🔑32
Judgment 🔑251(1)

In California, there is but one form of civil action for the enforcment or protection of private rights and the redress or prevention of private wrongs, and, where an answer is filed, court may grant plaintiff any relief consistent with the case made by the complaint and embraced within the issues. Code Civ.Proc. §§ 307, 580.

4. Appeal and error 🔑102, 870(5)

An order sustaining a demurrer is not appealable but can be reviewed on appeal from judgment.

◆

Appeal from Superior Court, Los Angeles County; Vernon W. Hunt, Judge.

Action by John D. Temple against C. B. Horrall, Chief of Police of the City of Los Angeles, Richard Simon, Deputy Chief of Police of the City of Los Angeles, and City of Los Angeles, to have plaintiff's resignation from Police Department of City of Los Angeles canceled on ground of fraud and duress. From judgment for defendants, and from order sustaining demurrer to complaint, plaintiff appeals.

Judgment affirmed. Purported appeal from order sustaining demurrer dismissed.

Matot & Seelig, by Harry B. Seelig, Los Angeles, for appellant.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, George William Adams and Alan G. Campbell, Deputy City Attorneys, Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal from a judgment in favor of defendants predicated upon the sustaining of their demurrer without leave to amend to plaintiff's second amended complaint, seeking to have his resignation from the Police Department of the City of Los Angeles cancelled on the ground of fraud and duress. There is also a purported appeal from the order sustaining the demurrer.

Facts

It was alleged in the complaint as amended that plaintiff had been a Los Angeles police officer for 17 years prior to October 18, 1947; that on such date he had resigned from the department under the coercion of his superior officer; that thereafter he had demanded that his resignation be cancelled; but that such demand was refused by defendant Chief of Police. It was also alleged that had he served an additional 2½ years he would have been able to retire under a pension pursuant to the provisions of the City Charter of defendant municipality. The prayer of the complaint as amended asked that plaintiff's resignation be declared of no force or effect and also sought general relief. The complaint was filed on June 3, 1948.

Question

Where a former employee of the City of Los Angeles claims that his resignation is not his free and voluntary act, may he maintain an action to rescind it without having filed a demand for reinstatement within the 90-day period provided by Section 112½ of the Los Angeles City Charter?[1]

[1, 2] This question must be answered in the negative. A charter provision requiring an employee claiming that he has been unlawfully suspended, laid off, or discharged, to file a demand for reinstatement within a specified time as a condition precedent to an action for reinstatement is applicable to resignations obtained under coercion or duress. (Moreno v. Cairns, 20 Cal.2d 531, 535, et seq., 127 P.2d 914.)

In the cited case plaintiff had been an assistant chief of the Los Angeles Fire Department.[2] The plaintiff claimed that his resignation from the Fire Department was not his free and voluntary act and he was entitled to cancel that resignation and to be reinstated to his position. He did not allege that he had filed a demand for his reinstatement as required by Section 112½ of the Charter. The Supreme Court held that if plaintiff's resignation was not free and voluntary, it must have been involuntary and consequently a wrongful removal from office, and that under provisions of Section 112½ of the City Charter, a demand for reinstatement must be filed within 90 days from the date of the wrongful removal as a condition precedent to an action to compel the employee's reinstatement. There is no essential difference between the facts in Moreno v. Cairns, supra, and those in the present case. Therefore, since plaintiff did not plead a compliance with

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[1] Section 112½ of the City Charter of Los Angeles reads as follows: "Whenever it is claimed by any person that he has been unlawfully suspended, laid off or discharged, and that such layoff, suspension or discharge is ineffective for any reason, any claim for compensation must be made and a demand for reinstatement must be presented in writing within ninety days following the date on which it is claimed that such person was first illegally, wrongfully or invalidly laid off, suspended or discharged. Such demands for reinstatement must be filed with the Board of Civil Service Commissioners and such claim for compensation for such allegedly wrongful, illegal or erroneous discharge must be filed with the City Clerk. Failure to file such demands for reinstatement within the time herein specified shall be a bar to any action to compel such reinstatement and proof of filing such a demand for reinstatement must be completed and proved a condition precedent to the maintenance of any action for reinstatement. Proof of filing the claim for compensation within the time and in the manner herein specified shall be a condition precedent to any recovery of wages or salary claimed to be due on account of said lay-off, suspension or discharge. Except as herein specified, such claims for compensation shall conform to the requirements of Sections 363, 369, and 376 of this charter." St.1937, p. 2858.

[2] The provisions of Section 135 of the City Charter (Stats.1935, page 2341) relating to the dismissal of members of the Fire Department, are identical with the provisions of Section 202 of that Charter (Stats.1935, page 2347) relating to the discharge of members of the Police Department.

Section 112½ of the Charter, he failed to state a cause of action and the trial court properly sustained defendants' demurrer without leave to amend.

Section 202, subdivision 18, of the City Charter[3] is not applicable to the facts alleged in the present action. Said subdivision is applicable where a police officer is removed pursuant to the provisions of Section 202 of the City Charter.[4] According to the allegations of the complaint, plaintiff was not removed pursuant to the provisions of Section 202 of the Charter as the result of charges filed against him, but he was unlawfully discharged because his resignation was obtained by fraud and duress. Hence his remedy, if any, was by following the provisions of Section 112½ of the Charter.

[3] Plaintiff's contention that the rule announced in Moreno v. Cairns, supra, is not applicable for the reason that the present action is one in equity while the Moreno case was a proceeding in mandamus is without merit because in California there is but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs (Section 307 of the Code of Civil Procedure), and where an answer is filed, the court may grant a plaintiff any relief consistent with the case made by the complaint and embraced within the issues. (Section 580 of the Code of Civil Procedure.) Applying these rules, it is evident that the ruling in Moreno v. Cairns, supra, is controlling in the present case.

Authorities Cited by Plaintiff

Snyder v. City of Alameda, 58 Cal.App.2d 517, 136 P.2d 857, 859, is not here in point. This case involved the claim of an Alameda fireman who had resigned from his position after 11 years of service, claiming that he was entitled to 11/50th's of his salary as a pension under an Alameda ordinance which provided that a fireman who had served more than 10 years should be entitled to a pension of 1/50th of his salary for each year of his service if he was removed "for any cause other than a conviction of a felony; notorious or consecutive insubordination or neglect of duty; or in case of voluntary or involuntary resignation." It was held that a pension should be allowed under the terms of the ordinance.

Aitken v. Roche, 48 Cal.App. 753, 192 P 464 is likewise not applicable. The court there held that an officer continues to be a member of the Police Department until death, dismissal or resignation, when he thereby forfeits his right to participate in the pension fund.

Groat v. Walkup Drayage, etc. Co., 14 Cal.App.2d 350, 58 P.2d 200, was merely an action for damages for negligence. It did not involve any question of a policeman's right to a pension after his separation from the Police Department nor did it involve any of the other questions presented upon this appeal.

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[3] Section 202, subdivision 18, of the City Charter reads:

"This section shall not be construed to in any way affect any other rights any officer or employee may have to pursue or assert any and all other legal rights or remedies in relation to his office or position or to the compensations attached thereto, or to appeal to or be heard or tried by or before any court or other tribunal of competent jurisdiction, whether such court or other tribunal now exists or may be hereafter created or established."

[4] Section 202, subdivision 1, of the City Charter reads:

"The right of an officer or employee of the police department to hold his office or position and to the compensation attached to such office or position is hereby declared to be a substantial property right of which he shall not be deprived arbitrarily or summarily, nor otherwise than as herein in this section provided. No officer or employee of the police department shall be suspended, removed, deprived of his office or position, or otherwise separated from the service of the police department, (other than by resignation) except for good and sufficient cause shown upon a finding of 'guilty' of the specific charge or charges assigned as cause or causes therefor after a full, fair and impartial hearing before the Board of Rights, (except as otherwise specifically provided in paragraphs two (2) and seven (7) of this section). Such charges must be based upon some act committed or omitted by such officer or employee within one (1) year prior to the filing of the complaint referred to herein. No case or suspension with loss of pay shall be for a period exceeding six (6) months."

In view of our conclusions, it is unnecessary to discuss whether or not the purported cause of action stated in the complaint as amended was barred by laches.

[4] An order sustaining a demurrer is not appealable but is reviewable on an appeal from the judgment. (Steiner v. Darby, 88 Cal.App.2d 481, 199 P.2d 429.) Hence the purported appeal from the order sustaining the demurrer is dismissed.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

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92 Cal.App.2d 182

TYREE v. CITY OF LOS ANGELES.

Civ. 16946.

District Court of Appeal, Second District,
Division 2, California.

June 3, 1949.

Hearing Denied July 28, 1949.

1. Automobiles 🔑230

An action for damages caused by negligent operation of an automobile by a city employee acting in scope of his employment, could be maintained against the city though it was neither alleged nor proved that a written, verified claim for damages was presented to and filed with the negligent employee within 90 days after the negligent act was committed. Government Code, § 1981.

2. Indemnity 🔑13(1)
Municipal corporations 🔑741(1)

Action of an injured party in neglecting to serve or present a city employee with a claim does not exonerate the employee from negligence but constitutes merely a waiver of the injured person's right to recover against him for his negligence, and such waiver does not impair the right of the city to be subrogated to the rights of the injured party and to hold the city employee responsible for the amount recovered by the injured party from the municipality. Government Code, § 1981.

◆

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action for damages sustained in an automobile collision by Wirth Tyree against the City of Los Angeles, a municipal corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, Edwin F. Shinn, Deputy City Attorney, and Ralph E. Ringwald, Deputy City Attorney, Los Angeles, for appellant.

William Jerome Pollack, Los Angeles, for respondent.

McCOMB, Justice.

Defendant city appeals from a judgment in favor of plaintiff after trial before a jury in an action to recover damages for injuries resulting from a collision between an automobile in which plaintiff was riding and a motor vehicle driven by an employee of defendant acting within the scope of his employment.

Facts

A judgment for $22,500 was rendered against defendant because of damages sustained by plaintiff as a result of the negligent driving of one of the city's automobiles by a city employee. The employee was not a party to the action. A claim was filed by plaintiff, within 90 days of the happening of the accident and before commencing this action, with the clerk of the city council in accordance with sections 363 and 376 of the Los Angeles municipal charter.[1]

It was not alleged in the complaint nor was any proof offered that any claim was presented to or filed with the employee of the city, who was driving the city owned automobile, in compliance with the provisions of section 1981 of the Government Code which insofar as material here reads as follows: "Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public * * * employee occurring during the course of his service or employment * * * within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the * * * municipality * * *."

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[1] Section 376 of the municipal charter requires that a claim be filed within six months of the happening of the accident.

Questions

[1] First: *May an action for damages caused by the negligent operation of a motor vehicle by an employee of a municipal corporation, acting within the scope of his employment, be maintained against the municipal corporation employer when it is neither alleged nor proved that a written, verified claim for damages was presented to and filed with the negligent employee within 90 days after the negligent act was committed?*

This question must be answered in the affirmative. The precise question here presented has not heretofore been decided by the Supreme Court or a District Court of Appeal of this state. However, it has been decided by the appellate department of the superior court of the county of Los Angeles. In Rubin v. City of Los Angeles etc., Superior Court No. Civ. A 6762, the opinion of the appellate department, prepared by Judge Edward T. Bishop and concurred in by Judge Jess E. Stephens, was filed but not published in the reports. Such opinion correctly states the law and the reasons therefor, and with the omission of immaterial matter is adopted and approved by this court. It reads:

"The defendant city appeals from the judgment rendered against it because of damages sustained by the plaintiff as a result of the negligent driving of a city car by a city employee. A claim had been filed by the plaintiff before she commenced her action, but only with the clerk of the City Council, not with the city employee. The defendant city's contention that section 1981 of the Government Code requires that the claim be filed with both the city employee and the clerk of the Council before such an action as this may be maintained against the city, presents the crucial question on this appeal. We have concluded that the trial court gave the correct answer to this difficult question, for we find that section 1981 does not apply to claims made against a city.

"In order to understand section 1981 of the Government Code correctly, a review of some of its statutory ancestors is essential. In 1931 two statutes were passed: the first (Stats.1931, p. 2475) is more easily identified as Act 5149, Deering's General Laws (either 1931 or 1937); the second (Stats.1931, p. 2476) is known as Act 5150 (Deering's General Laws). The first section of Act 5150, with brackets added, reads as follows: 'Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, [and/or the negligence or carelessness of any public officer], a verified claim for damages shall be presented in writing and filed with [such officer and] the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received. [In the case of a state officer said notice and claim shall be filed with the governor as well as the officer himself.]' We shall not quote the first section of Act 5149 for it is already before us. It is the section just quoted with the words between the three sets of brackets omitted.

"The second section of Act 5149 authorizes the city attorney to defend any action for damages brought against a city on account of injuries alleged to have been received as a result of the dangerous or defective condition referred to in section 1, and we find similar authority given in section 2 of Act 5150 in the case of an action brought against an officer of the city. In section 3 of Act 5149, cities (and the other governmental units) are authorized to insure themselves against the liabilities resulting from the dangerous or defective condition mentioned before, and the like section of Act 5150 permits cities to insure their officers against the liability made the subject of concern in that act.

"The strong suspicion aroused by the provisions of sections 2 and 3 of these acts that in spite of the general character of the language used in their first section, Act 5149 was meant to apply to claims against cities and Act 5150 to claims against officers of cities, is confirmed by reference to their titles. The title of Act 5149 begins: 'An act relating to the liability in damages of municipalities * * *'; the first words of the title of Act 5150 are: 'An act relating to the liability in damages of officers of municipalities * * *.' In Jackson v. City of Santa Monica (1936), 13 Cal.App.2d 376, 57 P.2d 226, this distinction between the two acts was given judicial recognition. That case was one where it was claimed that a municipal employee had negligently operated a city bus, and in the trial court the city had successfully defended on the ground that a claim had not been filed with the employee and the city clerk, as required by section 1 of Act 5150. The conclusion reached was that Act 5150 did not apply to cases where damages were sought from a city; Act 5149 covered such actions, so far as it went. Act 5150 was found inapplicable for the further reason that neither its title nor that of an attempt to amend it in 1933 (Stats. 1933, p. 2147) was broad enough, constitutionally, to cover claims for damages resulting from the negligent operation of motor vehicles. Section 400 of the Vehicle Code undoubtedly imposes a liability upon a city for such damages, but it is silent respecting the filing of claims in such cases, and, as Jackson v. City of Santa Monica holds, neither Act 5149, which does not purport to, nor Act 5150, which attempted to, prescribes that a claim shall be filed before suit may be brought against a city on a cause of action arising under section 400, Vehicle Code.

"An attempt was made to correct the title of Act 5150 in 1937, but again a defective title rendered the attempt futile. (Jackman v. Patterson (1940), 42 Cal.App.2d 255, 108 P.2d 682.) Down to the enactment of the Government Code in 1943 (Chapt. 134, Stats. 1943) therefore, we had these two statutes of 1931; Act 5149 governing the filing of claims when it was desired to sue a city; Act 5150 controlling when action was to be taken against an officer or employee. Neither applied to an action brought under section 400, Vehicle Code. (Dillard v. County of Kern (1943), 23 Cal.2d 271, 274–275, 144 P.2d 365, 150 A.L.R. 1048.)

"The Government Code, in the field in which we are particularly interested, suffered amendments before it became effective, and the amendments are to be found in the official publication, not as a part of the amending statute (Chapt. 557, Stats. 1943) but as a part of the code itself (Stats.1943, pp. 973 and 974). These are the pertinent facts respecting these statutes: Act 5150 is twice expressly repealed (Stats.1943, pp. 1010, and 2127). Act 5149 is not mentioned. We should expect to find a substitute for Act 5150 in the new code, therefore, and we do, although with considerable trimmings. Section 1956 authorizes cities to insure their officers against liabilities, section 2000 provides that city attorneys are to defend suits brought against city officers, and section 1981 (as enacted) reads: 'Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public property, and alleged to be due to the negligence or carelessness of any officer, within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. In the case of a State officer the claim shall be filed with the officer and the Governor.' We find no comparable sections covering the subject matter of Act 5149. We entertain no doubt, therefore, that section 1981 as enacted, and so far as it went, was limited, as was Act 5150, to claims against city officers and employees; it did not touch the cases where actions were to be brought against the cities themselves.

"As originally enacted, section 1981 plainly had no application to claims, either against cities or city officers, arising out of the negligence of the latter. By the amendment at the same 1943 session (Chapt. 557), the scope of the section was enlarged to cover damages resulting from the negligence or carelessness of any public officer or employee, as well as from dangerous conditions of public property due to their negligence, and an action against an officer or employee, arising under section 400, is now controlled by its provisions. (Huffaker v. Decker (1946), 77 Cal.App.2d 383, 175 P.2d 254.) We discover, however, nothing in the amendment to indicate that the section, which was enacted to supplant the late Act 5150, was intended also to repeal, entirely by implication, Act 5149, or to apply to claims against cities. In this connection we note that the amending statute (Chapt. 557, which originated as Senate Bill 251) had three objects in view: (1) to amend sections 1956 and 1981 of the Government Code, if that code should be adopted; (2) to repeal Act 5150, whether or no; and (3) to provide a substitute for Act 5150 if the Government Code should fail of passage. The title to the amending act is: 'An act relating to claims against, the liability of public officers and employees, and providing for insurance with respect thereto, amending Sections 1956 and 1981 of the Government Code, and repealing [Act 5150].' We are not disposed to complete this title by adding after the word 'against' the words 'municipalities and counties,' nor to add these words to the statute."

[2] Second: *Since section 1981 of the Government Code does not apply to acts of a municipal employee in an action for injury resulting from the negligence of the employee, acting within the scope of his employment, is the municipality subrogated to all the rights of the injured person against the employee?*

This question must also be answered in the affirmative. An act requiring notice of a claim for damages against a municipal employee is for the protection of the employee against unfounded litigation. Hence the action of the injured party in neglecting to serve or present the municipal employee with a claim does not exonerate the employee from negligence. It constitutes merely a waiver of a right to recover against him for his negligence and such waiver does not impair the right of the municipality to be subrogated to the rights of the injured party and to hold its employee responsible for the amount recovered by such party from the municipality. (Von Arx v. City of Burlingame, 16 Cal. App.2d 29, 38, 60 P.2d 305.)

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

CEDARS OF LEBANON HOSPITAL v. LOS ANGELES COUNTY et al., and five other cases.

Civ. 16531, 16532, 16534–16537.

District Court of Appeal, Second District,
Division 1, California.

May 31, 1949.

Hearing Granted July 28, 1949.*

1. Constitutional law 🔑13
Statutes 🔑181(1)

In construing statutes or constitutional provisions, court's efforts must be directed towards ascertaining their true intent.

2. Constitutional law 🔑14
Statutes 🔑190

If language used in statute or constitutional provision is such that its meaning is obvious and not ambiguous, resort to extrinsic aid is unnecessary.

3. Statutes 🔑235

The rule of strict or liberal construction is unimportant when the language of the legislative enactment indicates a purpose and intention to give the words therein used a strict or broad meaning.

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* Subsequent opinion 221 P.2d 31.

4. Statutes 🔑235

When, by a strict and narrow construction of a statute, the result would inevitably lead to mischief or absurdity, whereas a broader interpretation would reflect sound sense and wise policy, the former should be rejected and the latter adopted.

5. Statutes 🔑181(2)

The general terms in a statute will be limited in their scope to avoid an interpretation which leads to injustice, oppression, or absurd consequences.

6. Taxation 🔑204(2)

The welfare exemption provision must be reasonably construed, since it was passed not merely as an act of grace on the part of the state, but in the best interests of the state itself. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

7. Hospitals 🔑1

A "hospital" is primarily a service organization that serves its patients, its doctors, and the public.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Hospital".

8. Taxation 🔑241(2)

In statute exempting property used exclusively for "hospital purposes", the quoted phrase embraces those facilities or services that must be regarded as reasonable, necessary, or appropriate to accomplish the functions of a hospital in furnishing a complete and efficient hospital service to its patients, its doctors, and its community. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Hospital Purposes".

9. Taxation 🔑241(2)

Under statute exempting property "used exclusively" for hospital services, the use must be essential to the operation and conduct of the hospital. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Used Exclusively".

10. Taxation 🔑241(2)

Under statute exempting "property used exclusively for hospital purposes", a nurses' training school is an integral part of the hospital and necessary for the purposes of such an institution to improve the facilities in caring for the sick and afflicted and is exempt from taxation. Revenue and Taxation Code, § 214, Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Property Used Exclusively for Hospital Purposes".

11. Evidence 🔑20(1)

It is common knowledge that in many if not most hospitals, nurses and student nurses sleep in the hospital buildings or in a building adjoining the hospital.

12. Taxation 🔑241(2)

Under statute exempting "property used exclusively for hospital purposes" from taxation, nurses' homes are exempt. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

13. Evidence 🔑20(1)

It is common knowledge that admittance may be gained to hospital at any hour of the day or night.

14. Taxation 🔑241(2)

Under statute exempting "property used exclusively for hospital purposes", not only the buildings and grounds actually used for housing the patients, but adjacent buildings and grounds which are reasonably necessary or appropriate to the purposes and objects of the hospital and which are used directly for the promotion and accomplishment of them, are exempt. Revenue and Taxation Code, § 214; Const. art. 13 § 1c.

15. Taxation 🔑241(2)

Under statute exempting "property used exclusively for hospital purposes", property used to provide housing for interns, superintendents, and other employees is exempt. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

16. Pleading 🔑214(1, 4, 5)

A demurrer admits allegations of fact but not conclusions of the pleader.

17. Taxation 🔑241(2)

Under statute exempting "property used exclusively for hospital purposes," where on the first Monday of March, 1946, a hospital building for exclusive use as a dormitory and residence for student nurses attending hospital's school of nursing, was 85 per cent. completed, and on or about July 1, 1946, the building was placed in use for such purposes and had been so used ever since, the building was exempt from taxation. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

18. Taxation ⚷241(2)

Under statute exempting "property used exclusively for hospital purposes", property used to furnish recreational facilities to student nurses, interns, and residents was exempt from taxation. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

19. Taxation ⚷241(2)

Under statute exempting "property used exclusively for hospital services", a building of hospital which was used as a thrift shop where donated clothing and furnishings were sold by an authorized agency of the community chest, and the entire proceeds were devoted to the maintenance of free children's clinic maintained jointly by the hospital and the agency, was exempt from taxation. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

20. Taxation ⚷241(2)

The statute exempting "property used exclusively for hospital purposes" indicates a legislative purpose to give the words of the statute a broad rather than a strict meaning, to end that the intended purposes thereof may be accomplished. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

21. Taxation ⚷241(2)

The statute exempting property used exclusively for hospital purposes was intended to exempt hospitals from all taxes in exchange for the benefits conferred upon the public by such institutions. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

22. Taxation ⚷246

Under the statute exempting property used exclusively for hospital purposes from "taxation" the property of hospital was exempt from flood control levy along with other general property taxes. Revenue and Taxation Code, § 214; Gen.Laws, Act 4463, § 10; Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Taxation".

◆

Appeals from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Separate actions by Cedars of Lebanon Hospital, by Queen of Angels Hospital, by Walker and others (Hollywood Presbyterian Hospital), by Lutheran Hospital Society, etc., by Hospital of the Good Samaritan, and by Monte Sano Foundation, etc. (a hospital), against County of Los Angeles and City of Los Angeles to recover taxes wrongfully collected, which were consolidated for the purpose of hearing. From judgments rendered, the County of Los Angeles and City of Los Angeles appeal, and Walker and others (Hollywood Presbyterian Hospital) and Lutheran Hospital Society etc., cross-appeal.

Judgment in accordance with opinion.

Harold W. Kennedy, County Counsel, and Andrew O. Porter, Deputy County Counsel, Los Angeles, for appellant Los Angeles County.

Ray L. Chesebro, City Attorney, and Hugh H. MacDonald and Louis A. Babior, Deputy City Attorneys, Los Angeles, for appellant City of Los Angeles.

Musick, Burrell & Ingebretsen and Philip C. Jones and James E. Ludlam, Los Angeles, for respondents Lutheran Hospital Society and Monte Sano Foundation.

Gibson, Dunn & Crutcher, and Bert A. Lewis, Los Angeles, for respondents Hospital of the Good Samaritan.

Faries & McDowell and Wayne R. Hackett, Los Angeles, for respondent Hollywood Presbyterian Hospital.

Leonard G. Ratner, Beverly Hills, for respondent Cedars of Lebanon Hospital.

Joseph Scott and J. Howard Ziemann, Los Angeles, for respondent Queen of Angels Hospital.

WHITE, Presiding Justice.

These appeals involve the right of plaintiff hospitals to have certain portions of their property exempted from taxation under the recently enacted welfare exemption. Calif.Const. Art. XIII, Sec. 1c; Sec. 214, Revenue and Taxation Code. The portions in questions were used either to furnish a place of residence for personal attached to and employed by plaintiff hospitals, or for the purpose of conducting a nurses' training school in connection with a plaintiff hospital.

Also involved in some of the cases is the question of whether said welfare exemption extends to plaintiffs an exemption from the Los Angeles County Flood Control District levy.

A cross-appeal has also been taken by plaintiffs Walker et al. (Hollywood Presbyterian Hospital, numbered Civil 16536) from that portion of the judgment entered following the sustaining of defendants' demurrer to counts 2 and 4 of said last-named plaintiffs' complaint involving buildings under construction on the first Monday of March, 1946, to be used exclusively as a dormitory and residence for student nurses attending said plaintiffs' school of nursing. Plaintiff Lutheran Hospital has also filed a cross-appeal in case numbered Civil 16537, from that portion of the judgment entered pursuant to an order sustaining defendants' demurrer to said plaintiff's fourth and seventh causes of action involving property consisting in part of a tennis court used as a recreational facility for student nurses, interns and residents of said hospital, and a building, the lower floor of which is used to house a "Thrift Shop," the entire proceeds of which are devoted to the charitable work of said plaintiff hospital, to-wit, a Free Children's Clinic.

The California welfare exemption was operative for the first time in the tax year 1946–1947 and each of the plaintiffs herein duly filed a claim for the welfare exemption. The taxing authority granted such exemption in each case as to 90% to 95% of the respective hospitals' property. However, as to the remaining 5% to 10% portions, the taxing authority, being of the opinion that the same was being used for purposes not exempt, denied exemption thereof. Accordingly, a tax was levied upon the last mentioned portions and the Los Angeles County Flood Control District levy was levied against all of the real property of plaintiff hospitals in every case.

The plaintiffs paid such taxes and Flood Control District levy under protest, and then commenced the instant actions to recover such portions of those payments as to which the respective plaintiffs contended they were entitled to exemptions.

The complaint in each case was divided into several causes of action, with each cause of action involving either a separate piece of property or a portion of a particular piece of property devoted to a separate specific use.

A general demurrer as to each cause of action was filed in each case, and all of the cases were consolidated for the purpose of hearing.

As heretofore indicated, the trial court sustained demurrers without leave to amend as to those causes of action based upon property used to furnish recreation to hospital personnel; property used as a shop for the sale of donated clothing to realize funds for charitable purposes in connection with the hospital, and buildings under construction to furnish housing for student nurses. The demurrer was also sustained without leave to amend as to the fourth, sixth and eighth causes of action of plaintiff Monte Sano Foundation (case numbered Civil 16535) involving portions of a building leased out as an X-ray laboratory or doctor's office, but said plaintiff has not filed a cross-appeal from such ruling.

However, the trial court sustained the contentions of the five plaintiffs herein who claimed exemption from Flood Control District levies, overruled the demurrer to the cause of action relating to the properties used for the housing of personnel employed by plaintiff hospital, and also overruled the demurrer to the causes of action relating to the properties owned and used by certain of the plaintiff hospitals to provide a nurses' training school operated in connection with the hospital. The property devoted to the latter two uses constituted the bulk of the taxed portions of plaintiffs' properties claimed to be exempt. From the judgments entered upon the foregoing orders, defendants prosecute these appeals, and the two plaintiffs hereinbefore mentioned prosecute cross-appeals.

Because no question is raised herein by defendants as to any of these plaintiffs qualifying as an institution for the welfare exemption, and the only reason urged for denying exemption being the uses to which the taxed portions of the properties were devoted, we deem it unnecessary to here set forth the allegations of the complaints filed herein, other than to epitomize the issues presented therein and upon this appeal as follows:

(1) Is hospital property used to provide housing for the hospital's interns, student nurses, nurses and certain other essential employees required to live on the premises because of the nature of their services and the manner in which hospitals must operate, "property used exclusively for hospital purposes" and therefore exempt under the welfare exemption?

(2) Is hospital property used for a training school for its student nurses "property used exclusively for hospital purposes" and therefore exempt under the welfare exemption?

(3) Is hospital property upon which buildings are under construction "property used exclusively for hospital purposes" and therefore exempt under the welfare exemption?

(4) Is hospital property used to furnish required recreational facilities for its student nurses, interns and residents "property used exclusively for hospital purposes" and therefore exempt under the welfare exemption?

(5) Is hospital property used to house a "thrift shop" in conjunction with its charitable activities "property used exclusively for charitable or hospital purposes" and therefore exempt under the welfare exemption?

(6) Is the tax levied by the Los Angeles Flood Control District an exception to the general exemption granted under section 214 of the Revenue and Taxation Code?

Until the fiscal years 1946-1947, hospital and charitable organizations bore their pro-rata share of the property tax load. However, at the general election held November 7, 1944, an amendment to the California Constitution was approved by the voters and became section 1c of Article XIII. The constitutional section reads as follows:

"In addition to such exemptions as are now provided in this Constitution, the Legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes and owned by community chests, funds, foundations or corporations organized and operated for religious, hospital or charitable purposes, not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

In the year 1945, the Legislature, under the permission granted it by the foregoing constitutional amendment, enacted section 214 of the Revenue and Taxation Code. This section reads as follows:

"214. Welfare exemption: Requisites: Construction. Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

"(1) The owner is not organized or operated for profit;

"(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;

"(3) The property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted;

"(4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession;

"(5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital, scientific, or charitable purpose;

"(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes.

"The exemption provided for herein shall be known as the 'welfare exemption.' This exemption shall be in addition to any other exemption now provided by law. This section shall not be construed to enlarge the college exemption or to extend an exemption to property held by or used as an educational institution of less than collegiate grade."

It is first contended by defendants that the welfare exemption, California Const., Art. XIII, sec. 1c, and sec. 214, Revenue & Taxation Code, must be strictly construed and its provisions given a narrow and limited meaning.

[1-5] We are persuaded that in construing statutes or constitutional provisions our efforts must be directed toward ascertaining their true intent. If the language used is such that its meaning is obvious and not ambiguous, then resort to extrinsic aid becomes unnecessary. The rule of strict or liberal construction becomes important where the language of the legislative enactment indicates a purpose and an intention to give the words therein used a strict or a broad meaning. It is also the law that when by a strict and narrow construction of a statute the result would inevitably lead to mischief or absurdity, while a broader interpretation would reflect sound sense and wise policy, the former should be rejected and the latter adopted. Robbiano v. Bovet, 218 Cal. 589, 595, 24 P.2d 466. The general terms in a statute will be limited in their scope to avoid an interpretation which leads to injustice, oppression or absurd consequences. People v. Ventura Refining Co., 204 Cal. 286, 290, 268 P. 347, 283 P. 60.

Starting out with the proposition that under the foregoing rules the cardinal principle in construing a constitutional or statutory provision is to ascertain its intent; that the interpretation adopted must be reasonable and that the construction must be such as to give a sensible and intelligible meaning to every part of it so as to avoid absurd and unjust consequences, we are confronted with the problem of ascertaining and determining what the Legislature intended by using the words "property used exclusively for religious, *hospital,* scientific, or charitable purposes" (emphasis added) Sec. 214, Revenue & Taxation Code.

[6] However, before proceeding to a discussion of the legislative intent as evidenced by the foregoing words used in the statute, it seems appropriate to suggest that a reasonable construction of the welfare exemption is grounded upon sound legal principles. The existence in the community of a hospital which admits, cares for and gives medical aid to the sick and afflicted whether rich or poor, not without compensation in all cases, but where in all cases, any fees collected go to pay the expense of operation of the hospital and not to the profit of the founders or shareholders is a public charity in the fullest sense. Scripps, etc., Hospital v. Cal. Emp. Comm., 24 Cal.2d 669, 675, 151 P.2d 109, 155 A.L.R. 360. The existence of such hospitals furnishes to some extent a relief of the burden upon the state to care for and conserve the interests of its citizens. The policy of tax exemption of hospitals is not founded on maudlin sentiment but upon a sound economic principle that the benefits derived by the community at large from the services rendered by such institutions far outweigh the trivial inequality caused by an exemption of their property from taxes. Their ultimate contribution to the public good returns more than a fair equivalent for the exemption afforded them. It is therefore, at once apparent and manifest that such exemptions are not merely an act of grace on the part of the state, but stand squarely on the best interests of the state itself.

In arriving at a determination of the issues presented on this appeal we are first led to a consideration of what is a "hospital" and what constitutes a "use for a hospital purpose"? In their brief, respondents answer the first of those queries as follows:

[7] "A hospital is primarily a service organization. It serves three groups: Its patients, its doctors, and the public. It furnishes a place where the patient, whether poor or rich, can be treated under ideal conditions. It makes available room, special diet, X-ray, laboratory, surgery, and a multitude of other services and equipment now available through the advances of medical science. Essential to the administration of these techniques is the corps of highly trained nurses and student nurses who are on duty 24 hours per day. In the large hospitals there are the interns and residents whose presence make it possible for the hospital to do a better job. In addition, the hospital must be kept spotlessly clean; it must have power and utilities available even though the standard source of these services is cut off. It must have special meals and diets prepared and served throughout the day and night. It must have administration to see that its services function properly and are coordinated, and that patients are received and cared for regardless of the hour or the patient's condition. Nothing can be left to chance because a slip may mean a life or many lives. These facilities also stand ready to serve the community in times of epidemic or disaster."

[8] As to what is meant by the phrase "hospital purpose" we are persuaded that it embraces those facilities or services that must be regarded as reasonable, necessary or appropriate to accomplish the functions of a hospital in furnishing a complete and efficient hospital service to its patients, its doctors, and its community.

[9] The first question presented is whether the use of property by plaintiff hospitals for a nurses' training school and to provide housing for hospital interns, residents, student nurses and certain other alleged essential employees required to be readily available constitutes a use exclusively for hospital purposes and therefore renders the property exempt under the welfare exemption. We are impressed that in order to be "used exclusively" as contemplated by the statute, the use must be essential to the operation and conduct of the hospital.

If the major hospitals did not operate nursing schools, no student nurses would be available and resort would have to be made to registered nurses at much greater expense to patients. And obviously, if hospitals did not train nurses, eventually there would be no registered nurses available. Recognizing that the greater part of a nurse's training is in actual work with patients, our California law, Business & Professions Code, sec. 2786, requires that an accredited school of nursing must be "affiliated or conducted in connection with one or more hospitals." In connection with this problem, we regard as pertinent the language used by our Supreme Court in the case of Lutheran Hospital Society v. County of Los Angeles, 25 Cal.2d 254, 257, 258, 153 P.2d 341, 344, as follows:

"* * * Furthermore, it is apparent that in the ordinary acceptation of the term, a hospital is not considered as an 'educational institution of collegiate grade' or as a 'college or seminary of learning.' In this field of legislation *the Legislature may well have concluded that the training of women as nurses is mainly in connection with and for the benefit of the hospital* (see article 2; Ch. 6, div. II of the Business and Professions Code * * *), *and that the property used for such purposes is entitled only to the classification accorded general hospital property devoted to nonprofit or charitable uses.* The record indicates that upon application to the Board of Equalization and a presentation of facts showing its use exclusively for charitable and nonprofit purposes, the plaintiff received a 50 per cent reduction in the assessed valuation of all of its property including Larson Hall. Total exemption of the property of such institutions was rejected by the electors of the state in November, 1930, when it was proposed to add section 1⅝ to Article XIII of the Constitution to accomplish that purpose. However, at the November, 1944, election, proposed section 1c of Article XIII was added, making it permissive for the Legislature to exempt all or a portion of the properties of nonprofit hospital corporations." (Emphasis added.)

[10] In the case of Immanuel Presbyterian Church v. Payne, 90 Cal.App. 176, 265 P. 547, it was held that property adjoining the church and used by worshipers for an auto parking lot came within the constitutional provision which exempts from taxation so much of the real property, on which buildings used solely and exclusively for religious worship are situated, as may be required "for the convenient use and occupation of said buildings." Const. art. 13, § 1½. We entertain no doubt that a nurses' training school is an integral part of the hospital and necessary for the purposes of such an institution to improve the facilities of the same in caring for the sick and afflicted.

[11, 12] Little need be said in determining whether nurses' homes come within the welfare exemption and its application to specific facilities. It is the purpose to which the facility is put that is important. And it is a matter of common knowledge that in many if not most hospitals, nurses and student nurses sleep in the hospital building or in a building adjoining the hospital. Manifestly, an emergency condition may arise from time to time during the night requiring immediate attention and which makes it necessary to have more nursing personnel available than is actually on night time duty. This can be accomplished as alleged by plaintiffs, only by furnishing housing facilities upon the hospital grounds for nurses, student nurses and kindred aids. The nature and character of the property provided for such use would, under the pleadings in the instant cases, be identical with the nature and character of the hospital. Such property must therefore, be held as being used exclusively for hospital purposes. Aultman Hospital Ass'n v. Evatt, 140 Ohio St. 114, 42 N.E.2d 646, 647; Corporation of Sisters of Mercy v. Lane County, 123 Or. 144, 261 P. 694, 700; Appeal of Parmentier et al., 139 Pa.Super. 27, 11 A.2d 690, 693; Nuns of Third Order of St. Dominic v. Younkin, 118 Kan. 554, 235 P. 869; Calais Hospital v. City of Calais, 138 Me. 234, 24 A.2d 489; Dougherty v. City of Philadelphia, 139 Pa.Super. 37, 11 A.2d 695.

[13] Insofar as the exemption of property used to provide housing for interns, superintendents and other employees is concerned, it will suffice to say that fundamentally the cases involving the exemption of various types of institutions from taxation and which have dealt with the inclusion therein of housing facilities supplied to members of the staff, nurses, superintendents and other types of personnel, proceed on the basis that the administration of the affairs of the institution requires that certain personnel and employees be located on the property to the end that the operation of the institution may be efficiently conducted and supervised and that emergency cases may be cared for as they arise. It is commonly and generally known that admittance may be gained to a hospital at any hour of the day or night. To supply such service, help obviously must be on hand to provide for the handling of such emergencies. Illustrative of what we have just said we quote the following allegations, admitted by the demurrer, and contained in the complaint filed by plaintiff Lutheran Hospital Society of Southern California in case numbered Civil 16537:

"That plaintiff receives patients at all hours of the day or night and in connection therewith must have available employees to receive these patients, enter them in the hospital record, make up their rooms, attend to their personal effects, clean up after emergency operations, do the clean-up and maintenance work around the hospital at such times that it will not interfere with the essential services of the hospital. To do part of this work The California Hospital employs 48 housekeeping employees including porters and orderlies of whom 26 are housed by it, and the Santa Monica Hospital employs 30 housekeeping employees including porters and orderlies of whom 2 are housed by it. In addition plaintiff employs a large body of employees doing what it classifies (as) administration work which group includes clerks, bookkeepers, stenographers, telephone operators, engineers and the like. Of these the California Hospital employs 263 and houses 26, and the Santa Monica Hospital employs 104 and houses 5.

"That plaintiff operates its dietary department upon a split-shift (four hours' service during the day and four hours' during the night). That if plaintiff operated its said personnel on straight eight-hour shifts the unions to which such personnel belong would require plaintiff to hire more personnel than are required under the split-shift plan. That plaintiff thereby effects a substantial saving by employing the said personnel on a split-shift basis. That it is difficult to obtain competent personnel to work on a split-shift basis unless they are actually housed in the immediate vicinity since a split-shift requires them to be at the hospital for two different periods during each 24 hours. That the morning shift in the dietary department starts at between 4:00 o'clock and 6:00 o'clock at a time when public transportation is not readily available. That plaintiff houses 57 of its 67 dietary employees employed at the California Hospital and 2 of its 54 employees employed at the Santa Monica Hospital.

"That the plaintiff does not employ a night-shift engineer at the Santa Monica Hospital, but furnishes its two daytime engineers with housing on its premises so that they will be readily available in case of emergency to service the pressure boiler maintained by plaintiff to furnish steam to its sterilizers as well as general heating service."

[14, 15] We entertain no doubt that the term "property used exclusively for * * * hospital * * * purposes," as used in section 214 of the Revenue & Taxation Code, means not only the buildings and grounds actually used for housing the patients, but adjacent buildings and grounds which are reasonably necessary or appropriate to the purposes and objects of the hospital and which are used directly for the promotion and accomplishment of the same. Judged by this standard, it must be held that the property used to provide housing for interns, superintendents and other employees as aforesaid is exempt under the welfare exemption. Corporation of Sisters of Mercy v. Lane County, supra; County of Hennepin v. Brotherhood of Gethsemane, 27 Minn. 460, 8 N.W. 595, 38 Am.Rep. 298; Aultman Hospital Assoc. v. Evatt, supra; Calais Hospital v. Calais, supra; Appeal of Parmentier, et al., supra.

We are next confronted with the question of whether buildings under construction on the first Monday in March, when such buildings had not been but were intended for use exclusively for hospital purposes, and were thereafter actually so used, are within the welfare exemption.

This issue relates to the second and fourth causes of action of plaintiffs Hugh K. Walker, et al. (Hollywood Presbyterian Hospital) in case bearing number Civil 16536.

The judgment of the trial court herein sustained defendant's demurrrers to these two causes of action, thereby holding that none of the real and personal property of plaintiffs described in their second and fourth causes of action was exempt from taxation under the provisions of section 214 and 254.5 of the Revenue and Taxation Code. While holding that completed buildings used exclusively for housing facilities for student nurses were tax exempt, the trial court concluded that the welfare tax exemption does not apply to property on which buildings were under construction on the tax day, even though such buildings were designed and intended exclusively for a hospital or for any other hospital purposes.

With reference to this issue, plaintiffs (Hollywood Presbyterian Hospital) alleged in Paragraph II of both the second and fourth causes of action, after describing the property involved in each cause of action:

"That on the first Monday of March, 1946, there was being constructed on this property for plaintiffs a building designed to be used exclusively as a dormitory and residence for student nurses attending plaintiffs' School of Nursing hereinabove referred to. That construction of said building began on or about September 1, 1945, and said building was placed in use as such dormitory and residence on or about July 1, 1946, and has been so used ever since said date. That construction of said building was approximately eighty-five per cent (85) completed on the first Monday of March, 1946."

[16] Insofar as allegations of fact and not conclusions of the pleader are con-

cerned, the same are, of course, admitted by the demurrer of defendants.

In urging the correctness of the action of the trial court defendants lean heavily upon the case of Southern California Telephone Company v. Los Angeles County, 212 Cal. 121, 125, 126, 298 P. 9, 11, which involved the taxation of a building under construction belonging to a telephone company which if "used exclusively in the operation of their business" was subject to assessment by the State Board of Equalization and exempt from county taxation. In the case just cited, the court said, 212 Cal. at page 125, 298 P. at page 11:

"In San Bernardino v. State Board of Equalization, 172 Cal. 76, 79, 155 P. 458, 460, the court said: 'The measure of the taxing power of the local authorities, applied in all of the cases, is not the *quality* or the *nature* of the property so much as its *use*.' It may readily be conceded that none of these decisions deals with facts similar to those involved herein, but they indicate an interpretation of the words 'operative' and 'used exclusively in the operation of their business' to mean an *actual use* of the property. It may also be observed that other states, in dealing with tax exemptions, have interpreted the words 'used exclusively' to require an actual use. * * *" (Citing cases.)

We do not regard this case as determinative of the question now before us. The case in question involved taxation of a corporation organized and operated for profit and not the question of tax exemption of a non-profit hospital whose property is "irrevocably dedicated to * * * hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for * * * hospital * * *, or charitable purposes." By their very incorporation for purely nonprofit hospital purposes, they have made a contract with the state, effectually constituting those in charge of the enterprise as trustees of a special trust and in their last analysis and their legal effect, the charter of such institutions became declarations of trust.

As heretofore stated, the primary principle in construing a constitutional or statutory provision is to ascertain its intent, and the interpretation must be reasonable to the end that conclusions reached thereon will result in a sensible and intelligent meaning, devoid of absurdity and injustice in the ensuing consequences.

It was undoubtedly this concept of the rule of interpretation that led the court in the case of Southern California Telephone Company v. County of Los Angeles, supra, relied upon by defendants, to say, 212 Cal. at page 126, 298 P. at page 11:

"* * * Of course, it cannot be doubted that it is the duty of a utility to plan and prepare for emergency and future needs of its business; and we are disposed to give a broad interpretation to the constitutional provision. No one would seriously doubt that extra equipment for replacement purposes or for emergency use is property 'used' by the utility, even though on the taxable date it was not in use, and even though at that date it had never been actually placed in use. And the same is true, we think, of necessary additions or betterments when the same are completed. The reason for this is clear enough. It is necessary that this property be on hand when needed, and it is available for use at any time. It is in the same classification as property normally in use, but temporarily out of use, which has been held to come within the meaning of an 'actual use' provision. Seaside Home v. State Board of Taxes, 98 N.J.L. 110, 118 A. 704. It was never intended that local assessors should minutely scrutinize the entire system of the utility to select and tax locally isolated parts thereof which on the tax date or during the taxable year had performed no actual service. We accept the proposition that property which is necessary for the efficient operation of the business, *and is available for use,* is operative property whether actually placed in use or not." (Emphasis added.)

We are not here confronted with a situation wherein the plaintiffs in question owned vacant property with the expressed intention of starting the construction of a hospital or hospital facilities thereon at some future date. Under the pleadings in the instant action, defendants by their demurrers have admitted that on March 1, 1946, the tax assessment day, there was under construction on this property, and approximately eighty-five per cent (85%) complete, a building designed to be used exclusively as a dormitory and residence for student nurses, and that the building was completed and placed in use as such dormitory and residence about July 1, 1946, an has been so used ever since.

[17] We are persuaded that the weight of authority requires that under a reasonable interpretation of section 214 of the Revenue and Taxation Code, the property immediately here under consideration be considered as "used exclusively" for hospital "purposes."

We are cited to no California cases directly in point and our own research therefor has been unavailing. However, cases from other jurisdictions present impelling reasons for the conclusion just stated by us.

For example, in El Jebel Shrine Ass'n v. McGlone, 93 Colo. 334, 26 P.2d 108, the Colorado Constitution exempted from taxation "lots, with the buildings thereon, if said buildings are used solely and exclusively for religious worship, for schools, or for strictly charitable purposes." Const. art. 10, § 5. Plaintiff Shrine Association had started construction on its land of a building designed to be used for charitable purposes, but had proceeded no further than to erect the foundation. Work on the building had been stopped, apparently because of the business depression, but plaintiff's complaint alleged that the property in question was acquired for charitable purposes, and that it was the intent and purpose to complete the buildings on the lots to be used for charitable purposes. In its opinion, the court emphasized that plaintiff's intent and purpose were to complete the buildings for a benevolent, charitable use as soon as conditions improved. The Supreme Court of Colorado held that the property was exempt from taxes, and reversed the judgment of the trial court which had sustained defendants' demurrer. While the rule of liberal construction is applied by the courts of Colorado, nevertheless the reasoning is convincing under the rule of interpretation adopted in California.

Additional cases supporting our view include McGlone v. First Baptist Church of Denver, 97 Colo. 427, 50 P.2d 547, 548; Forsesee v. Board of Directors of Bergman Special School District No. 8, 213 Ark. 569, 211 S.W.2d 432, 433; Osteopathic Hospital of Maine v. Portland, 139 Me. 24, 26 A.2d 641, 644; New England Hospital v. Boston, 113 Mass. 518, 521; Trustees of Property of Protestant Episcopal Church v. State Tax Commission, 39 N.M. 419, 48 P.2d 786, 787; Trinity Church v. Boston, 118 Mass. 164, 166.

We are convinced that the weight of authority supports the rule thus epitomized in the case of In re Appeal of Children's Hospital of Philadelphia, 82 Pa.Super. 196, 198, 199:

"It is well settled in this State that the right to exemption of property from taxation is based upon use * * * But our Supreme Court has never held that an addition to a building which was in use as a place of religious worship, a hospital or other purely public charity is subject to taxation prior to the time when it is actually used for religious or charitable purposes. *Would anyone contend that if a hospital burned to the ground, that the ground on which a new structure was being built and the incompleted building itself, would be subject to taxation? We see no difference in principle between such a case and the one before us. It cannot be said that the ground and the partly erected building thereon is not a part of the hospital merely because the operations of the hospital are excluded from it while the building is in course of erection* * * * While it is the use of a hospital plant which determines its character as a public charity, it would be sticking in the bark to hold that an addition which is being constructed to a building which is in actual use as a purely public charity is not a part of the institution. It is not to be considered independently of the main structure.

It will increase its efficiency and facilities. To entitle it to consideration as a purely public charity, it is essential that it be devoted to the purposes for which the charity operates: Phila. v. Jewish Hospital Association, supra [148 Pa. 454, 23 A. 1135]. We think that there is sufficient devotion to hospital purposes under the circumstances to give it character as part of the hospital." (Emphasis added.)

The next question presented is whether property used to furnish limited recreational facilities to student nurses, interns and residents is entitled to exemption. This issue relates to the fourth cause of action of plaintiff Lutheran Hospital Society of Southern California (California Hospital) in case bearing Civil No. 16537. Defendants demurrer to this cause of action was sustained by the trial court.

The property immediately in question consists of a tennis court owned by the plaintiff in question, located on the hospital grounds, used as an outdoor recreational facility for its student nurses, interns and residents. In its complaint plaintiff California Hospital alleged that "To qualify for the training of interns or residents under the rules of the American Medical Association Council on Medical Education and Hospitals a hospital must provide for the *health*, care, housing, recreation and food for its residents and interns." (Emphasis added.)

There is no denial of the fact that the nature and type of the recreational facility here under consideration is of a reasonable character both as to the relationship of its cost and the size and location of the hospital. In the case of Corporation of Sisters of Mercy v. Lane County, 123 Or. 144, 261 P. 694, 697, 700, wherein land "actually occupied for the purpose" of a hospital was held tax exempt, there was included a tennis court used "to afford recreation for the pupil nurses and employees of the hospital, and sometimes the patients."

In State v. Academy of Our Lady of Lourdes, 221 Minn. 227, 21 N.W.2d 617, 618, defendant hospital claimed exemption from taxation under the Constitution of the State of Minnesota, Art. 9, sec. 1, which provided:

"* * * public hospitals, * * * institutions of purely public charity, * * shall be exempt from taxation * * *." The court held that defendant was clearly a public hospital and that its property, including "a nurses home, *swimming pool, auditorium, recreation hall*" was tax free. (Emphasis added.)

Defendants call attention to the fact that in the first of the two last cited cases "it appears that the tennis court was sometimes used by patients," and that in the last cited case, "the statement of facts shows that the hospital contained a swimming pool and recreation hall but it is not shown that these were not maintained primarily for the use of patients and they were not considered separately from the rest of the hospital." Defendants then proceed with the statement:

"It is submitted that had the tennis court here involved been maintained for the use of patients it might be entitled to exemption but that there is no authority for exempting it when it is maintained exclusively for the use of employees and that the arguments against exempting housing for employees apply also to the tennis court."

[18] We fail to perceive the force of this argument. To us it appears manifest that it is equally as important to conserve the health of nurses, student nurses, interns and residents of the hospital as it is to restore the health of its patients, because upon the existence of the former depends to a large extent the accomplishment of the latter. We conclude that the recreational facility here in question is reasonably necessary or appropriate to the purposes and objects of a hospital and must therefore be classified as used exclusively for hospital purposes and entitled to the benefits of the welfare exemption statute. Revenue & Taxation Code, sec. 214. Defendants' demurrer to the fourth cause of action of plaintiff California Hospital should have been overruled.

We are now confronted with the question of whether hospital property used to house a "thrift shop" in conjunction with the charitable activities of such hospital is entitled to exemption.

This issue relates to the seventh cause of action of plaintiff Lutheran Hospital

Society of Southern California (California Hospital) in case bearing Civil No. 16537. Defendant's demurrer to this cause of action was sustained by the trial court.

The "thrift shop" is located in a portion of plaintiff hospital building. In its complaint plaintiff California Hospital alleged in detail the use and purpose of this part of its building as follows:

> "This building is owned by the plaintiff, but the lower floor which is in issue in this cause of action is used as a Thrift Shop where donated clothing and furnishings are sold by the Women's Auxiliary of the California Babies' and Children's Hospital, an authorized agency of the Los Angeles Community Chest. The entire proceeds of the shop are devoted to the maintenance of the Free Children's Clinic maintained jointly by the plaintiff and the agency. The above use of the property is deemed by the board of directors of the plaintiff to be a charitable use."

Defendants contend that according to the aforesaid complaint, the sole purpose of the thrift shop is to raise money and that its exemption is specifically forbidden by subparagraph 3, sec. 214 of the Revenue & Taxation Code, which provides that property is exempt from taxation only if "the property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted."

[19] Under the rule that claims for exemption from taxation must be strictly, but reasonably construed, we are convinced that the property upon which the thrift shop was conducted was exclusively used for hospital and purely charitable purposes. This is not a commercial enterprise and does not compete with taxpaying business. The property is used for the purpose of receiving and converting gifts of clothing and furnishings into cash to assist in financing a free clinic for children —strictly a hospital purpose. Who would contend that if a gift of bonds was received by a hospital, converted into cash and used to erect a hospital building, that such property would not be exempt? Yet, such a situation is analogous to the one with which we are confronted, wherein gifts are made, converted into cash, and utilized for a strictly hospital purpose. The thrift shop is not operated for "profit" as is generally the primary purpose of business. The primary purpose of the thrift shop, on the contrary is to aid sick and afflicted children by maintaining for their benefit a free clinic. The case of Cypress Lawn Cemetery Association v. San Francisco, 211 Cal. 387, 295 P. 813, cited by defendants is not persuasive. In that case the court had under consideration a construction of sec. 1b of Article XIII of the State Constitution, adopted November 2, 1926, reading as follows:

> "All property used or held exclusively for the burial or other permanent deposit of the human dead or for the care, maintenance or upkeep of such property or such dead, *except as used or held for profit,* shall be free from taxation and local assessment" (emphasis added).

Plaintiff cemetery was a cemetery association and in possession of certain trust moneys, a portion of which it had invested in a hotel then operated by it, the profits from which hotel operated by the cemetery association were used exclusively for the care, maintenance and upkeep of the cemetery in question and the care of the dead interred therein. The court held that the purpose of the constitutional amendment was to protect and preserve the place where the dead are buried against interference of possible sales for unpaid taxes, thereby keeping such property free from molestation of desecration. That the constitutional amendment was never intended to relieve from taxation, property operated by the cemetery association for profit, but only property used for burial of the dead. In the case now engaging our attention no analogous situation is presented. The thrift shop is not maintained for profit. It operates only to convert the gifts of personal property into cash to be used in maintaining a free clinic for children—purely a hospital purpose, which the welfare exemption statute and the constitutional amendment under which it was enacted, clearly intended to exempt from taxation. Upon full consideration of the record herein and the able briefs and argument of counsel for each side, we are convinced that the property utilized for the operation of the thrift shop falls within a reasonable definition of "Property used exclusively for * * * hospital * * * purposes" and is therefore tax exempt. Missouri Goodwill Industries v. Gruner, Mo.Sup., 210 S.W.2d 38. Defendant's demurrer to the seventh cause of action of plaintiff California Hospital should therefore, have been overruled.

Finally, we come to a consideration of the question whether the exemption from taxation granted the plaintiff under section 214 of the Revenue & Taxation Code includes the levy imposed by the Los Angeles County Flood Control District. In this regard the trial court sustained the contention of the five plaintiffs herein who claimed exemption from the flood control levy. The Los Angeles County Flood Control District was created by an act of the Legislature of the State of California entitled, "Los Angeles County Flood Control Act," approved June 12, 1915, Stats.1915, p. 1502, Gen.Laws, Act 4463. Section 10 of the act empowers the Board of Supervisors of the district to levy a "tax" each year upon the taxable real property in the district sufficient to pay interest and installments of principal on the bonds and to pay other expenses of the district. Under the same section, such taxes are to be levied and collected at the time and in the same manner as the general taxes levied for county purposes.

When the constitutionality of the flood control statute was assailed, Los Angeles County Flood Control Dist. v. Hamilton, 177 Cal. 119, 169 P. 1028, its validity was sustained, the court holding that though the act used the expression "tax," it in fact conferred authority merely to levy an assessment against the real property of the district on the basis of benefits and that the legislature itself had determined the question of these benefits when it authorized the assessment or tax against the real property on the basis of the assessed valuation thereof for general taxation purposes. Holding that the flood control district levy is a special assessment and not a tax is a long line of additional cases, including Los Angeles Ry. Corp. v. Los Angeles County Flood Control District, 78 Cal.App. 173, 180, 181, 248 P. 532; Los Angeles v. Los Angeles C. F. C. Dist., 11 Cal.2d 395, 80 P.2d 479; Los Angeles County F. C. Dist. v. Wright, 213 Cal. 335, 338, 2 P.2d 168; Inglewood v. County of Los Angeles, 207 Cal. 697, 702, 280 P. 360.

Defendants earnestly contend that the universal rule is that an exemption from special assessments must be expressed and will not be implied, and that an exemption from taxes does not include exemption from special assessments. However, in the case of Hollywood Cemetery Assoc. v. Powell, 210 Cal. 121, at page 133, 291 P. 397, 403, 71 A.L.R. 310, relied upon by defendants, the Supreme Court says: "And while we recognize the general rule that a mere exemption from 'taxation' does not exempt from local assessments, each case must largely depend upon the language of the statute giving the exemption."

In the Hamilton case, supra, which is the cornerstone for the theory that the flood control levy is a special assessment, the issue urged here by defendants, that if exempted from payment thereof plaintiffs would be relieved from paying an assessment upon lands which will receive benefits from the flood control district, was suggested to the court, but decision thereon was specifically refused by the Supreme Court, which, 177 Cal. at page 130, 169 P. at page 1032 said: "The proper time to decide this question of interpretation will arrive when the question arises in a case involving the right to assess particular property. There is no occasion to decide it now."

The present litigation presents an occasion for such a decision. Whether or not the Legislature in 1945 intended to include the flood control levy within the exemptions granted to hospitals and comparable charitable non-profit institutions must now be determined.

To us it seems pertinent in determining that intention to contrast the county flood control levy with what is typically characterized as a special assessment. In that regard, plaintiffs observe: "Most special assessments for various types of property improvements follow a similar pattern. The court will, undoubtedly, take judicial notice of the fact that most of such improvements in California for many years have been made in accordance with the provisions of the Improvement Act of 1911, presently comprising Division 7, Section 5000 et seq., of the California Streets and Highways Code. This is a typical special assessment statute and will be used for purposes of comparison.

"Section 5101 of this Code lists the types of improvements covered by that Act including grading, paving, sidewalks, sewer work, drainage, lighting, fire protection, tree planting, retaining walls, gas supply, and many other similar types of improvement. Under this Act the proceedings are commenced with a Resolution of Intention to make the proposed improvement. (Section 5130 et seq.) Notice thereof must be published and a public hearing held. (Sections 5133 and 5190.) Property owners are given an opportunity to protest. (Section 5220.) A resolution is then adopted authorizing the work and a contract is let. (Section 5240 et seq.)

"The Act solicitously avoids the use of the word 'tax' in its provisions covering the payment for the improvement. Section 5315 provides that 'the expenses of the improvement shall be assessed upon the lots and lands fronting thereon * * *.' If no bonds are issued such assessments are paid by the property owner to the contractor (Section 5390), or the Superintendent of Streets of the municipal unit involved (Section 5392). If bonds are issued, under Section 6400 et seq., the treasurer of the municipal unit involved executes the bonds and delivers them to the contractor. The bonds are in varying amounts, depending upon each particular unit of property involved and the total obligation of that unit with respect to the assessment (Section 6423), and that particular obligation alone constitutes a lien upon that particular property; thus the obligation of each property owner is a several one with respect to the assessment against his particular property and once he pays that his land is clear regardless of defaults by any other property owner. The installments on the bonds are, of course, paid to the treasurer of the municipal unit pursuant to a special card notice provided by law which is entirely different from the County Tax Bill.

"The contrast between the typical special assessment, as above summarized, and the Los Angeles County Flood Control District Act is striking. The latter is entirely different from the former in all respects relating to the creation of the lien, the coverage of the lien, and the method of the collection and payment of the levy. Insofar as they both purport to exact from the property owner the cost of an improvement to his property which increases its value, we respectfully refer this court to the Hamilton decision. It will be apparent from the discussion there, that in many instances the benefits accruing from Los Angeles County Flood Control expenditures do not enhance directly the particular land involved; the enhancement is merely indirect in a manner somewhat similar to the indirect benefits accruing to all property owners from the exercise of typical police and general governmental functions, which by tradition have always been financed by a general tax levy. Moreover, the Flood Control levy, unlike special assessments generally, is collected in the same manner and constitutes a lien in the same manner as the general tax levy. Each year the levy depends upon the District's costs for the ensuing year, and the removal of any lands from that taxation merely affects the levy for the ensuing year. By contrast, under the 1911 Improvement Act and comparable special assessments, the contractor or the bondholder would suffer an unfair loss if specific land subject to a special lien for a specific obligation were exempted from further payment of the obligation. *Furthermore, in the typical special assessment situation, there is a direct benefit to all of the lands assessed which enhances the value of that particular land.* Consequently, it is only in the most rare of situations where property is held exempt from a pure special improvement levy." (Emphasis added.)

[20, 21] It is noteworthy that when the Welfare Exemption Act here in question was adopted by the Legislature in 1945, the Los Angeles County Flood Control levy had appeared as one of the levies on the general property tax bills for all prior years since the adoption of the Flood Control Act in 1915 and was in common parlance regarded as a "tax" imposed on all real

property whether directly benefited or not. It is true that in the Hamilton case, supra, the flood control levy was viewed as a special assessment and in the case of the Los Angeles Ry. Corp. v. Los Angeles C. F. C. Dist., 78 Cal.App. 173, 248 P. 532, was held to be a special assessment not covered by a general exemption from taxes But in that case the taxpayer involved was a corporation operated for profit and the case involved an exemption which existed prior to the imposition of the county flood control levy. We are impelled to the conclusion that the nature of the exemptions sought to be extended to the non-profit charitable institutions by the welfare act indicates a legislative purpose and intention to give the words of the statute a broad rather than a strict meaning, to the end that the intended purposes thereof might be accomplished. It cannot be doubted that it was the intention of the legislature through the welfare exemption statute to exempt hospitals from all taxes in exchange for the benefits conferred upon the public by such institutions.

In its practical effect, the flood control levy is not an exaction for specific benefits accruing directly to the property taxed. It is such a direct benefit which undoubtedly is the principal reason for and gave rise to the general rule that a general tax exemption does not cover special assessments. Such a reason does not exist in the instant case. It is not unreasonable therefore, to impute to the legislature the intention under the language used, to exempt the property of public charities from such a levy.

The power of the board of the Los Angeles County Flood Control District to determine a levy, to be made upon all of the taxable property sufficient to cover the estimated expenses, including installments on bonds and interest, permits an annual adjustment of the levy so that there is no undue hardship if the exemption is applied to the real property of the charities here under consideration. It is not unreasonable to assume that it was this quality or character of the flood control statute which impelled our Supreme Court to hold in the case of Inglewood v. County of Los Angeles, supra, that public property was exempt from this levy even though it had been held in private ownership at the time of the particular improvement there involved. As was said in the case just cited, 207 Cal. at page 703, 280 P. at page 363:

"Nevertheless, the power to levy a special assessment is the exercise of the same power as that exerted in the levy of an ordinary tax for governmental purposes. Both have their source in the fundamental power inherent in all governments. Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112, 17 S. Ct. 56, 41 L.Ed. 369; County of Santa Clara v. Southern Pac. R. Co., C.C., 18 F. 385, at page 411. In this latter case the court said: 'Taxation for local improvements, or for city, county, or town purposes, involves the exercise of the same power which is exerted in taxation for state or general purposes. It is the sovereign power of the state in both cases which authorizes the tax, whether that power be exerted directly by an act of the legislature, or by a municipal body as an instrumentality of the state. "That these assessments," says Cooley, speaking of such as are special, "are an exercise of the taxing power, has over and over again been affirmed, until the controversy may be regarded as closed."'

"While publicly owned and used property is not exempt from special assessments under the Constitution or statutory law of this state, there is an implied exemption of such property from burdens of that nature."

[22] In the case of Los Angeles County Flood Control District v. Hamilton, supra, 177 Cal. at page 131, 169 P. at page 1032, the flood control district conceded that the flood control levy might not apply to public property and property "devoted to a public use." Giving to the words of the welfare exemption act a reasonable rather than a strict meaning, because of the wide and varied nature of the exemptions provided therein, we are persuaded that since the property here involved is devoted to a public charitable use it is entitled to exemption from the flood control levy along with the other general property taxes.

For the foregoing reasons, the judgments, and each of them are affirmed except as to counts two and four of plaintiffs' Walker, et al. (Hollywood Presbyterian

Hospital) complaint, and counts four and seven of plaintiff Lutheran Hospital Society of Southern California. As to the last named four counts, the judgments are and each is reversed with directions to the court below to overrule defendants demurrer as to said counts and to permit defendants a reasonable time within which to answer said last named four causes of action, should they be so advised.

DORAN, J., concurs.

DOOLING, J., assigned, deeming himself disqualified, did not participate.

DRAPEAU, J., did not participate.

FREDERICKA HOME FOR THE AGED v. SAN DIEGO COUNTY.

Civ. 16572.

District Court of Appeal, Second District, Division 1, California.
May 31, 1949.

Hearing Granted July 28, 1949.[*]

1. Constitutional law ⇨14
Statutes ⇨190, 245

When the language of a Constitution or a statute is clear, plain, and unambiguous, there is no room for construction, strict or otherwise, and in any event the rule of strict construction should never be applied to the exclusion of the rule of reasonableness or in such an arbitrary manner against the taxpayer as to defeat the apparent legislative intent or lead to injustice or oppression and absurd consequences.

2. Taxation ⇨251

In action by charitable institution to recover back taxes wrongfully collected, finding that plaintiff did not collect from occupants of home for the aged enough to pay the full cost of their support and maintenance was sustained by the evidence. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

3. Taxation ⇨251

In action by charitable institution to recover back taxes wrongfully collected, finding that, in fixing the rates to be charged occupants of the home for the aged, the directors did not endeavor to make a profit or even to meet all the operating expenses but rather endeavored to set rates as low as possible without creating a deficit so large that it could not be met by reasonably anticipated gifts and contributions, was sustained by the evidence. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

4. Taxation ⇨251

In action by charitable institution to recover back taxes wrongfully collected, evidence showed that the land and buildings of the plaintiff were dedicated to and used exclusively for a strictly charitable purpose and that, though plaintiff had not accepted residents who were entirely destitute, it had so ministered to them through its endowment, legacies, and facilities that they received a great deal for which they paid nothing. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

5. Taxation ⇨241(1)

The test of whether an institution is a charitable one is, not whether a few pay or all pay, but whether such payments do not exceed what is required for the successful maintenance of the institution and are devoted to the purposes for which the institution was founded, and, if such payments do not exceed the expenses of the charity and are devoted to such purposes, then the institution is no less a "charity". Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Charity".

6. Constitutional law ⇨68(4)

The courts are not privileged to legislate under the guise of judicial construction, and, if a change in wording of statute exempting property used exclusively for charitable purposes is desired, it must come from the Legislature. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

7. Taxation ⇨241(2)

Where payments made by residents of home for the aged are not commensurate with benefits received by them, where there is no element of private gain, and where the use of all income is devoted to the purposes of the institution, the fact that such payments are made does not affect or destroy the charitable character of the institution. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

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[*] Subsequent opinion 221 P.2d 68.

8. Taxation ⊂⇒241(2)

Where home for the aged admitted persons who were at least 69 years of age and members of the personnel who lived on the premises were required to live there so as to be available for immediate service and action day or night in case of fire or other emergency, the property of the institution which was used to house the personnel was "property used exclusively for charitable purposes", and was therefor exempt from taxation. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Property Used Exclusively for Charitable Purposes".

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Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Fredericka Home for the Aged against County of San Diego to recover back taxes wrongfully collected. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

James Don Keller, District Attorney and County Counsel; Carroll H. Smith, Chief Trial Deputy, San Diego (Fred N. Howser, Attorney General; E. G. Benard, Deputy Attorney General, of counsel), for appellant.

Gray, Cary, Ames & Driscoll and John M. Cranston, San Diego, for respondent.

WHITE, Presiding Justice.

Respondent, a non-profit corporation operating a home for elderly people on a "life-care contract" basis, sought exemption from taxation under section 1c, Article XIII of the Constitution of California, as a charitable corporation devoting its property exclusively to charitable purposes. Its claim for exemption being denied by the county assessor, it paid the taxes assessed against its property under protest and brought this action for refund thereof. The trial court found that all of respondent's property except a portion leased by it for commercial purposes was exempt from taxation and rendered judgment accordingly, from which judgment the County of San Diego prosecutes this appeal.

Section 1c of Article XIII of the Constitution of California, adopted by the people on November 7, 1944, provides as follows:

"In addition to such exemptions as are now provided in this Constitution, the Legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes and owned by community chests, funds, foundations or corporations organized and operated for religious, hospital or charitable purposes, not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

Pursuant to this constitutional authority, the Legislature in 1945 adopted section 214 of the Revenue and Taxation Code, setting forth the requirements of what is known as the "welfare exemption." The section provides:

"Property used exclusively for religious, hospital, scientific, or charitable purposes * * * is exempt from taxation if:

"(1) The owner is not organized or operated for profit;

"(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;

"(3) The property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted;

"(4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession;

"(5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital, scientific, or charitable purpose;

"(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes.

"'The exemption provided for herein shall be known as the "welfare exemption." * * *.'"

Respondent was incorporated in 1908 and received as a gift certain land and buildings. Subsequent buildings were donated, and in 1916 a trust fund of $200,000 was created. It is conceded that respondent is a non-profit corporation organized for the purpose of maintaining a home for aged people and that its property is used exclusively for such purpose and irrevocably dedicated thereto; that all of its income, whether from charges to inmates, investments, or gifts or donations, is used entirely in the maintenance and operation of the home; that the members of its board of directors serve without compensation, and the compensation paid its employees is not excessive. It is the position of appellant, nevertheless, that respondent does not qualify under the welfare exemption because "it appears that no services or facilities are free, that no services are rendered to the needy or destitute, and that life care contracts are entered into only with those who meet the personal approval of respondent and pay a fee of such substantial size that any question of need is immediately dispelled."

Applicants for admission to the home must have attained the age of 69, be in good health, and meet the approval of the board of directors. Prior to November 1, 1944, applicants were required to pay a fixed fee and execute a trust agreement whereby three-fifths of the applicant's estate would go to the home upon death of the applicant. The trust agreement requirement was eliminated after November, 1944. In consideration of the life care contract, the home furnished room, board and certain hospital services. The applicant was required to make separate provision for burial and certain special services, and provide his own clothing and spending money. The applicant was required to furnish the quarters to be occupied by him, such furniture to become the property of the home upon the death of the applicant.

The trial court found that after November, 1945, all newly admitted residents were required to pay a minimum fee of $5,500. During the fiscal year ending June 30, 1945, 21 new residents were admitted, 16 of them under the policy of charging a minimum fee of $5,500, the average fee being $6,264.04, and the highest being $9,700. The court found that the total amounts received by respondent from its inmates and from the endowment fund have always been insufficient to pay the operating expenses of the home and that the deficit has been made up by voluntary gifts and contributions from persons not inmates of the home.

[1] Appellant's reliance upon the principle of strict construction of tax exemption statutes is answered by what we said in the consolidated hospital cases, Cedars of Lebanon Hospital v. Los Angeles County, Cal.App., 206 P.2d 915, wherein we in effect held that when the language of a constitution or statute is clear, plain and unambiguous, there is no room for construction, strict or otherwise, Lockhart v. Wolden, 17 Cal.2d 628, 631, 111 P.2d 319, and that in any event, the rule of strict construction should never be applied to the exclusion of the rule of reasonableness, or in such an arbitrary manner against the taxpayer as to defeat the apparent legislative intent or lead to injustice, oppression and absurd consequences.

[2] Appellant's contention that the trial court's finding to the effect that the occupants of the home do not pay the full cost of their support and maintenance is not supported by the evidence, cannot be sustained. Aside from the testimony given by Ralph E. Bach, a director of respondent home, there was abundant evidence, oral and documentary, that 35% of respondent's

income came from interest on the endowment fund and from donations, while only 65% came from fees of the members.

[3] The appellant further objects to the court's finding that in fixing the rates to be charged the directors do not endeavor to make a profit or even to meet all operating expenses, but rather endeavor to set rates as low as possible without creating a deficit so large that it cannot be met by reasonably anticipated gifts and contributions. This finding is directly supported by the uncontradicted testimony of respondent's director, Mr. Bach, that the rates were set so that the amounts received from the inmates, together with 'income from the endowment and from other sources," would equal expenses, Obviously, that testimony alone demonstrates the correctness of the challenged finding without recourse to much other documentary evidence showing that over one-fourth of the gross cash income of respondent, as well as the value of the use of the lands and buildings, comes from sources other than residents.

The basic ground upon which appellant urges its claim that respondent cannot be a charitable institution is that "no services or facilities are free," and "no services are rendered to the needy or destitute." Appellant's argument that unless something is given free to the poor and destitute there is no charity, is cogently answered by our Supreme Court in Scripps Memorial Hospital, Inc., v. California Employment Commission, 24 Cal.2d 669, wherein, at page 675, 151 P.2d 109, 113, 155 A.L.R. 360, there is quoted with approval from Dingwell v. Seymour, 91 Cal.App. 483, 267 P. 327, the following:

"Any person, the rich as well as the poor, may fall sick or be injured or wounded and become a fit subject for charity. St. Luke, chapter 10, verses 30-37. A trust may be and often is charitable in its nature, uses, and purposes without giving alms to the poor. It is true that poverty is a condition which, even when brought about by indolence and waste of life's opportunities, arrests the attention and commands the consideration of charity. Yet perhaps more worthy and deserving members of society than the ne'er-do-well poor may under certain conditions be proper objects of charity. A gift to establish and maintain a public institution where the misery and unhappiness of any person of high or low degree, rich or poor, may be considered and sanely dealt with would come within the purview of the definition of a public charity."

While the evidence herein supports the statement that the residents of respondent's home do not receive *all* respondent's services absolutely free of charge, it will not support a claim that full value is given by the residents for all that they receive, or that each resident does not receive a great deal for which he pays nothing. If we assume what the evidence shows, that one-fourth of the total income of respondent comes from other sources than its inmates, and all of its land, buildings and endowment fund were so derived, this would indicate, for purposes of illustration, that every fourth meal of each resident is furnished free, and that for one month out of four no charge is made for operating expenses. In this sense, every resident of respondent's home receives one-fourth of its services free.

[4] There is substantial evidence in the record to support the statement that though respondent has not accepted residents who are entirely destitute, it has so ministered to them through its endowment, legacies and facilities, that in the years after their entrance to the home, when the amount of their contribution thereto had been consumed, they did not become paupers or public charges, as they would have become when their assets had been consumed had they not entered respondent's home.

The facts presented by the record herein are too clear to require discussion, that the lands and buildings in question were dedicated to and used exclusively for a strictly charitable purpose. To adopt appellant's construction of the statute would confine the concept of charity solely to the relief of the destitute and exclude all humanitarian activities, though rendered at cost or less, which are maintained to care for the physical or mental well-being of the recipients, and make it less likely that they will become burdens on society, but on the contrary enabling them to establish themselves for life. Nothing could be further than appellant's contention from the legal concept of a charitable institution.

[5] The test of whether an institution is a charitable one is not whether a few pay or all pay. The true test is whether such payments or compensation do not exceed what is required for the successful maintenance of the institution and are devoted to do the purposes for which the charitable institution was founded. If such payments do not exceed the expenses of the charity and are devoted to the aforesaid purposes, then the institution is no less a charity.

[6] The statute with which we are here concerned makes no requirement that an institution must extend free services to the poor and destitute before it may be regarded as charitable. If it were the intention of the Legislature to require institutions to furnish free service to the needy as a condition precedent to tax exemption, appropriate language to that effect could readily have been employed. Courts are not privileged to legislate under the guise of judicial construction. If a change in the wording of the statute is desired, it must come from the Legislature.

[7] Our conclusion that where, as in the case at bar, the payments made by residents are not commensurate with the benefits derived by them from respondent home, where there is no element of private gain, and where the use of all income is devoted to the purposes of the institution, the fact that such payments are made does not affect or destroy its charitable character, is supported by a veritable forest of authorities. Scripps Memorial Hospital v. California Employment Commission, supra, 24 Cal.2d 699 at page 675, 151 P.2d 109, 155 A.L.R. 360; In re Estate of Henderson, 17 Cal.2d 853, 857, 858, 112 P.2d 605; 51 A. Jur., Taxation, sec. 602; Powell & Jacobs' Reducing Realty Taxes, 3d Ed., pp. 202, 212, 224; Bishop & Chapter of Cathedral of St. John the Evangelist v. Treasurer of City & County of Denver, 37 Colo. 378, 379, 385, 386, 387, 388, 86 P. 1021; Brattleboro Retreat v. Town of Brattleboro, 106 Vt. 228, 173 A. 209, 212, 213; Gundry, Auditor General, v. R. B. Memorial Hospital Ass'n, 293 Mich. 36, 291 N.W. 213, 214, 215; Old Colony Trust Co. v. O. M. Fisher Home, Inc., 301 Mass. 1, 16 N.E.2d 10, 11; Salvation Army v. Hoehn, 354 Mo. 107, 188 S.W.2d 826, 829, 830, 831; In re Mendelsohn, 262 App.Div. 605, 31 N.Y.S.2d 435, 440, 441; People ex rel. Doctors Hospital, Inc. v. Sexton, 267 App.Div. 736, 48 N.Y.S.2d 201, 205, 207; Baylor University v. Boyd, Tex.Civ.App., 18 S.W.2d 700, 701; In re Will of Vassar, 127 N.Y. 1, 14, 15, 27 N.E. 394; Gooch v. Association for Relief of Aged Indigent Females, 109 Mass. 558; Boyce et al. v. Sumner, Collector of Taxes, 97 Vt. 473, 124 A. 853; Trinidad v. Sagrada, 263 U.S. 578, 44 S.Ct. 204, 68 L.Ed. 458.

[8] We come now to a consideration of appellant's final contention that tax exemption should not be extended to that portion of respondent's property used to house personnel. In this regard it will suffice to say that there is in the record testimony that those of the personnel who live on the premises are required to live there so as to be available for immediate service and action day or night in case of fire or other emergency. In this connection it must also be remembered that a prerequsite for entrance to the home as a resident is that the applicant be at least 69 years of age. The foregoing testimony was not contradicted. Upon authority of and for the reasons stated in the so-called consolidated hospital cases, supra, with reference to a kindred issue, it follows that the portion of respondent's property used to house personnel, under the circumstances here present, is entitled to exemption.

For the foregoing reasons, the judgment is affirmed.

DORAN, J., concurs.

DOOLING, J., assigned, deeming himself disqualified, did not participate.

DRAPEAU, J., did not participate.

PASADENA HOSPITAL ASS'N, Limited, v. LOS ANGELES COUNTY.

Civ. 16530.

District Court of Appeal, Second District, Division 1, California.

May 31, 1949.

Hearing Granted July 28, 1949.*

1. Taxation 🔑204(2)

The welfare exemption provisions of the Revenue and Taxation Code were begotten from principles of public policy and are not to be so narrowly construed as to lead to injustice, oppression, or absurd results. Revenue and Taxation Code, § 214, subd. (6); Const. art. 13, § 1c.

2. Taxation 🔑241(1, 2), 242(7), 243

Where corporation had been organized exclusively for nonprofit hospital purposes and its property had been used exclusively to effectuate such purpose for more than 50 years, but after adoption of the welfare exemption provisions of Revenue and Taxation Code the corporation adopted an amendment irrevocably dedicating property to charitable, scientific, educational, and hospital purposes, which amendment was consented to by all members on March 1, 1946, but was not indorsed as filed in office of Secretary of State until March 14, 1946, the exemption was timely and entitled the corporation to the welfare exemption from taxation for tax year 1946–1947. Revenue and Taxation Code, §§ 214, 441; Civ.Code, §§ 362b, 605d; Const. art. 13, §§ 1c, 8.

3. Taxation 🔑241(2)

Amendment of articles of incorporation whereby nonprofit corporation irrevocably dedicated its property to charitable, scientific, educational, and hospital purposes constituted a sufficient irrevocable dedication to charitable hospital purposes as to entitle corporation to tax exemption under welfare exemption, since words "educational" and "scientific" as used in amendment were only an adjunct to hospital purposes. Revenue and Taxation Code, §§ 214, 441; Civ.Code, §§ 362b, 605d; Const. art. 13, §§ 1c, 8.

4. Taxation 🔑241(1, 2), 242(2), 243, 244

"Dedication" of property, within statutory provision granting tax exemption if property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes, is simply setting property apart or devoting it to a particular use and the vital principle of dedication is the intention to dedicate, so that whenever such intention is unequivocally manifested the dedication, so far as the owner of the property is concerned, has been made. Revenue and Taxation Code, § 214, subd. (6); Const. art. 13, § 1c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Dedication".

5. Taxation 🔑241(1, 2), 242(2), 243, 244

Under statutory provision granting tax exemption if property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes, the test of exemption is the actual purpose which an organization serves and for which its funds are used rather than the possibility that, as organized, it might pursue objects or use its funds for purposes beyond scope of the exempting statute. Revenue and Taxation Code, § 214, subd. (6); Const. art. 13, § 1c.

6. Taxation 🔑241(2)

Where nonprofit corporation operated a charitable hospital for more than 50 years, the fact that purposes enumerated in articles of incorporation included any lawful purpose where pecuniary profit was not object thereof and right in certain instances to protect its investment in other corporations by guarantying their indebtedness implemented the corporation's basic purpose to maintain and operate a charitable nonprofit hospital and did not defeat right to tax exemption. Revenue and Taxation Code, § 214, subd. (6); Const. art. 13, § 1c.

7. Charities 🔑37, 49

Where nonprofit corporation operating charitable hospital accepted legacy requiring operation of hospital for charitable purposes, the power granted by articles of incorporation to devote funds to any lawful purpose was circumscribed within charitable bounds by cy pres doctrine, and any departure from general purposes for which corporation was formed or any failure on its part to comply with the trust which it had assumed would subject the corporation to an action by Attorney General in name of state to correct such noncompliance or departure. Revenue and Taxation Code, § 214, subd. (6); Const. art. 13, § 1c; Corporation Code, § 9505.

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* Subsequent opinion 221 P.2d 62.

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Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by the Pasadena Hospital Association, Limited against the County of Los Angeles on causes of action involving tax exemption. From an adverse judgment, the plaintiff appeals.

Judgment reversed and cause remanded with directions.

Gibson, Dunn & Crutcher, Los Angeles, Bert A. Lewis and Samuel O. Pruitt, Jr., Los Angeles, of counsel, for appellant.

Harold W. Kennedy, County Counsel, Andrew O. Porter, Deputy County Counsel, Los Angeles, for respondent.

WHITE, Presiding Justice.

This action is one of a series of consolidated cases involving the question of exemption of various hospital properties under the recently enacted Welfare Exemption Act, Const. of Calif., Art. XIII, sec. 1c; Revenue & Taxation Code, sec. 214.

Plaintiff's complaint contained two causes of action, the first of which involved property used for the housing of student nurses, registered nurses and a supervisor of nurses, as well as for a nurses' school. The second cause of action involves only the question of irrevocable dedication. Rev. & Tax.Code, sec. 214(6).

Insofar as plaintiff's first cause of action is concerned, our views thereon are stated in the consolidated cases numbered Civil 16531, 16532, 16533, 16534, 16535, 16536 and 16537, Cedars of Lebanon Hospital v. Los Angeles County, 206 P.2d 915; Serra Retreat v. Los Angeles County; 206 P.2d 940, in which we have this day filed an opinion. Under the holding in the cases just referred to it is manifest that so far as this plaintiff's first cause of action is concerned, the demurrer of defendants thereto should have been overruled, if in other respects the institution qualified under the welfare exemption statute.

The instant case, however, differs from the aforesaid hospital cases in that the trial court held that none of the property of this plaintiff was entitled to the welfare exemption for the reason that it was not irrevocably dedicated to religious, charitable or hospital purposes as required by section 214(6) of the Revenue and Taxation Code.

The sole question presented on this appeal is whether this plaintiff's property was irrevocably dedicated on the first Monday in March, 1946.

Section 214(6) of the Revenue and Taxation Code provides that property used exclusively for hospital purposes is exempt from taxation if "the property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes."

According to plaintiff's complaint, it was organized as a nonprofit corporation in 1892 and has been operated exclusively as such ever since. For many years it has been exempt from all federal and state income, corporation, franchise and social security taxes, as a charitable hospital. All of plaintiff's assets have their source in charitable gifts to it through the years and are irrevocably dedicated to charitable hospital purposes, except for the excess of receipts over disbursements which has been realized in certain of its prior years' operations and invested in hospital property. Plaintiff has never made any distribution of assets to any individual and has never used any asset except in furtherance of the charitable hospital purpose for which it was organized.

In 1932, in satisfaction of a legacy of $2,000,000, the executors of the Estate of Henry E. Huntington distributed funds to certain trustees, in trust however, to use a portion of the gifts for the purpose of establishing a memorial hospital and to use the remainder as an endowment fund to invest and reinvest so that it would yield an income for the perpetual maintenance of the hospital. In 1936 the directors and members of the Pasadena Hospital Association accepted a proposal of the trustees under the Huntington will that the hospital then owned by plaintiff be operated thereafter as the "Collis P. and Howard Huntington Memorial Hospital," which should be *the* hospital referred to in the will of Henry Huntington and would be operated in accordance with the terms of the trust. At that time, all the members and directors of plaintiff resigned, and the trustees of the aforesaid trust became the only members and directors of plaintiff. None of the trustees has ever contributed any property to plaintiff or had ever been a member or director of plaintiff prior to the amalgamation. Since 1936 the entire hospital property has been operated as one unit, under the sole control of the Huntington trustees.

Plaintiff's articles of incorporation are set forth in full as Exhibit "A," attached to the complaint; the provisions thereof pertinent to the question of dedication are as follows:

"Know All Men by These Presents: That we, the undersigned, citizens and residents of the State of California, do hereby voluntarily associate ourselves together for the purpose of incorporating under the laws of the State of California a *private* corporation.

"And we do hereby certify:

* * * * * *

"Second—(A) That the *objects* and *purposes* for which this corporation are (is) formed are:

"(1) To establish, maintain, and carry on within the County of Los Angeles, State of California, a hospital for the sick and injured, and for that purpose *or any other lawful purpose where pecuniary profit is not the object thereof,* to purchase, lease * * * (etc.)

"(4) *To promote or to aid in any manner,* financially or otherwise, *any corporation or association* of which any stocks, bonds or other evidences of indebtedness or securities are held directly or indirectly by this corporation; and for this purpose *to guarantee the* contracts, dividends, stocks, bonds, notes *and other obligations of such corporation or association; and to do any other acts or things* designed to protect, preserve, improve or enhance the value of such stocks, bonds or other evidences of indebtedness or securities.

* * * * * *

"(7) To convey all or any portion of the corporate property *in trust for such lawful purposes as the Board of Directors may deem advisable;* to receive endowments and to invest the same.

* * * * * *

"(9) To do and perform every act and thing necessary to carry out the foregoing purposes and powers in other states and jurisdictions, *which like corporations* or corporations organized for *social,* charitable or religious purposes under the laws of such states and jurisdictions may lawfully do or cause to be done therein.

"(10) To do each and every thing necessary, appropriate or adapted to carry into effect any and all of the foregoing purposes and powers, or to attain *any one or more of the objects* herein enumerated, or which shall at any time appear conducive to or expedient for the protection or benefit of this Corporation, and, generally, to do any act, or transact any business in connection with said purposes and powers which a copartnership or natural person could do or exercise, and which now or hereafter may be authorized by law; *to carry on any other lawful business, enterprise, or activity whatsoever* which may seem capable of being carried on in connection with the foregoing, or calculated, directly or indirectly, to promote the interests of this Corporation *or to enhance the value of its properties.*

"(B) This is a corporation which does not contemplate pecuniary gain or profit to the members thereof. No part of the net earnings of this corporation shall inure to the benefit of any private member or individual, and no substantial part of the activities of this corporation shall be devoted to carrying on propaganda or otherwise attempting to influence legislation."

(Emphasis added.)

After the welfare exemption became a part of the Revenue and Taxation Code, plaintiff, on December 21, 1945, adopted a resolution amending the foregoing section "B" to read as follows:

"(B) This corporation has no capital stock, is not formed for profit, and is a corporation which does not contemplate pecuniary gain, profit or dividends to the members thereof. No part of the net earnings of this corporation shall inure to the benefit of any member or individual, and no part of the activities of this corporation shall be devoted to carrying on propaganda or otherwise attempting to influence legislation. *The property of this corporation is irrevocably dedicated to charitable, scientific, educational and hospital purposes, and upon the abandonment, liquidation or dissolution of this corporation said property shall not inure to the benefit of any private person but* shall be distributed to a fund, foundation or corporation organized *and operated for hospital, scientific, educational or charitable purposes, or to the United States of America, the State of California, or any political subdivision thereof."* (Emphasis added.)

This amendment was consented to by all the members of plaintiff on March 1, 1946, but was not indorsed as filed in the office of the Secretary of State until March 14, 1946.

In the interest of clarity we shall first give consideration to respondent's contention that the foregoing 1946 amendment to appellant's articles of incorporation was not effective for the tax year 1946-1947. That pursuant to section 8, Article XIII, of the Constitution and section 441 of the Revenue and Taxation Code, each taxpayer is required to file a declaration of his property as of noon on the first Monday in March. That for tax purposes or tax exemption purposes, the status of property is fixed at noon on the first Monday in March. It is conceded that in the year 1946 this was March 4, or ten days before the amendment to appellant's articles of incorporation was filed with the Secretary of State. Respondent contends that under the provisions of sections 605d and 362b of the Civil Code the articles of incorporation here in question cannot be deemed amended for any purpose until they were lodged with the Secretary of State on March 14, 1946.

[1, 2] There can be no question under the admitted allegations of the complaint that prior to the adoption and filing of the amendment to the articles of incorporation, appellant was organized exclusively for non-profit hospital purposes and that its property was used exclusively to effectuate such purpose for more than fifty years. As heretofore pointed out, the provisions of the welfare exemption are begotten from principles of public policy and are not to be so narrowly construed as to lead to injustice, oppression or absurd consequences. We therefore conclude that the statute does not make so rigid a requirement as that contended for by respondent. The amendment was as irrevocable before it was filed with the Secretary of State as it was thereafter. To hold otherwise would be to ignore the element of intent which is decisive of the question.

[3] Respondent, however, urges that though we hold, as we do, that the amendment to appellant's articles of incorporation was timely and did not defeat the exemption, nevertheless such an amendment would not constitute an irrevocable dedication to charitable or hospital purposes. This, it is argued, for the reason that the new amendment purports to make an irrevocable dedication to "hospital, *scientific, educational* and charitable purposes" (emphasis added). Respondent urges that under the 1946 amendment it was possible for the board of directors to divert the association's property to scientific purposes or to educational purposes of less than collegiate grade, and that neither of said purposes is exempt under the welfare exemption or under any law. When read in its entirety it seems obvious that the words "educational" and "scientific" as used in the amendment would not give the appellant association power to use its property for any educational or scientific non-hospital purpose. That a hospital may have an educational feature as an incident to its main purpose and usefulness was the holding in Lutheran Hospital Society v. County of Los Angeles, 25 Cal.2d 254, 153 P.2d 341. When words are lifted from the context there is always danger that the intended meaning may be distorted if not actually destroyed. The only safe way to avoid such a pitfall is to read the context as a whole. When so read, the words "educational" and "scientific" as used in the amendment to the articles of incorporation of appellant association are only an embellishment and adjunct to its hospital purposes.

[4] There is much to be said in favor of appellant's contention that its articles of incorporation prior to the 1946 amendment, interpreted in the light of the methods of its operation as a non-profit charitable hospital for fifty-four years prior to said date, operated effectively to dedicate said property to the requisite hospital purpose. Dedication of property is simply setting it apart or devoting it to a particular use. And the vital principle of "dedication" is the intention to dedicate. Whenever such intention is unequivocally manifested, the dedication, so far as the owner of the property is concerned, has been made. Smith v. City of San Luis Obispo, 95 Cal. 463, 465, 30 P. 591. In the instant case, the history of appellant association and the manner in which it was conducted for more than half a century clearly indicate the dedication of its property to the requisite purpose of the welfare exemption.

[5, 6] Respondent seizes upon some isolated excerpts from appellant's articles of incorporation, such as "to carry on any other lawful business, enterprise, or activity whatsoever," as indicative of the power vested in appellant association to divert its property from charitable and hospital purposes to non-exempt uses. We are not impressed with this argument, because the test of exemption is the actual purpose which an organization serves and for which its funds are used—in the instant case for more than fifty years—rather than in the possibility that, as organized, it *might* pursue objects or use its funds for purposes beyond the scope of the exempting statute. The other excerpts relied upon by respondent, one of which provides rather broadly that appellant's purposes include any lawful purpose where pecuniary profit is not the object thereof, and the other giving it the right in certain instances to protect its investment in other corporations by guaranteeing their indebtedness, must be regarded, in the light of appellant's history, as intended to implement appellant's basic purpose to maintain and operate a charitable, non-profit hospital. Indeed, such is their obvious effect. People ex rel. Untermyer v. McGregor, 296 N.Y. 237, 66 N.E.2d 292; People ex rel. Goodman v. University of Illinois Foundation, 388 Ill. 363, 58 N.E.2d 33, 157 A.L.R. 851.

[7] The power to devote funds to any lawful purpose is circumscribed within charitable bounds by the cy pres doctrine. Any departure from the general purposes for which appellant association was formed, or any failure on its part to comply with trusts which it has assumed would subject appellant to an action by the Attorney General in the name of the State to correct such noncompliance or departure. Corporation Code, sec. 9505.

In any event, the language of the 1946 amendment amounted to a complete irrevocable dedication of its property to hospital purposes as contemplated by section 214 of the Revenue and Taxation Code, and appellant is therefore entitled to the welfare exemption.

For the foregoing reasons, the judgment is reversed and the cause remanded with directions to the court below to overrule defendant's demurrer and grant to it a reasonable time within which to answer plaintiff's complaint if it be so advised.

DORAN, J., concurs.

(DOOLING, J., assigned, deeming himself disqualified, did not participate. DRAPEAU, J., did not participate.)

SERRA RETREAT v. LOS ANGELES COUNTY.

Civ. 16533.

District Court of Appeal, Second District, Division 1, California.

May 31, 1949.

Hearing Granted July 28, 1949.*

1. Pleading ⇨214(1)

Allegations of fact in a complaint must be accepted as true on demurrer.

2. Taxation ⇨204(2)

Rule of strict construction of tax exemption laws should never be applied to the exclusion of the rule of reasonableness, or so as to render the exempting language so narrow and restricted as to defeat the apparent legislative intent.

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* Subsequent opinion 221 P.2d 59.

3. Statutes ⚷194

General terms in the statute will be limited in their scope to avoid an interpretation which leads to injustice, oppression, and absurd consequences.

4. Taxation ⚷196

Exemption of property used exclusively for religious purposes is valid.

5. Taxation ⚷244

It is the primary purpose to which property is put that determines whether it is exempt from taxation for religious purposes, which is not to be denied where property is devoted primarily to religious purposes and where to realize and implement that primary purpose, it may be used in part for another purpose.

6. Taxation ⚷244

The entire edifice of a religious corporation which was irrevocably dedicated to religious and charitable purposes was entitled to a 100 per cent. welfare exemption on ground property was used exclusively for "religious purposes", notwithstanding that a portion of property was used to house Franciscan priests who conducted the religious retreats and six lay brothers who did the necessary maintenance work, where presence of priests and lay brothers was absolutely necessary to effect the primary purpose of use of the property for religious purposes. Revenue and Taxation Code, §§ 214, 251, 254, 254.5, 259.5.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Religious Purposes".

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Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Serra Retreat, a California non-profit corporation, against the County of Los Angeles, a political subdivision of the State of California, a body corporate and politic, seeking a refund of taxes on ground that plaintiff's property was exempt from taxation. From the judgment, defendant appeals.

Affirmed.

Harold W. Kennedy, County Counsel, and Andrew O. Porter, Deputy County Counsel, Los Angeles, for appellant.

Joseph Scott and J. Howard Ziemann, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff Serra Retreat is a California religious corporation organized, owned and operated exclusively for religious and charitable purposes, and not for profit; no part of its net earnings, if any there be, inures to the benefit of any person or individual. It has been duly exempted from federal and state income, corporation, franchise, gift, estate, inheritance, social security and unemployment insurance taxes. Plaintiff, as owner and operator, is qualified for welfare exemptions from taxation pursuant to the provisions of sections 214, 251, 254, 254.5 and 259.5 of the Revenue and Taxation Code of the State of California.

All of the property, a single edifice known as Serra Retreat, described in plaintiff's complaint, is used exclusively for religious and charitable purposes, and not for the profit or gain of any person, and has been irrevocably dedicated to such uses.

In addition to recognizing plaintiff's qualifications for welfare tax exemption, defendant has granted such exemption to 78% of the property described in the complaint. Defendant has denied welfare exemption to 22% of plaintiff's property on the ground that this portion of the property involved herein is used to house four Franciscan priests who conduct the retreats and six lay brothers who do the necessary housekeeping, laundry, gardening and maintenance work.

Plaintiff's complaint alleged that the property here in question is operated "for the sole and exclusive purpose of dispensing charity and providing a place of religious reflection to which all persons regardless of race, color or creed may come to spend time in religious reflection and meditation, and to make a layman's religious Retreat for the purpose of giving spiritual benefits and improvement of character to those using said institution; a layman's Retreat lasts for fifty (50) hours, during which time absolute silence is kept by the laymen making the Retreat, and religious exercises and instructions are conducted by the Franciscan Fathers; said retreats are regularly given over weekends and at various times during the week.

"That said Retreat House is open to the public at any and all times for use as a place of religious worship and meditation."

Following an allegation of the daily schedule maintained by retreatants, the complaint further alleged:

"That during the Retreats it is required as part of the religious activity that all retreatants remain constantly on the property, without radios, newspapers, telephone calls or visitors, and that they keep complete and absolute silence so as to be able to meditate upon the religious instructions and exercises without distraction or interruption; that the presence of all retreatants upon the property and the maintaining of strict silence by them constantly during the Retreat is essential to and an integral part of the Retreat.

"No charge, stipend or fee is asked, made or collected for the use of said institution or for the board and room received by anyone desiring to use the same; said institution is supported entirely by voluntary, confidential offerings."

Serra Retreat consists of a two-story and basement building wih housing accommodations for fifty-five lay retreatants, four Roman Catholic Franciscan priests and six Franciscan lay brothers, in addition to chapel, library, kitchen, dining room, laundry and service quarters.

Plaintiff corporation paid the tax levied on the foregoing 22% of its property and commenced the instant action for refund thereof, alleging that the presence of priests and lay brothers is essential and incidental to the operation of the Retreat House. Defendant filed a demurrer on the ground that plaintiff's complaint failed to state facts sufficient to constitute a cause of action. The demurrer was overruled. From the judgment thereafter entered, defendant prosecutes this appeal.

This case is a companion case to those involving a similar question in regard to the exemption of housing of personnel of various hospitals, in which cases we have this day filed an opinion. Pasadena Hospital Ass'n v. Los Angeles County, 206 P.2d 936.

The sole question involved in this appeal is whether that portion of the property owned by a religious institution and used to house the foregoing priests and lay brothers is entitled to the welfare exemption. Const.Calif., Art. XIII, sec. 1c; Rev. & Tax.Code, sec. 214.

We are persuaded that the reasons actuating us to hold in the foregoing hospital cases that nurses' training schools and nurses' homes were of such nature and character as to be identical with the nature and character of the hospital, and therefore must be held as being used exclusively for hospital purposes and exempt under the welfare exemption, require us to hold in the instant case that the presence on the property of respondent of the priests and lay brothers is, under the allegations of the complaint, essential, indispensable and necessary to the conduct and operation of the religious and charitable activities of Serra Retreat.

[1] The complaint alleges as a fact, and not as a conclusion of law, and it must therefore be accepted on demurrer as true, that none of the above mentioned priests or lay brothers receive any remuneration whatsoever for their services except room, board and maintenance, and that all work under a vow of poverty.

[2] Appellant's contention that the welfare exemption law must be strictly construed was answered by us in the foregoing hospital cases, wherein we held, in substance, that the rule of strict construction should never be applied to the exclusion of the rule of reasonableness, or so as to render the exempting language so narrow and restricted as to defeat the apparent legislative intent. The general terms in a statute will be limited in their scope to avoid an interpretation which leads to injustice, oppression and absurd consequences.

[3] The exemption of property used exclusively for religious purposes, like the exemption of property used exclusively for nonprofit charitable hospitals, is grounded on sound legal principles and the truly American philosophy of government.

As was said by the court in State ex rel. Eveland v. Erickson, 44 S.D. 63, 182 N.W. 315, 316, 13 A.L.R. 1189, 1191:

"Thus we see how, during the whole history of our nation, religion and education have been recognized as the foundation pillars of American civilization. We question whether the rule of strict construction should have any place in determining the intention of those who framed and who adopted those provisions of our Constitution relating to exemptions of property used for religious or educational purposes; it would almost seem to us that, in the light of the other provisions to which we have referred, it might well be held that a liberal rather than a strict construction should be applied to our constitutional and statutory provisions in relation to exemption from taxation of property used for school and religious purposes. But, even if the rule of strict construction is to be adhered to, yet, as was said by the court in State ex rel. [Spillers] v. Johnston, 214 Mo. 656, 113 S.W. 1083, 21 L.R.A.,N.S., 171: 'Strict construction must still be a reasonable construction, the product of right and clear thinking, or else reason is no longer the life of the law. * * * In getting at the meaning of the constitutional and statutory exemptions, courts, while applying the rules of strict construction, yet take the road the guidepost of common sense points.'"

[4] In support of its contention that the portion of the property herein used for housing the priests and lay brothers is not within the welfare exemption, appellant directs our attention to many cases, but practically all of them involve the question of whether church rectories and parsonages are exempt under statutes exempting buildings used exclusively as places of worship. We are not here concerned with the interpretation of constitutional provisions granting exemption to churches, such as section 1½, Article XIII, of the Constitution of California. It is noteworthy that the California constitutional provision exempting churches from taxation speaks of buildings and property *used* solely and exclusively *for religious worship,* while the welfare exemption statute now before us speaks of property used exclusively for *religious purposes.* In construing exemption statutes it is easy to fall into error through a consideration of the mere use as distinguished and disconnected from the *purpose* of the *use* of the property. Thus, the primary uses of a church edifice and a rectory or parsonage, when considered without reference to the purposes with which such uses may be connected, may be the same, and yet the primary purposes lying back of such uses may be entirely different. In the church exemption constitutional and statutory cases relied upon by appellant, relating to rectories and parsonages, the primary purpose of the uses to which the property was put was the housing of the pastor or the minister and his family, and the exemptions were sought under statutes which exempted only places used for public worship.

However, in the case now engaging our attention, both the primary use and the purpose of the entire building is entirely and exclusively religious. Appellant's action in exempting 78% of the property amounts to a concession that the primary purpose and use of the institution in question is exclusively religious. The admitted allegations of respondent's complaint explicitly show that the presence on the property of the priests and lay brothers is absolutely necessary to effectuate the primary purpose and use of the property to conduct the retreat, during the progress of which the physical and temporal needs of the retreatants are cared for as well as their spiritual needs. In other words, without the priests and lay brothers being on the property it would not be a retreat house. The presence of the priests and lay brothers on the property here in question is not at all comparable or analogous to the residence of a church pastor or minister in a rectory or parsonage.

It should also be remembered that, as a prerequisite to securing the welfare exemption from taxes, respondent was first required to and did in fact irrevocably dedicate to religious and charitbale uses *all* (not merely 78%) of the property for which the exemption is sought.

[5] Under the rule that it is the primary purpose to which property is put that determines whether it is exempt from taxation, exemption is not to be denied when, as here, the property is devoted primarily

to a religious purpose, and where, *in order to realize and implement that primary purpose,* it may be used in part for another purpose. People v. Jessamine Withers Home, 312 Ill. 136, 143 N.E. 414, 34 A.L.R. 628; School of Domestic Arts & Science v. Carr, 322 Ill. 562, 153 N.E. 669.

[6] It therefore follows that since respondent's entire property has been irrevocably dedicated to religious and charitable purposes, and is devoted in its entirety exclusively to religious purposes, it is entitled to 100% welfare exemption, and the trial court was correct in overruling appellant's general demurrer.

The judgment is affirmed.

DORAN, J., concurs.

(DRAPEAU, J., did not participate. DOOLING, J., assigned, deeming himself disqualified, did not participate.)

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92 Cal.App.2d 299

WESTERN GULF OIL CO. et al. v. SUPERIOR OIL CO. et al.

Civ. 3792.

District Court of Appeal, Fourth District, California.

June 8, 1949.

Rehearing Denied July 1, 1949.

Hearing Denied Aug. 4, 1949.

1. Mines and minerals 🔑92.61

The courts are without jurisdiction to compel defendants who operated oil and gas wells overlying a reservoir to return the residue gas to the reservoir and maintain a high gas pressure therein in order to increase future production and avoid eventual waste, in view that general legislation attempting to limit and prorate production of oil and gas has been defeated, and in view that limited legislation for such purpose provides for voluntary agreement and has no specific provision for compulsory repressuring of an oil and gas field as a unit. Public Resources Code, §§ 3106, 3300 et seq., 3301, 3302.

2. Constitutional law 🔑70(3)

Question whether public policy requires retention of gas in the ground or its return to the ground as residue gas after having been brought to the surface in connection with oil production, or the cutting off of the supply to users of natural gas from such production, in order to increase future production of oil and avoid eventual waste of oil, is a question to be decided, not by the courts, but by the Legislature.

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Appeal from Superior Court, Kern County; Norman F. Main, Judge.

Suit by the Western Gulf Oil Company, a corporation, and the Texas Company, a corporation, against the Superior Oil Company, a corporation, and others to restrain defendants from producing hydrocarbons, liquid or gaseous, from reservoir which was a common source of supply of gas and oil, in such manner as to cause waste of hydrocarbons in the reservoir, and to recover damages for waste. From a judgment of dismissal, the plaintiffs appeal.

Judgment affirmed.

Harvey, Johnston, Baker & Palmer and Claude F. Baker, Bakersfield, J. A. McNair, R. K. Barrows, and James G. Leovy, Los Angeles, David Proctor, Archie D. Gray, and Walter C. Clemons, Houston, Tex., Robert E. Hardwicke, Fort Worth, Tex., D. H. Culton and S. A. L. Morgan, Amarillo, Tex., for appellants.

Hanna & Morton, E. A. Penprase, and Harold C. Morton, Los Angeles, Borton Petrini and Conron & Borton, Bakersfield, for respondent Superior Oil Co.

R. R. Von Hagen, W. Joseph McFarland, Gibson, Dunn & Crutcher, Norman S. Sterry, and Henry F. Prince, Los Angeles, for respondent Lloyd Corporation, Ltd.

Dockweiler & Dockweiler, Thomas A. J. Dockweiler, and Mortimer A. Kline, Los Angeles, West, Vizzard & Howden, Bakersfield, for respondent Pacific Western Oil Corporation.

Robert W. Walker and L. W. Butterfield, Los Angeles, and Calvin Conron, Jr., Bakersfield, for respondent Chanslor-Canfield Midway Oil Co.

Lynn O. Hossom, Long Beach, and West, Vizzard & Howden, Bakersfield, for respondent Hancock Oil Co. of California.

Mervyn W. Phelan, Los Angeles, for respondent Richfield Oil Corporation.

Robert L. Lipman, Burnham Enersen, San Francisco, Felix F. Stumpf, San Francisco, and McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, for respondent Kern County Land Co.

J. E. Woolley and Vincent J. McGovern, San Francisco, for respondent Miller & Lux, Inc.

Briggs & Briggs, Stockton, for respondents Myrtle M. Chase and King M. Chase.

Borton, Petrini, Conron & Borton, Bakersfield, for respondents James Petrini, Carrie L. Borton, and Harry M. Conron.

Herbert W. Clark, San Francisco, for respondents L. A. Cranson and C. E. Houchin, as trustees under the last will of Robert R. McGuire, deceased.

H. T. Sutherland, Los Angeles, A. M. Gee and Calvin A. Brown, Findlay, Ohio, for Ohio Oil Co., as amici curiæ in support of appellants.

GRIFFIN, Justice.

This is an appeal from a judgment of dismissal is an injunction proceeding after sustaining general demurrers to the complaint without leave to amend. The plaintiffs are Western Gulf Oil Company and the Texas Company. One group of defendants are The Ohio Oil Company, General Petroleum Corporation of California, Union Oil Company of California and Barnsdell Oil Company, and will hereinafter be referred to as "unit operators" with plaintiffs. Defendants The Superior Oil Company, Lloyd Corporation, Ltd., Pacific Western Oil Corporation, Chanslor-Canfield Midway Oil Company, The Hancock Oil Company, and Richfield Oil Corporation are referred to as "non-unit defendants." The other defendants mentioned in the complaint are landowners or royalty owners and are referred to as "non-operating defendants."

There was discovered in Kern County the "Paloma Oil Field," about six years before the filing of this action. It is a condensate field and the entire area covers approximately 20 square miles. The unit operators are the owners of the sole and exclusive right to drill and operate for oil and gas within a described area, referred to as the "unit area," and each of the non-unit defendants is the owner of similar rights within other described areas. These areas overlie a common source of supply of oil and gas referred to as the "Reservoir." In addition, there are certain areas overlying the Reservoir in which some of the unit operators hold exclusive drilling and operating rights but which are not a part of the land operated as a unit. The rights of each operator are limited and affected by similar and correlative rights of the others. The non-operating defendants are landowners or royalty owners without present operating rights.

According to the allegations of the complaint, as epitomized by counsel for plaintiffs, the free gas in the Reservoir contains, as a component part thereof, large qualtities of hydrocarbons which under ordinary surface pressure and temperature conditions would be fluids. They are maintained in gaseous form, intermixed with the other gas, only because of the exceptionally high pressures. At lower pressures, these hydrocarbons become liquids—in other words, they condense. This free gas containing condensate is concentrated in one part of the Reservoir, referred to as the "Condensate Area." As the pressures under which this gas is held are reduced, condensation occurs. The condensation resulting from such pressure decline is known as "retrograde condensation." When such condensation occurs, the resulting liquids are precipitated at progressively accelerated rates into the interstices between the grains or particles of sand in the underground formation. Only a very small part of these precipitated liquids can be recovered by any practicable method of operation. To minimize this precipitation and conseqent wastage, it is necessary to maintain the pressure in the Reservoir at as high level as practicable, and in this manner make possible the production of liquefiable hydrocarbons while they remain in gaseous form. Pressure declines resulting from production of fluids from the Reservoir have already caused precipitation of some liquids into the formation, but the pressures are still at sufficiently high levels to hold the greater part of the liquefiable hydrocarbons in the gaseous phase. The quantity of gas in the Reservoir is in excess of one trillion cubic feet; and the recoverable liquefiable hydrocarbons in the condensate gas are in excess of 88,000,000 barrels. The part of the Reservoir outside of the Condensate Area contains crude oil, referred to in the complaint as "black oil." This black oil holds in solution large quantities of gas, called "solution gas." The solution gas adds to the fluidity and mobility of the black oil and furnishes energy to propel the black oil to the well bore. The quality of solution gas retained in the black oil is dependent upon the prevailing formation pressure. In order to produce maximum quantities of black oil, good production practice requires that the solution gas be kept within the black oil until it has performed its functions. The maintenance of pressure in the condensate gas area is a further aid to the production of the black oil. The maintenance of high pressures in the Reservoir is of utmost importance, not only to prevent condensation in the Reservoir, but also to produce the maximum quality of black oil. It is alleged that prudent and efficient producing operations and sound engineering practices, as an effective means of maintaining high pressures within the Reservoir, require the return to the Reservoir, at proper locations and at pressures exceeding pressures in the Reservoir, of all the gas produced therefrom and remaining after processing for the removal of liquefiable constituents, except the small amount used for fuel in lease and plant operations. This is called "cycling," and by means thereof the above-described losses can be kept at a minimum. The complaint then states that the proper distribution of producing wells is an important factor in cycling; that cycling is more effective if the Reservoir is treated as a single entity without regard to property lines, as if it belonged to one owner; that the development and operation (including cycling) of the Reservoir as a unit in an efficient manner consistent with sound engineering practices would result in the production of at least 61,000,000 barrels more than could otherwise be produced; that this represents the quantity that would be wasted in the ground and its value at today's prices exceeds $166,000,000; that plaintiffs' shares of this loss would be in excess of $66,000,000; that plaintiffs and the other unit operators have, at great cost and expense, erected a cycling plant and are carrying on cycling operations on their lands, but the other operators have refused to cycle; that while this cycling in part of the Reservoir by the unit operators has materially increased the recovery of black oil and other liquid and liquefiable hydrocarbons from the common Reservoir, as compared with what would have been recovered had their gas not been returned, such cycling is driving the condensate gas and black oil from the high pressure areas of the unit area into areas from which the non-unit defendants are producing, to the irreparable damage of plaintiffs and the other unit operators; that the non-unit defendants are producing on a large scale without returning to the formation any of the gas (solution or condensate) produced by them, and without extracting the liquefiable hydrocarbons; that such gas, except a small quantity used as fuel, is sold and transported out of the field; that Richfield has only recently commenced its operations; but the others have been so operating for several years and Richfield is returning no gas to the Reservoir; that it is drilling other wells, and, unless prevented, will continue to operate without returning gas to the Reservoir, and will continue the same wasteful practices now being followed by other non-unit defendants. It is further alleged that there is, and has been for several years, an acute and serious shortage of oil and other hydrocarbons in the United States, particularly in California; that public policy, and the protection of private rights of plaintiffs, require that the court enjoin the non-unit defendants from continuing the unreasonable, profligate, and wanton waste in the Reservoir of recoverable oil and other hydrocarbons; that their wasteful practices cause a pressure gradient toward their wells from the unit area, with consequent drainage of tremendous quantities of condensate gas, black oil, and solution gas away from the unit area, where pressures are being maintained, to areas from which non-unit defendants are producing; that if such operations continue, the unit operators cannot prevent the continuance of the enormous losses they are sustaining by this migration and drainage, and cannot materially increase their proportion of total production from the Reservoir, unless they abandon cycling and resort to the same wasteful practices and methods as those of the non-unit defendants. Then follows the claim that plaintiffs are reluctant to abandon cycling and resort to such wasteful practices; but, in order to prevent great damage through drainage to wells of the non-unit defendants, they will be forced to do so unless the non-unit defendants be required to cease their wasteful operations; that maximum ultimate recoveries and sound practices require unit operations and division of the products produced and the costs of operations can be made so as to adjust and protect correlative rights; that such a proposal was made to the non-unit defendants, other than Richfield, but was rejected by them and the only counter-proposal was one by Superior which involved a participation by it on a basis that would allot to it a part of the total production equal in value to more than twice the value of the recoverable oil and gas and other hydrocarbons under the leases; that none of the other non-unit operators would agree to any plan unless Superior became a party thereto; and that the plan proposed by the unit operators was fair and equitable, would prevent the profligate waste now occurring and would fully protect the correlative rights of all interested parties; that plaintiffs are still ready to enter into such a plan or in the alternative, they are ready and willing and, in an effort to do equity, they offer to enter into any other plan of unit operation which will require the return of the residue gas to the Reservoir, so long as economically feasible under sound engineering practices, will prevent waste effectively, and will protect the correlative rights of all; that without complete unitization, even though all should return their gas to the Reservoir, correlative rights cannot be protected unless the non-unit defendants are restricted to their fair and equitable share of the total production from the Reservoir; that too rapid rate of production by any operator would involve uneconomic expenditures for drilling and equipping unnecessary wells and for installing excessive plant facilities; that such uneconomic and unnecessary expenditures could be amortized only by producing and appropriating hydrocarbons not now underlying the lands in which the operator owns operating rights, to the damage of adjoining owners and in violation of the right of the latter to produce their fair share of such hydocarbons at rates dictated by sound engineering and economic practices and considerations; that the non-unit defendants and each of them, unless enjoined by the court, will continue their wasteful practices and will continue to take and appropriate from the Reservior hydrocarbons enormously in excess of the proportions thereof to which they are fairly entitled, in violation of the correlative rights of plaintiffs and the other unit operators and those owning royalty rights in the unit area.

It is then alleged that plaintiffs have no adequate remedy at law; that the non-operating defendants, though not conducting operations themselves, are the beneficiaries of such operations, they being the lessors, royalty owners, or landowners, and they are joined in order that they may be bound by the decree.

In support of their contention plaintiffs also allege that injection wells should be located with regard to the structural features of the reservoir and without regard to property lines, and to protect all of the owners of lands and leasehold estates embracing the Reservoir "in their correlative rights in the Reservoir and its contents," the entire reservoir should be unitized and treated as a single entity *without regard to property lines,* in exactly the same manner as would be the case if the entire field or Reservoir belonged to one owner; that along with such unitized operation, provision should be made for the equitable distribution of the hydrocarbons recovered from the entire reservoir "in conformity with the correlative rights of the owners of the lands embracing the entire Reservoir," without any regard to the particular tracts of land under which the hydrocarbons are now situated and without regard to the tracts of land in which the wells may be drilled to produce and recover the hydrocarbons from this field.

It is then alleged that after discovery of the field the appellants and the other unit operators, recognizing that wastage would result if the residue gas were not returned to the Reservoir, entered into a unitization agreement with respect to their properties and have erected, at great cost, a cycling plant in this field, and they have injected and now are injecting into the reservoir all of their residue gas; that the plaintiffs and the unit operators are injecting their residue gas to the structurally high portions of the Reservoir, where the unit operators have the exclusive rights to drill, and this causes a migration of condensate oil and black oil in the unit area into the non-unit area; and that the non-unit operators sell all of their gas produced from their wells except for the amount used for fuel, and such gas is transported in pipe lines out of this field away to markets. It is alleged that this sale of gas produced by the non-unit operators is a wasteful practice in that the gas is not returned to the producing formations.

Plaintiff then prays: 1. That the court determine, find, and declare (a) the total quantity of each type of recoverable hydrocarbon within the Reservoir and the gross value at the fair market prices above ground of each type of such recoverable hydrocarbons; (b) the total quantity of each type of recoverable hydrocarbon within the Reservoir underlying each tract of parcel of land in which the operating rights are severally vested or owned by the unit operators and the non-unit defendants, and the gross value at the fair market prices above ground of each type of such recoverable hydrocarbon underlying each such tracts or parcels of land; (c) the rights of each non-operating defendant in the Reservoir; (d) the reasonable time over which the liquid and gaseous hydrocarbons should be produced in order to obtain, within reasonable economic limits and under sound engineering practices, the maximum recovery of hydrocarbons from the Reservoir. 2. That the court determine, find, and declare from the evidence the most equitable and efficient method of operating the Reservoir so as to prevent the waste of hydrocarbons in the Reservoir and to protect and adjust the correlative rights of the interested parties. 3. That the court restrain and enjoin each defendant, and the heirs, legal representatives, successors, and assigns of each defendant, from producing any hydrocarbons, liquid or gaseous, from the Reservoir unless and until such defendant shall conduct his operations to conform to the method determined, found, and declared by the court to be the most equitable and efficient in order to prevent the waste in the Reservoir of hydrocarbons and to protect and adjust the correlative rights of all the interested parties. 4. In the alternative, plaintiffs pray that each non-suit defendant, its successors and assigns, be restrained from producing any hydrocarbons, liquid or gaseous, from the Reservoir, during such period as it shall be feasible within economic limits under sound engineering practices, considering the Reservoir as a whole, to cycle and restore the residue gas to the Reservoir, unless and until such defendant injects all the residue gas produced by it from the Reservoir into the Reservoir in a manner which will effectively prevent waste of hydrocarbons in the Reservoir and protect the correlative rights of all interested parties. 5. That before the conclusion of the trial plaintiffs be permitted to file a supplemental complaint alleging the damages sustained by them during the pendency of this action as a result of the continuance of the wasteful and wrongful practices of each defendant; and that damages be awarded to plaintiffs in such amounts. 6. That each non-operating defendant, his heirs, assigns, successors, and legal representatives be restrained and enjoined from asserting or claiming any breach of any covenant or condition, express or implied, of any of said leases held severally by plaintiffs and the operating defendants at variance with the terms and conditions of the judgment and decree entered herein, and that each be required in all respects to conform to and abide by the terms and conditions of such judgment and decree. 7. That plaintiffs have judgment for their costs and for such other and further relief in law and in equity to which they shall show themselves entitled in the premises. 8. That the decree herein provide that after entry thereof jurisdiction be retained by the Court for the purpose of revising or supplementing the same in the event that conditions subsequently arising or discovered make such action necessary in order to further the ends of justice.

The trial court sustained general demurrers interposed by defendants. After plaintiffs indicated their lack of desire to amend, the demurrers were sustained without leave to amend. Judgment of dismissal followed and plaintiffs appealed.

In support of their claim that the complaint does state a cause of action it is argued (1) That it states a cause of action at *common law.* (2) That the use by the non-unit defendants of their property in such manner as to cause injury to the common Reservoir and unreasonable waste of oil and gas infringed on the rights of plaintiffs and constitutes an actionable nuisance, both at common law and under the statutes. (3) That the complaint states a cause of action under the statutes of California, especially under sections 3106 and 3300 of the Public Resources Code which impose a duty upon operators to carry on their operations in a manner that will not cause unreasonable waste of gas or the loss of oil or gas, and the non-unit defendants have failed to conform to the statutory standards in this respect. (4) That a court of equity has the jurisdiction to protect the rights of the plaintiffs in the Reservoir by enjoining the wasteful operations of the non-unit defendants or by prohibiting them from producing unless they refrain from causing unreasonable injury to the correlative rights of the plaintiffs. (5) That as to the non-operating defendants, they are proper and necessary parties to this action.

It is true that this right of the individual to operate as he pleases in extracting oil and gas from his own land is being subjected to increasing control and limitation in the interest of the public and of correlative overlying owners. The restriction on unlimited drilling, provisions for offset wells, requirement of capping of wells to prevent waste, shutting off water, control of "reservoir energy" and other similar regulations, which have been imposed on the developers of oil and gas lands in recent years, while largely based on public interest, is also founded on equitable principles which operate as between the private interests of the collective owners of adjoining lands overlying the reservoir.

Considerable reliance is had by counsel for plaintiffs upon the case of Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35, involving the drawing off of percolating underground water and importing it to distant lands to the damage of adjoining property. It is argued that the common law prnciple of correlative rights, as established in that case, applies equally to oil and gas. We have examined the petition for rehearing in that case. It was there argued by petitioners that a rehearing should be had because the principle of law there stated in reference to correlative rights in percolating underground water might be held applicable to the rights of the owners of land to develop and sell oil. In answering this question the court said, 141 Cal. at page 136, 74 P. at page 772:

"It does not necessarily follow that a rule for the government of rights in percolating water must also be followed as to underground seepages or percolations of mineral oil. Oil is not extracted for use in agriculture, or upon the land from which it is taken, but solely for sale as an article of merchandise, and for use in commerce and manufactures. The conditions under which oil is found and taken from the earth in this state are in no important particulars different from those present in other countries where it is produced. There is no necessary parallel between the conditions respecting the use and development of water and those affecting the production of oil. Whether, in a contest between two oil producers concerning the drawing out by one of the oil from under the land of the other, we should follow the rule adopted by the courts of other oil-producing states, or apply a rule better calculated to protect oil not actually developed, is a question not before us, and which need not be considered."

It is apparent, therefore, that the case relied upon by plaintiffs is not determinative of any correlative rights respecting the rule that should be adopted as to oil production.

In Ohio Oil Company v. Indiana, 177 U.S. 190, 210, 20 S.Ct. 576, 584, 44 L.Ed. 729, it is said:

"* * * the legislative power * * * can be manifested for the purpose of protecting all the collective owners, by securing a just distribution * * * and preventing it (the oil and gas) from being taken by one of the common owners without regard to the enjoyment of the others." See, also, 31 California Law Review, p. 369.

[1] Stripped of all unnecessary minutiae, it appears to us the real question here involved is whether the courts of this state are authorized, or have the power and jurisdiction and are obligated to exercise such power and jurisdiction, if any, to determine the several questions of public policy which are here involved, including whether the repressuring of such a reservoir for increased future production is of greater value than its use for supplying present needs. Also, whether a court, notwithstanding the limited authorization heretofore furnished by the legislature, has power to take over and superintend the operation of any and all oil fields by court decree, to compel a fixed distribution of oil produced regardless of the effort expended, and to require non-unit operators to expend large sums in boring wells and installing repressuring machinery on the property of others, all of which would be necessary in carrying out a unit operation of the entire field, according to the proposed plan or to any plan which would successfully bring about compulsory unitization.

Counsel for defendants have pointed out writings of Robert E. Hardwicke, one of the counsel for plaintiffs, a highly recognized authority on the subject of oil and gas, and oil and gas law. Reported in 13 Mississippi Law Journal, 1941, p. 407. He describes the difficulty attendant upon compulsory unitization and its doubtful legality or enforcement by a court. We adopt the words of the eminent author hereinafter quoted as most applicable to the facts here pleaded:

"It is freely admitted that unit operation of a field is a splendid thing. However, complications arising from compulsory unit operations are considered to be almost insurmountable. As observed above, if unit operation of a field is to be effective, the program should be formulated in the early stages of its history. Obviously, if the field is already drilled up, or substantially so, it is then too late to provide for unit operation. Let us assume, therefore, that several wells have been completed in an area which unquestionably constitutes a new field. Undoubtedly, there is available a reasonable amount of geological and geophysical data, giving some indication of the probable extent of the field. If, at this point, a hearing should be had before a regulatory agency for the purpose of formulating a program for unit operation of the field, whatever its extent and character, the program would have to provide for valuing in some way all properties within the limits found from meagre evidence to be within the productive area, or the program would have to provide some method for taking care of tracts later found to be productive or nonproductive, contrary to a previous classification. The program would have to provide money for drilling and operating wells, and for distribution of the allowable production at a time when few facts exist as to the relative values of properties. If exploratory wells should first be drilled, such fact finding procedure might cover a considerable period, and the owners and lessees of the land in the area would be deprived of the right to do their own drilling, and to secure immediate income.

"Beyond question, it would be found that changes would have to be made from time to time in the relative values of tracts, frequently requiring refunds by royalty owners and lessees. The many complications arising from entering an order requiring compulsory unit operations become apparent. The facts would be too meagre to permit findings as to relative values of properties supported by substantial evidence; consequently, it is extremely doubtful whether such an order would stand up in court. The chances are that it would be stricken down as being unreasonable, constituting an unwarranted regulation of property rights.

"It cannot be denied that a compulsory unit-operation order would restrict the use of property and the discretion of the owners far more than does the usual type of conservation regulation now current. The ultimate recovery likely under a compulsory unit-operation program, as distinguished from a normal conservation program, would have to be very great before a court would hold that the extraordinary restrictions in the use of property which would take place under the compulsory unit-operation program were justified as a reasonable means of preventing waste and protecting rights. It is more likely the courts would hold that such restrictions were far beyond the necessities of the case.

"This much is certain: the merits of compulsory unit operations, as against reasonably efficient and effective control under existing conservation statutes, are not well enough established to overcome in legislative bodies the reluctance to give administrative agencies far greater powers than are now being exercised. I think it can be said that no compulsory unit operations law would have a chance to pass either in Congress or in any state legislature. Moreover, no regulatory agency is likely, under present state of knowledge, to issue a compulsory unit-operation order without being clearly directed by statute to do so."

As to the public policy involved, the legislature of this state, in 1939, passed the California Oil and Gas Control Act, commonly known as the Atkinson Bill (Stats.1939, Chap. 811, p. 2368). The administration of the act was entrusted to an Oil Conservation Commission. By its terms the Commission was authorized to limit and prorate the production of crude oil and natural gas and have general authority over the question of waste, both underground and surface, and production in excess of the reasonable market requirement. Pooling of properties was permitted and could be required in certain cases. The operation of this act was suspended by referendum. At the election the act and the policy therein declared suffered defeat at the hands of the electorate. Since that time somewhat similar legislation has been proposed and rejected. However, limited and less authoritative enactments have been passed.

In 1915 a Department of State Mining Bureau was created for the protection of natural resources of petroleum and gas from waste and destruction. It provided for the appointment of a State Oil and Gas Inspector and also prescribed his duties and powers. In 1929 (Stats.1929, p. 923, Chap. 535) this Act was amended declaring the *unreasonable* waste of natural gas to be opposed to the public interest and unlawful. In 1939 (Stats.1939, p. 1067, Chap. 93) the Public Resources Code was adopted and the enactments then in force were incorporated therein. Section 3300 et seq. provide generally that the *"unreasonable waste"* of natural gas, before or after the removal of gasoline from the gas, is opposed to public interest. Provision is made for *voluntary* agreements between the respective parties for the purpose of bringing about cooperative development and operation of oil fields as a unit, on approval of the Supervisor, but there is no specific provision for *compulsory* repressuring of an oil or gas field as a unit.

In two large oil production states, Louisiana and Oklahoma, legislation has been enacted looking to compulsory unitization or recycling of gas in any oil pool, but provision is made for a hearing and notice, or 50 per cent of the operators of a field can petition for such unitization. A special corporation commission charged with the duty of administering the law is designated and special machinery for carrying it into effect is created by statute. Apparently some practical difficulty is arising in attempting to enforce such unit organization, even under such a statute. See January, 1948 issue of Oil & Gas Journal, p. 46. Respondent's brief indicates that a test case is now pending involving the constitutionality of the Oklahoma statute.

It should also be here noted that in Texas there are statutory provisions permitting operators to enter into a unit agreement for the operation of a gas field with the approval of the Attorney General, Art. 6008, Sec. 21, Vernon's Civil Statutes, but with respect to oil, the statute prohibiting waste, including underground waste, restricts the definition of "waste." Article 6014(g) provides: "* * * however, it is not the intent of this Act to *require* repressuring of an oil pool or that the separately owned properties in any pool be unitized under one management, control or ownership."

[2] It therefore appears to us that the question whether public policy requires the retention of gas in the ground or its return to the ground after being brought to the surface in connection with oil production, or the cutting off of the supply to present users of natural gas from such production, and the wisdom of any such drastic course is a question that should be decided, not by the courts, but by the legislature. People v. Pacific Health Corporation, 12 Cal. 2d 156, 82 P.2d 429, 119 A.L.R. 1284.

A bill was heretofore presented to the legislature (A.B.700 [1947]) and rejected, and one is now pending (A.B.2718) bearing on this subject. The legislature has been careful to state and expressly provide the particular acts which it deems to be a waste of oil and gas, and has provided the necessary procedure for presenting such question to the Director, Sec. 3302, Public Resources Code, but where unitization or repressuring is referred to, it has expressly left such matters to agreement between the parties concerned, subject to the Supervisor's approval. Sec. 3301, Public Resources Code. The legislature is fully cognizant of the question here presented, as evident from the history of the Atkinson Oil Control Bill. It may be that plaintiffs have presented a persuasive argument in favor of legislation looking toward some form of compulsory unit operation of a field such as the complaint describes, but no matter how good the argument for legislation may be, a court is not the body to whom such an argument should be addressed.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

WERNER v. SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS.

Civ. 16837.

District Court of Appeal, Second District. Division 2, California.

June 2, 1949.

Rehearing Denied June 20, 1949.

Hearing Granted July 28, 1949. *

1. Constitutional law 🔑90
Libel and slander 🔑1½

Satute providing for recovery of special damages only for libel in newspaper or slander by radio unless correction is requested and refused, has no effect on the right to speak, write, and publish freely on any subject. Civ.Code, § 48a.

2. Libel and slander 🔑70

Statute providing for recovery of special damages only for libel in newspaper or slander by radio unless correction is requested and refused, has for its sole purpose the limitation of the character and amount of damages that may be recovered by one who suffers injury by reason of the written or spoken word. Civ.Code, § 48a.

3. Appeal and error 🔑102

Order sustaining demurrer to complaint was not appealable.

4. Constitutional law 🔑90

Constitutional provision guaranteeing the right to every person to speak and write freely, does not contemplate that the legislature may abridge the responsibility of the writer or publisher of libelous matter concerning another. Const.Cal. art. 1, § 9.

5. Constitutional law 🔑90

Constitutional provision guaranteeing right to every person to speak and write freely, being responsible for the abuse of that right, intends that every publisher or writer shall be responsible to aggrieved persons for what he publishes or writes, in the dissemination of his views, and that every publisher and writer shall be fully responsible for his words, and that all persons shall be responsible alike. Const.Cal. art. 1, § 9.

6. Constitutional law 🔑208(1)

The legislature cannot give one class of citizens legal exemptions from liability from wrongs, where such exemptions are not granted to others, and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering fully for the wrong.

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* Subsequent opinion 216 P.2d 825.

7. Constitutional law 🔑211

The "equal protection of law" guaranteed by the federal constitution forbids the selection of one person and the imposition on him of burdens and liabilities that are not cast on another similarly situated, and forbids the arbitrary classification of individuals, subjecting one to special burdens and liabilities from which another is immune. U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Equal Protection of Law".

8. Constitutional law 🔑211

Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. U.S.C.A.Const. Amend. 14.

9. Constitutional law 🔑209

The mere fact of classification is not sufficient to remove a statute from the inhibition of the equality clause of the fourteenth amendment, but it must appear that the classification has been made on a reasonable ground, and that there is a difference that bears a just and proper relation to the attempted classification. U.S.C.A. Const. Amend. 14.

10. Libel and slander 🔑74

The phrase "every person" as used in constitutional provision that "every person" is responsible for the abuse of the right guaranteed him to speak, write, and publish his sentiments freely on all subjects includes all persons, both natural and artificial. Const.Cal. art. 1, § 9.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Every Person".

11. Constitutional law 🔑36

The legislature is without power to shrink the horizon of the constitution or to diminish any right guaranteed by it.

12. Libel and slander 🔑1½

Provision of the constitution that every person shall be responsible for the abuse of his privilege of speaking, writing or publishing his sentiments, does not permit the construction that any person may be made only partially responsible for such abuse. Const. art. 1, § 9.

13. Constitutional law 🔑308

The legislature is without authority to limit responsibility under constitutional provision that every person is responsible for the abuse of the right guaranteed him to speak, write, and publish his sentiments freely on all subjects, and is without authority to circumscribe the right of an injured person to recover such damage, general or special or both, as he may sustain by reason of such abuse. Const. art. 1, § 9.

14. Constitutional law 🔑93(1)
Property 🔑5½

The right to recover actual or compensatory damages, is "property" and vests in the injured party immediately on the commission of the wrong injuring him.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Property".

15. Constitutional law 🔑93(1)
Property 🔑5½

Since exemplary or punitive damages are awarded on grounds of public policy and not because plaintiff is entitled thereto, they are not "property," and the power of the legislature to restrict or to prohibit their recovery is not involved.

16. Constitutional law 🔑277(1)
Property 🔑5½

Right to recover actual damage is "property" and constitutional guarantees of that right are the same as of other property rights, and hence an injured person cannot be deprived thereof without "due process of law," which means that he is entitled to a hearing and determination by a court of law.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Due Process of Law".

17. Libel and slander 🔑49

A newspaper is not justified in publishing a false and scurrilous statement without making an examination as to its source and authenticity merely in order to furnish reading matter.

18. Libel and slander 🔑49

A newspaper publisher cannot be absolved from liability for libel merely because he prints "spot news" without attempting to ascertain whether it be true or false in order to supply the public with up-to-the-minute news.

19. Libel and slander 🔑49

A widespread desire by a newspaper publisher for criminal or other sensational news does not excuse the publication of a libel, and there is no greater immunity for publication of gossip in a newspaper than if published by some other medium.

20. Constitutional law 🔑249, 308
Libel and slander 🔑1½

Statute providing for recovery of special damages only for libel in newspaper or slander by radio unless correction is requested and refused, is unconstitutional as a denial of due process and equal protection of the law. Civ.Code, § 48a; U.S.C.A.Const.Amend. 14.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Stanley H. Barnes, Judge.

Action by Erwin T. Werner against the Southern California Associated Newspapers, a California corporation, to recover damages for alleged libel. From a judgment of dismissal and from an order sustaining a demurrer to complaint, the plaintiff appeals.

Judgment reversed with directions, and purported appeal from order sustaining demurrer dismissed.

Morris Lavine, Los Angeles, for appellant.

O'Melveny & Myers, Pierce Works and Sidney H. Wall, Los Angeles, for respondent.

WILSON, Justice.

[1,2] The sole question to be determined in this action is the constitutionality of section 48a of the Civil Code.[1] That

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[1] Sec. 48a of the Civil Code of California, as amended by Stats.1945, ch. 1489, p. 2762:

"1. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

"2. If a correction be demanded within said period and be not published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast.

"3. A correction published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as the statements claimed in the complaint to be libelous, prior to receipt of a demand therefor, shall be of the same force and effect as though such correction had been published or broadcast within three weeks after a demand therefor.

"4. As used herein, the terms 'general damages,' 'special damages,' 'exemplary damages' and 'actual malice,' are defined as follows:

"(a) 'General damages' are damages for loss of reputation, shame, mortification and hurt feelings;

"(b) 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other;

"(c) 'Exemplary damages' are damages which may in the discretion of the court or jury be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication or broadcast with actual malice;

"(d) 'Actual malice' is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, section has no effect on the right to speak, write and publish freely on any subject. Its sole purpose is to limit the character and therefore the amount of damages that may be recovered by one who suffers injury by reason of the written or spoken word.

The complaint contains the conventional allegations in an action for libel: the publication in defendant's newspapers, wantonly, recklessly and with disregard as to its truth or falsity, of a false and unprivileged story concerning plaintiff, charging that he had been convicted of bribery and grand theft and had been sentenced to San Quentin Prison therefor; that the statement was false and was either known to or easily ascertainable by defendant to be false; that the publication was made with actual malice, and with intent to injure, disgrace and defame plaintiff and to expose him to hatred, contempt, ridicule and obloquy, to his damage in the sum of $100,000.

[3] Defendant's demurrer to the complaint was sustained. Upon plaintiff's declining to amend an order and judgment of dismissal was entered, from which plaintiff has appealed. There is also a purported appeal from the nonappealable order sustaining the demurrer.

Defendant contends that the complaint is fatally defective in that it does not allege, in the language of section 48a, (1) that within 20 days after the discovery of the libel plaintiff demanded of defendant a retraction and defendant failed to make such retraction; (2) that plaintiff has failed to allege special damages; (3) that plaintiff has prayed for compensatory and punitive damages but is not entitled thereto because the libel was printed in a newspaper.

Plaintiff maintains that the complaint states a cause of action in proper form for the reason that section 48a is in violation of (1) the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, (2) subdivision 33 of secion 25 of Article IV of the State Constitution,[2] and (3) section 9 of Article I thereof.[3]

The constitutionality of section 48a has not heretofore been raised. That section has been cited only twice—in Behrendt v. Times-Mirror Co., 30 Cal.App.2d 77, 82, 85 P.2d 949, and Harris v. Curtis Publishing Co., 49 Cal.App.2d 340, 343, 121 P.2d 761. In neither case was the validity of the act questioned but in each timely demand for retraction was made.

The rights secured to all persons are set forth in Part II of Division 1 of the Civil Code. Section 43 provides that every person has the right to protection from, among other things, defamation. Section 44 provides that defamation is effected by libel or slander. Libel is defined in section 45.[4]

[4, 5] Section 9 or Article I of the Constitution of California guarantees the right to every person to speak and write freely "being responsible for the abuse of that right." That provision does not contemplate that the Legislature may abridge or curtail the responsibility of the writer or publisher of libelous matter concerning another. The framers of the Constitution intended just what they expressed in plain language—that every publisher or writer shall be responsible to aggrieved persons for what he publishes or writes in the dissemination of his views; that every publisher and writer shall be fully responsible for his words—not partially responsible; that all persons shall be responsible alike—

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that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice."

[2] Constitution, art. IV, sec. 25: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Thirty-third—In all other cases where a general law can be made applicable."

[3] Constitution, art. I, sec. 9: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *"

[4] Civil Code.

Sec. 45: "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

not that some shall be fully responsible, others only in part, and some not at all. If liability for damages may be limited by the Legislature in one particular it may be limited in another and another until the legislative power shall have been exercised to such an extent that the import and reality of the constitutionally imposed responsibility will have vanished leaving no more substance than the grin of Alice's Cheshire cat.

Section 48a places a limitation on the right of recovery of damages to reputation and for shame, mortification and hurt feelings, no matter how scurrilous and false the statements may be. In order to maintain an action therefor a victim of libel must serve a notice on the publisher demanding a correction and if correction is published as provided in the statute such damage cannot be recovered at all. Without making demand the libeled person may recover special damages, that is only such as he proves he has suffered in respect to his property, business, trade, profession or occupation. "There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property." Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731, 733, 1 L.R.A. 599, 16 Am.St.Rep. 544.

In the Park case the court declared the Michigan statute,[5] adopted in 1885, invalid and beyond the power of constitutional legislation. The act provided that a plaintiff should recover only actual damages if it appeared that the libelous article was published in good faith and its falsity was due to mistake or misapprehension, and if a correction was published in the manner provided in the statute. The definition of the term "actual damages" was substantially the same as that of "special damages" in section 48a of our Civil Code. The court pointed out that the proof of actual damages as defined in the act would be impracticable in some cases and difficult in all; that damage to property, business, profession or occupation would not be the true damage in a large share of the worst cases; that if the income of a libeled person is from a fixed investment or from a salary or business not depending upon his repute, there would be no direct loss or damage to him unless the publication caused him to be separated from his office or employment. The Park case was approved in McGee v. Baumgartner, 121 Mich. 287, 80 N.W. 21, 22, wherein the court declared that a statute prohibiting damages to reputation is clearly unconstitutional.

A statute of Ohio[6] provided that if a publication was made in good faith through mistake of fact, but with reasonable ground for believing it to be true, and the publisher upon demand therefor published a retraction, the presumption of malice should thereby be rebutted. In Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N.E. 917, 920, 38 L.R.A., N.S., 913, the statute changing the presumption and burden of proof as to malice in libel cases was held to be contrary to the Fourteenth Amendment in that it abridged the plaintiff's rights and privileges. The court said: "Under this statute the plaintiff is given the choice of resorting to the courts without the right of demanding a retraction, or of demanding a retraction, and, if given, being limited in his right of recovery; and if he chooses either course, he must do it at his own peril and without any recompense whatever."

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[5] Michigan Laws, 1885, pp. 353–354: "An Act relative to suits for libel.

"Section 1. The People of the State of Michigan enact, In any suits brought for the publication of a libel in any newspaper in this State the plaintiff shall recover only actual damages if it shall appear that the publication was made in good faith and did not involve a criminal charge, and its falsity was due to mistake or misapprehension of the facts, and that in the next regular issue of said newspaper after such mistake or misapprehension was brought to the knowledge of the publisher or publishers, whether before or after suit brought, a correction was published in as conspicuous a manner and place in said newspaper as was the article sued on as libelous.

"Sec. 2. In any action or suit for the publication of a libel in any newspaper in this State, the plaintiff shall not be entitled to recover, in addition to actual damages, any greater sum than five thousand dollars.

"Sec. 3. The words 'actual damages' in the foregoing section shall be construed to include all damages the plaintiff may show he has suffered in respect to his property, business, trade, profession or occupation, and no other damages."

[6] Sec. 5094, Revised Statutes of Ohio, as amended in 1900, 94 Ohio Laws 295: "Sec. 5094. In the actions mentioned in the preceding section, the defendant may allege and prove the truth of the matter charged as defamatory, and proof of the truth of the same shall be a complete defense to any claim for damages, and in every case the defendant may prove any mitigating circumstances to reduce the amount of damages. If it shall appear at the trial, (that) the publication complained of was made in good faith, through mistake of fact, but with reasonable ground for believing that the statements therein contained were true and that the publisher upon demand and (within) a reasonable time thereafter published a full and complete retraction in as public (a) manner as that in which

A Kansas statute similar to that of California was held to be void in Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041, 1042, 64 L.R.A. 790, 104 Am.St.Rep. 422, where the act is set forth in full. It limited the right of recovery in a libel case to actual damages, as defined, when retraction had been made after demand and it was shown that the publication was made in good faith. Said the court, general damages "are designed to compensate for that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation, consequent upon the malicious publication of the false and libelous matter." The court pointed out that the statute does not deny remedy for a portion of the damage suffered by the victim of the libel but for the larger class of injuries—suffering, anguish, humiliation—he is without remedy. The argument that retraction reinvested the libeled person with his good name and accomplished all that would be achieved by a verdict of a jury was rejected.

In North Carolina the statute relating to damages for libel was substantially the same as the Michigan act except that it did not contain a definition of "actual damages." In Osborn v. Leach, 135 N.C. 628, 47 S.E. 811, 66 L.R.A. 648, where the text of the act is quoted, the plaintiff was held to be entitled to recover actual damages, which the court calls compensatory damages, and which include damages for (1) pecuniary loss, direct or indirect, or special damages, (2) for physical pain and inconvenience, (3) for mental suffering, and (4) for injury to reputation. The court quoted at length with approval from Hanson v. Krehbiel, (Kan.) supra, and Park v. Detroit Free Press Co., (Mich.) supra, and held that since compensatory damages for a wrong are property, a person cannot be deprived of the right to recover such damages by a "legislative adjudication" beforehand that a newspaper's retraction of a libelous article is full compensation for the injury. The provision for retraction was construed as affording an opportunity to escape only punitive damages when there is good faith, honest mistake and reasonable ground of belief of the truth of the article, and with this limitation was held to be an appropriate remedy for newspapers and periodicals and not a discrimination forbidden by the Constitution. The provision for notice by the plaintiff before bringing the action, said the court, was only for the purpose of furnishing the defendant opportunity to publish a retraction, the effect of which could extend no further than to relieve him from punitive damages even when good faith, honest mistake and reasonable ground of belief were proved by the defendant.

The Constitutions of Ohio, Kansas and North Carolina each contained a guarantee that every person, for an injury done him in his land, goods, person or reputation, shall have remedy in due course of law. It has been suggested that such a guarantee in the respective bills of rights of those states furnished the basis for striking down

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said original publication was made, the presumption of malice attaching to or growing out of the publication of said libellous matter shall be thereby rebutted; provided that nothing contained in this act shall prevent the person libelled from alleging and proving actual malice on the part of the publisher and any special damage resulting to him therefrom."

[The "preceding section" referred to in section 5094 relates to allegations and proof required in actions for libel and slander.]

the limitation on the right to recover damages for libel. While the courts in each of the cited decisions rested on such constitutional guarantee as one of the reasons for invalidating the statute, yet they relied just as emphatically on the other reasons to which we have referred. The Michigan court voided a similar statute notwithstanding there was no comparable provision in the Constitution of that state.

[6] Section 48a does not operate on all persons alike. Privileges and immunities are guaranteed to one class of persons, newspaper publishers and radio broadcasters, that are denied to all others. The members of the favored class, under the conditions provided in the statute, are relieved from liability for injury to reputation, even for intentionally false statements, while all others are held to full and strict accountability under all circumstances for both general and special damages. It "is not competent for the legislature to give one class of citizens legal exemptions from liability for wrongs not granted to others; and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering fully for the wrong." Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.M. 731, 734, 1 L.R.A. 599, 16 Am.St.Rep. 544, supra.

It is contended that the statute escapes condemnation as class or special legislation by reason of the fact that all newspaper publishers and all radio broadcasters are included in the special class upon which the statute operates. The producers of magazines, periodicals and other forms of publication are not included within the exemption from liability. Furthermore, the encompassing of all persons within a given perimeter of action does not solve the question. The statute involved in the cases of Oyama v. California, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249; Takahashi v. Fish and Game Comm., 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478, and Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17, s. c. sub nom. Perez v. Lippold, 32 Cal.2d 711, 198 P.2d 17, imposed restrictions on all persons within the classes named in the respective statutes. The laws were invalidated in the Oyama and Takahashi cases because persons ineligible to citizenship (in these cases Japanese) were placed in a class separate from all other persons and inhibitions were imposed upon them to which others were not subjected. In the Perez case the restrictions were upon the right of Negroes and persons of other specified races to marry white persons but were not applicable to persons of other races or colors.

A false statement is no more nor less injurious when published in a newspaper than the identical statement disseminated to the public by means of a letter or other medium should it be read by the same number of people. Under the California statute a newspaper publisher would be liable for no more than special damages unless the victim demanded a correction and the same was not published. However, should another person make similar libelous statements concerning the same individual by means of letters that were read by the same or the same number of people as those who read the newspaper, he would be liable for all damages suffered by the victim without the necessity of demand for a correction. The publisher would be given immunity which the other person could not claim. At the same time the libeled person would be denied the equal protection of the law in that he could recover damages of a limited character and in a less amount in one case than would be permitted in the other for a libel of the same nature. The nonpublisher would be liable for a greater amount and for damages of a different nature than would the publisher. In either case the privileges and immunities of one are enlarged to a greater extent than of the other, and one is denied protection of the law equal to that given to the other.

[7, 8] The equal protection guaranteed by the Constitution forbids the selection of one person and the imposition upon him of burdens and liabilities that are not cast upon another similarly situated, nor may individuals be arbitrarily classified, subjecting one to special burdens and liabilities from which another is immune. Atchison, etc., Co. v. Matthews, 174 U.S. 96, 104-105, 19 S.Ct. 609, 43 L.Ed. 909, 913. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. Shelley v. Kraemer, 334 U.S. 1, 22, 68 S.Ct. 836, 92 L.Ed. 1161, 1185, 3 A.L.R.2d 441.

[9] The mere fact of classification is not sufficient to remove a statute from the inhibition of the equality clause of the Fourteenth Amendment, but it must appear that the classification has been made on a reasonable ground—a difference that bears a just and proper relation to the attempted classification. Gulf, etc., Co. v. Ellis, 165 U.S. 150, 165, 17 S.Ct. 255, 41 L.Ed. 666, 672.

[10–15] Defendant contends that the statute does not absolve a publisher from responsibility for the abuse of his right to publish freely what he chooses since (1) the libeled person may always recover "special damages" as defined in section 48a—that is damages to his property, business, trade, profession or occupation, and (2) he may recover general, special and punitive damages should the newspaper fail to publish a correction after demand therefor. Section 9 of Article I of the Constitution declares that "every person" is "responsible for the abuse of" the right guaranteed him to speak, write and publish his sentiments freely on all subjects. The term "every person" includes all persons, both natural and artificial, without exception. The Legislature is without power to shrink the horizon of the Constitution or to diminish any right guaranteed by it. The provision that "every person" shall be responsible for the abuse of his privilege of speaking, writing or publishing his sentiments does not permit the construction that any person may be made only partially responsible. The Legislature is without authority to limit such responsibility or to circumscribe the right of an injured person to recover such damage, general or special or both, as he may sustain by reason of such abuse. The right to recover actual or compensatory damages is property and vests in the injured party immediately upon the commission of the wrong. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811, 66 L.R.A. 648, supra. Since exemplary or punitive damages are awarded on grounds of public policy and not because the plaintiff is entitled thereto, they are not property and the power of the Legislature to restrict or to prohibit their recovery is not brought into question.

[16] The right to recover actual damage is property and the constitutional guarantees of that right are the same as of other property rights, hence an injured party cannot be deprived thereof without due process of law, which means that he is entitled to a hearing and determination by a court of law. The publication of a retraction is not such a hearing and cannot be made a substitute for the constitutional right of trial by court or jury.

As emphasized in the Michigan case Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731, 1 L.R.A. 599, 16 Am.St. Rep. 544 supra, proof of special damages would be impracticable in most cases and impossible where the victim of the libel relied on a fixed investment for his income or where he was employed on a salary and the publication did not cause him to be separated from his position.

Under defendant's theory, which we decline to accept, a newspaper would always be able to avoid general damages by publishing a correction in the manner specified in the code section, therefore no matter how foul and false a published statement may be or how loathsome a crime may be charged, the victim would be denied any relief whatsoever in the event (1) he should be unable to prove actual damage to his business or occupation, and (2) the newspaper published a correction or retraction. Shame, mortification and injury to reputation are counted at naught under the statute if a correction is published.

Defendant contends that a timely correction published as conspicuously as the libelous article would afford a remedy of equal or greater value than any damage he might recover. The answer to such argument is that the legislative theory of recompense for injury is not a valid substitute for the constitutional pledge that every person, no exception, is responsible for his acts.

The framers of the Constitution did not contemplate that its virility could be so impaired by the Legislature that the responsibility imposed on writers and publishers would be reduced to the extent that a mere correction or retraction would operate as a condonation of the publication of a libel or as an exculpation of a negligent, indifferent or reckless publisher. A retraction, and as well a plea of publication without malice, is admissible in mitigation of damages, but not to defeat entirely a plaintiff's right of recovery.

In contending that the Legislature had power to restrict the recovery of damages for libel, defendant relies on Langdon v. Sayre, 74 Cal.App.2d 41, 168 P.2d 57, which prohibits the common law right of action for breach of promise to marry. That decision is inapplicable since there is nothing in the Constitution providing for a remedy for such a breach. Defendant's quotation from Modern Barber Colleges v. California Stabilization Commission, 31 Cal.2d 720, 192 P.2d 916, 920, that "Except as the Constitution otherwise provides, the Legislature has complete power to determine the rights of individuals," is also inapplicable for the reason that the Constitution does "otherwise provide" with reference to libel suits and the Legislature is without power to withdraw the guaranteed remedy.

In support of the setting apart of newspapers as a class to which special privileges and immunities may be constitutionally granted, defendant contends that such classification is proper for the reasons, among others, "1. That newspapers are expected and relied upon by the public to furnish dead-line spot news; 2. That under such circumstances it is virtually impossible to make any accurate check as to the authenticity of the news stories published." Such argument has mild support in Thorson v. Albert Lea Publishing Co., 190 Minn. 200, 251 N.W. 177, 180, 90 A.L.R. 1169, where, in discussing the Minnesota retraction statute, M.S.A. § 548.06, the court says that there cannot be long delays in the publication of information which the public is entitled to receive seasonably and because newspapers are performing an important public service they "are entitled to all reasonable protection." We disavow any theory that sanctions the publication of libelous statements under an immunity which limits the damages that may be recovered to such amount as the injured party has suffered in respect to his property, business or occupation. Under this theory a respected citizen who has honorably retired from his business, profession or occupation, with the hope and expectation of enjoying his declining years in peace and tranquility, would be denied the right to recover any damages whatsoever by reason of an obscene charge, known to be false and published maliciously, since (1) he could not have suffered damage in respect to his business or occupation because he had ceased to have one, and (2) he would be denied either general or exemplary damages by reason of the publication of a correction or retraction. Whatever may have been the injury to a blameless and reputable citizen in his feelings, whatever the humiliation, he would be remediless if a newspaper may publish falsehoods in the guise of "spot news."

[17, 18] Judicial sanction cannot be given to defendant's theory that because newspapers are expected "to furnish dead-line spot news" and "to keep the public supplied with up to the minute news," it is "virtually impossible to make any accurate check as to the authenticity" of what is published. This is a confession of impotency on the part of those whose business is to furnish accurate news to the public Truth, not falsehood, is news. While the public may demand dead-line spot news it also demands veracity and accuracy. News is a report of a recent event, intelligence, information about some person or thing: a falsehood is neither—it is a fabrication. A newspaper is not justified in publishing a false and scurrilous statement without making an examination as to its source and authenticity merely in order to furnish reading matter for those who read to escape boredom, for the prurient minded, the sensation seekers or those with depraved and perverted appetites for scandal. A publisher cannot be absolved from liability merely because he prints "spot news" without attempting to ascertain whether it be true or false. A basic essential for a newspaper's winning and holding the confidence and support of the reading public is its reputation for truth and accuracy.

[19] In the instant case plaintiff alleges that the charge in defendant's news article that he had been convicted of two felonies is false. Defendant could have readily and

quickly ascertained the authenticity of the statement from an examination of the public records. If the charge in the newspaper is false its publication is not justified and cannot be defended by the alleged public demand for spot news. A widespread desire for criminal or other sensational news does not excuse the publication of a libel, and there is no greater immunity to the publication of gossip in a newspaper than if publicized by some other medium. McAllister v. Detroit Free Press Co., 76 Mich. 338, 43 N.W. 431, 437, 15 Am.St.Rep. 318.

The only case brought to our attention that upholds defendant's contention that a statute limiting the liability of newspapers for libel is valid, is Allen v. Pioneer Press Co., 40 Minn. 117, 41 N.W. 936, 3 L.R.A. 532, 12 Am.St.Rep. 707. That case is not in harmony with the theory we have expressed nor with the decisions cited. It has been expressly disapproved in North Carolina and Kansas. See Osborn v. Leach, 135 N.C. 628, 47 S.E. 811, 815, 66 L.R.A. 648; Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041, 1043, 64 L.R.A. 790, 104 Am.St.Rep. 422. But the opinion in the Allen case recognizes that "a retraction is not a complete remedy for injury to reputation." [40 Minn. 117, 41 N.W. 938.] That case involved a matter of mistaken identity. In a similar case Behrendt v. Times Mirror Co., 30 Cal.App.2d 77, 85 P.2d 949, this court held that it was not error to admit evidence of injury to feelings, condition of plaintiff's mind, physical pain and mental anguish, humiliation and suffering upon which the jury could allow damages to compensate the plaintiff for the injury sustained as the natural and probable consequence of the libelous publication.

[20] The cases cited from other jurisdictions do not, nor does our decision in the instant case, tend in the slightest degree to impair the freedom of a newspaper publisher or a radio broadcaster in publishing and speaking his views on any subject. Section 48a has nothing whatsoever to do with the freedom of speech or of the press. The independence of writers and speakers is fully guaranteed by the Constitution and was not enlarged by the adoption of that section, therefore their independence will not be abridged by its nullification. It deals solely with the character of damages recoverable by a libeled person under given circumstances and conditions and has no bearing on the constitutionally guaranteed right of every person to write and speak as he pleases. Hence a declaration that it violates other provisions of the Constitution does not curtail that right, but merely affirms the responsibility placed on writers and speakers by the Constitution which that section of the code diminishes in all cases and abrogates in some.

The order and judgment are reversed with directions to overrule the demurrer and to permit defendant to answer within a reasonable time. The purported appeal from the order sustaining the demurrer is dismissed.

MOORE, P. J., concurs.

McCOMB, Justice.

I dissent. *First*: In my opinion the reasoning in Allen v. Pioneer Press Co., (40 Minn. 117), 41 N.W. 936, 3 L.R.A. 532, 12 Am.St.Rep. 707, upholding the constitutionality of a statute similar to section 48a of the Civil Code, sustains the validity of such section in conformity with an enlightened jurisprudence, and answers the arguments set forth in the majority opinion. I do not hold an antipathy for the fourth estate and radio broadcasters evidenced by the views expressed in the prevailing opinion. The free press of the United States of America, in more recent years aided by radio commentators, is and has been the first line of defense and the bulwark of the liberties of the free men and women of the United States. The fact has been demonstrated in this country by a century and a half of experience where we have had free and unfettered newspapers but for which the people would have long since been in mental and physical bondage equal to Hitleristic Germany or a communistic Russia. So important was a free press that by the first amendment the founders of the Constitution provided that "Congress shall make no law * * * abridging the freedom * * * of the press." Likewise the people of the state of California in their constitution have provided that "No law shall be passed to restrain or abridge the liberty * * * of the press." (Art. I, sec. 9, Const. of the State of California.)

Second: The fallacy of the argument supporting the majority conclusion is well illustrated by the statement in it: "Defendant could have readily and quickly ascertained the authenticity of the statement from an examination of the public records." It is a matter of common knowledge of which this court should take judicial notice (Chavez v. Times-Mirror Co., 185 Cal. 20, 23, 195 P. 666; Sewall v. Johnson, 165 Cal. 762, 772, 134 P. 704, Ann.Cas.1915B, 645; Southern Pac. R. Co. v. Painter, 113 Cal. 247, 253, 45 P. 320; Calhoun v. Calhoun, 81 Cal.App.2d 297, 302, 183 P.2d 922. See also Hammel v. Britton, 19 Cal.2d 72, 75, 119 P.2d 333), that plaintiff was convicted of bribery and grand theft in the Superior Court of Los Angeles County and sentenced to San Quentin prison. (People v. Werner, 29 Cal.App.2d 126, 84 P.2d 168; see also People v. Werner, 16 Cal.2d 216, 105 P.2d 927.) The convictions were subsequently reversed upon appeal. Nevertheless, the fact remains that plaintiff "had been convicted of bribery and grand theft and had been sentenced to San Quentin Prison." It is therefore obvious that the statement in the article being true, the article was not libelous. (Hanson v. Bristow, 87 Kan. 72, 123 P. 725, 726; Shields v. Chilton Co., 255 App.Div. 985, 8 N.Y.S.2d 276, 277 [leave to appeal to the Court of Appeals denied 256 App.Div. 820, 9 N.Y.S.2d 582].) Evidently defendant in the present action did the very thing the majority opinion says it should have done. If the conclusion reached in the majority opinion is permitted to stand it constitutes cogent evidence in support of the criticism so often expressed by laymen, that justice is not only blind but obtuse in ignoring facts which all know.

Since the statement made by defendant was in fact true it is manifest that no useful purpose would be accomplished by prolonging the present litigation.

Section 48a of the Civil Code was originally adopted in 1931 by the people of the state of California through their duly elected representatives and was subsequently amended in 1945 by the people of the state. In my judgment the act does not violate any provision of the constitution of the state of California and therefore I will not join in thwarting the desires of the people of this state as expressed through their duly elected representatives.

I would affirm the judgment of the trial court.

Rehearing denied; McCOMB, J., dissenting.

34 Cal.2d 83

RAIDEN v. SUPERIOR COURT FOR LOS ANGELES COUNTY et al.

L. A. 20920.

Supreme Court of California, in Bank.
June 17, 1949.

1. Contempt 🔑**30**

A court has inherent power to adjudge and punish for contempt.

2. Contempt 🔑**63(4)**

An order adjudicating a direct contempt is valid only if the recital of facts therein shows acts which constitute a contempt, and, if the facts so recited do not constitute a contempt, the order is not enforceable. Code Civ.Proc. § 1211.

3. Contempt 🔑**63(1)**

Where because of penalties imposed, a contempt is criminal in nature, presumptions or intendments may not be indulged in support of an order holding one in contempt, and the findings and judgment are strictly construed in favor of the one found in contempt.

4. Contempt 🔑**10**

An attorney is entitled to advocate respectfully and in good faith his contentions on behalf of his client, even though asserted inadequacies in the action taken by the court are pointed out, and is not guilty of contempt when he does so.

5. Contempt 🔑**10**

The mere expression by attorney on motion for new trial that a prior order of the court defeated the ends of justice, did not constitute contempt in absence of any showing that such opinion was not respectfully advanced in good faith.

6. Contempt 🔑**63(4)**

In original certiorari proceeding in the Supreme Court by attorney to review and annul an order of a judge of the superior court holding the attorney in contempt, additional showing by judge by affidavit could not serve to overcome the absence in the contempt order of jurisdictional facts.

◆

Appeal from Superior Court, Los Angeles County; Vernon W. Hunt, Judge pro tem.

Certiorari proceeding by Edward Raiden against the Superior Court of California for Los Angeles County, and the Honorable Vernon W. Hunt, Judge thereof, pro tem, respondents, to review and annul an order holding the petitioner in contempt and imposing a fine.

Order annulled.

Edward Raiden, in pro per.

Marion P. Betty, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, James A. Cobey and John L. Harris, Deputy County Counsel, Los Angeles, for respondents.

SHENK, Justice.

In this proceeding the petitioner, an attorney, seeks by certiorari to review and annul an order holding him in contempt of the respondent superior court and imposing a fine of $50 which was paid under protest.

The petition shows that the alleged contempt was committed in the course of the petitioner's argument of a motion for a new trial on behalf of the defendant in an action for divorce between Richard Edward Reeves and Annabelle Reeves in the superior court in Los Angeles county.

The wife in that action was a minor nineteen years of age. She resided with their two children in Nevada where she had filed an action for divorce against her husband. Substituted service of summons was had on her in the California action. By an amendment in 1947 to section 413 of the Code of Civil Procedure a shorter time than the period prescribed by the order of publication was provided for completion of service of summons when personal service was effected outside of the State. It is alleged that due to this change the petitioner, employed as attorney for the wife, miscalculated the time for appearance by the wife and her default was taken. The respondent court held a hearing on the default, granted a divorce to the husband and awarded to him the community property and the custody of the children. Thereupon the petitioner moved to set aside the default and requested that the wife be permitted to appear and defend. The motion was denied. The petitioner then served a notice of intention to move for a new trial. The motion came on for hearing before the respondent judge who had heard the default proceeding and the motion to set aside the default. The motion for a new trial was also denied.

A transcript of the proceedings taken on default hearing has been filed as an exhibit to the petition for the writ. It shows that the following took place on the default hearing:

At the close of the testimony the judge suggested the appointment of a guardian ad litem for the defendant, stating that although the wife was over eighteen and married she should be represented by a guardian ad litem. Counsel for the plaintiff questioned the necessity for the appointment. The judge held it in abeyance and called for authorities and argument. He indicated that he would appoint David Lynn if it appeared that a guardian was necessary, and that the divorce, the custody of the children, and the community property would be awarded to the plaintiff.

At the session after the noon recess the judge announced his decision to the effect that the appointment of a guardian ad litem for the defendant was necessary and on his own motion appointed Mr. Lynn as such guardian. The judge then re-announced the decree and awards to the plaintiff.

No reporter was present at the hearing of the defendant's motion for a new trial and a transcript of those proceedings is not available. The order denying the motion and holding the petitioner in contempt is as follows:

"Come now the parties by their respective counsel * * * and the defendant moves the court for a new trial herein, upon the grounds stated in the notice of intention to move for a new trial, filed herein. Motion is argued. The court finds defendant's counsel Edward Raiden, in contempt of court for making the statement to the court that the appointment of the guardian ad litem for the defendant in this case defeats the ends of justice, and assessed a fine of fifty dollars. The fine is paid under protest. A check is accepted as payment, on order of court. Defendant's motion for a new trial is by the court denied."

[1-3] It thus appears that the acts constituting the alleged contempt were committed in the immediate view and presence of the court. A court has inherent power to adjudge and punish for contempt. In re Shortridge, 99 Cal. 526, 532, 34 P. 227, 21 L.R.A. 755, 37 Am.St.Rep. 78. The order adjudicating a direct contempt is valid only if the recital of facts therein show acts which constitute a contempt. If the facts so recited do not constitute a contempt the order is not enforceable. Section 1211, Code Civ.Proc.; Overend v. Superior Court, 131 Cal. 280, 63 P. 372; Otis v. Superior Court, 148 Cal. 129, 130, 82 P. 853; In re Shortridge, 5 Cal.App. 371, 375, 90 P. 478; Bennett v. Superior Court, 73 Cal. App.2d 203, 209 et seq., 166 P.2d 318; see also In re Hallinan, 126 Cal.App. 121, 14 P.2d 797, Rose v. Superior Court, 140 Cal. App. 418, 35 P.2d 605, and Gillen v. Municipal Court, 37 Cal.App.2d 428, 99 P.2d 555. Because of the penalties imposed a contempt is criminal in nature and presumptions or intendments may not be indulged in support of the order. The findings and judgment are strictly construed to favor the accused. Hotaling v. Superior Court, 191 Cal. 501, 506, 217 P. 73, 29 A.L.R. 127; Wilde v. Superior Court, 53 Cal.App.2d 168, 177, 127 P.2d 560.

The recited facts show that the petitioner expressed to the court no more than his opinion that the former order appointing the guardian ad litem defeated the ends of justice. The merits of the questions regarding the necessity for the appointment of a guardian or the effect thereof on the rights of the defendant in the default hearing or in the new trial proceeding are not matters for consideration here. The circumstances attending the appointment of a guardian at the default hearing are related merely as further support of the intendments favorable to the petition flowing from the fact recitals in the contempt order. The result would be the same without special reference to those proceedings.

[4, 5] An attorney is entitled to advocate respectfully and in good faith his contentions on behalf of his client even though

asserted inadequacies in the action taken by the court are pointed out. Platnauer v. Superior Court, 32 Cal.App. 463, 475, 163 P. 237; Curran v. Superior Court, 72 Cal. App. 258, 267, 236 P. 975. It does not appear here that the petitioner was overstepping the bounds of propriety by merely expressing an opinion that a prior order of the court defeated the ends of justice. That opinion concerned an order theretofore made by the court and was expressed in the course of a proceeding which may properly be said to include a review of the past action. For aught that appears in the contempt order the opinion was respectfully advanced in good faith. The facts stated in the order are therefore insufficient to support an adjudication in contempt.

[6] The respondent judge filed an affidavit in the present proceeding in which it is sought to support the order by averments showing additional language used by the petitioner and the manner of his protestation. But such additional showing may not serve to overcome the absence in the order of jurisdictional facts.

The portion of the order adjudicating a contempt and imposing a fine of fifty dollars is annulled.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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34 Cal.2d 59

ROUNDS v. DIPPOLITO et al.

L. A. 20804.

Supreme Court of California, in Bank.

June 14, 1949.

1. Appeal and error ⇨151(2)

Parties who were named defendants in the action and who appeared and filed a demurrer and answer and against whom the judgment ran, and wherein a second judgment was rendered which included a provision stating that there should be a deduction from the amount awarded such parties to the extent of the judgment in favor of another party against them, were "aggrieved" parties entitled to appeal from an order denying their motion to set aside judgment.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Aggrieved".

2. Appeal and error ⇨113(1)

Rule that an appeal will not lie from an order refusing to vacate a judgment if grounds for motion existed before entry of judgment has no application to an appeal from an order overruling a motion made pursuant to the statute providing that a judgment not consistent with a special verdict may be set aside. Code Civ.Proc. § 663.

3. Judgment ⇨386(1)

Under section 663a providing that a motion made under section 663, to set aside a judgment as not consistent with a special verdict, must be made within ten days after notice of entry of judgment served upon the adverse party, such motion need not be made within 60 days after entry of the judgment though the prevailing party may by serving notice of entry of the judgment limit the time within which his adversary is entitled to proceed under section 663. Code Civ.Proc. §§ 663, 663a.

4. Appeal and error ⇨113(1)

An order denying a motion under statute to set aside a judgment as not consistent with a special verdict is appealable. Code Civ.Proc. § 663.

Appeal from Superior Court, San Bernardino County; Stanley Mussell, Judge.

Action to recover money allegedly due for removing trees and for other relief by C. E. Rounds against Joseph Dippolito and others and George J. Garecht and Raymond H. Marks doing business as Grading and Excavation Company and another. George J. Garecht and Raymond H. Marks etc., filed an action against Joseph Dippolito and others. The actions were consolidated. George J. Garecht and Raymond H.

Marks, etc., filed a motion to vacate the judgment entered in the first action. From an order denying the motion George J. Garecht and Raymond H. Marks, etc., appeal and the plaintiff moves to dismiss the appeal.

Motion to dismiss denied.

For prior opinion see 200 P.2d 67.

Walker & Sullivan and J. R. Walker Jr., Riverside, for appellants.

Oliver M. Charleville, San Bernardino, for respondent.

EDMONDS, Justice.

George J. Garecht and Raymond H. Marks moved to vacate the judgment requiring them and other defendants to pay C. E. Rounds $908 for services rendered. The question now presented for decision concerns their right to appeal from the order denying the motion.

Joseph, Grace, Charles and Angelina Dippolita, who were the owners of certain land, entered into a contract with Garecht and Marks, doing business as Grading and Excavation Company, to remove eucalyptus trees from the property. Garecht and Marks felled the trees and contracted with Vergil Grove to take them away. Grove, in turn, hired Rounds, who operated his own crane, to do a certain part of the work at the rate of $9 per hour.

Upon the completion of his contract, Rounds brought an action claiming $1,014.90 due for wages and for the foreclosure of a mechanic's lien. In addition to the Dippolitos, he named as defendants Garecht, Marks, Grove and Jack McCoy. Several fictitious defendants, and also McCoy, were not served. The demurrer of Garecht and Marks was overruled, and after an answer was filed by them, the matter proceeded to trial.

Concurrently with the filing of this action (No. 58,123), a separate one was brought by Garecht and Marks against the Dippolitos (No. 57,843). By stipulation, the two cases were consolidated for trial. On May 3, 1948, a judgment was entered in the Rounds case (No. 58,123) "against the defendants in the sum of" $908. On May 17, 1948, a judgment was entered in action No. 57,843 in favor of Garecht and Marks and against the Dippolitos for $1,200, "provided, however, that there should be deducted from the judgment in favor of said plaintiffs the sum of $908.00 adjudged due and owing the plaintiff C. E. Rounds by the defendants Joseph Dippolito et al in action No. 58,123."

No notice of entry of judgment was served in the action brought by Rounds, and on July 8, 1948, Garecht and Marks served a notice of motion to vacate the judgment in that action pursuant to sections 663 and 663a of the Code of Civil Procedure. The appeal is from the order denying the motion made in accordance with the notice. Rounds has moved to dismiss the appeal upon the grounds that: (1) appellants are not "aggrieved" parties under the judgment; and (2) even if aggrieved, they may not appeal from an order denying a motion under section 663 where such motion was made after 60 days from the entry of judgment and the same questions presented by the motion could have been raised upon an appeal from the judgment.

[1] As to the first contention, Garecht and Marks, named defendants in the action, appeared and filed a demurrer and an answer. The judgment runs "against the defendants" for the $908. Further, the second judgment (No. 57,843) includes a provision specifying that there shall be a deduction from the amount awarded Garecht and Marks to the extent of the judgment in favor of Rounds against them. The Dippolitos owe the contract price for the work done on their property; the only truly adverse interests in the litigation are those of the contractor and the subcontractor who have not been able to agree as to the proper division of the money between them.

[2] Considering the procedural point, the rule to the effect that an appeal will not lie from an order refusing to vacate a judgment if the grounds for the motion existed before the entry of judgment has no application to one made pursuant to section 663 of the Code of Civil Procedure. Such appeals "are set apart from and are made

an exception to the rule relied on". Funk v. Campbell, 15 Cal.2d 250, 251, 100 P.2d 762; California Delta Farms v. Chinese American Farms, 201 Cal. 201, 255 P. 1097.

[3, 4] Section 663a provides that a motion under section 663 must be made "within ten days after notice of the entry of judgment, served upon the adverse party". There is no limitation, as suggested by the respondent, that such motion be made within 60 days after entry of judgment. Nor does this rule allow "every unsuccessful litigant to set his own time for appeal", for the prevailing party by serving notice of entry of the judgment may limit the time within which his adversary is entitled to proceed under section 663. An order denying a motion made under that section is appealable, Funk v. Campbell, supra; California Delta Farms v. Chinese American Farms, supra, and the record in the present action shows that the notice of appeal was timely filed.

The motion to dismiss the appeal is denied.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

34 Cal.2d 62

MEYER v. BOARD OF MEDICAL EXAMINERS et al.

L. A. 20929.

Supreme Court of California, in Bank.

June 15, 1949.

Rehearing Denied July 14, 1949.

1. Physicians and surgeons ⟹11(2)

An order of State Board of Medical Examiners, suspending physician's license for unprofessional conduct by reason of his conviction of offense involving moral turpitude in unlawfully selling morphine preparation, was not improper as imposing penalty for such offense, in violation of statute, after superior court discharged physician from probation and dismissed accusations against him. Health and Safety Code, § 11164; Government Code, § 11512; Pen. Code, §§ 1203.3, 1203.4; Business and Professions Code, § 2383.

2. Criminal law ⟹998
Physicians and surgeons ⟹11(2)

The trial court's action in setting aside verdict of conviction and dismissing prosecution after discharging convict from probation mitigates his punishment by restoring certain rights and removing certain disabilities, but does not obliterate fact that he was finally adjudged guilty of crime, so that State Board of Medical Examiners is not precluded from suspending license of physician convicted of crime involving moral turpitude and discharged from probation, with such accompanying statutory relief, whether before or after such disciplinary order. Pen.Code, §§ 1203 et seq., 1203.3, 1203.4; Business and Professions Code, § 2383.

CARTER, SHENK and SCHAUER, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Proceeding by Paul Oliver Meyer against the Board of Medical Examiners of the State of California, its secretary and members, for a writ of mandate to review the board's action in ordering suspension of plaintiff's license as a physician and surgeon. From a judgment denying a peremptory writ, plaintiff appeals.

Affirmed.

Prior opinion, Cal.App., 200 P.2d 128.

French & Indovina and F. Walter French, Santa Monica, for appellant.

Fred N. Howser, Attorney General, and Bayard Rhone, Deputy Attorney General, for respondents.

SPENCE, Justice.

This is an appeal from a judgment denying a peremptory writ of mandate in a proceeding brought to review the action of the respondent Board of Medical Examiners of the State of California in ordering the suspension of appellant's license as a physician and surgeon. Appellant challenges the propriety of the respondent board's order, but his position cannot be sustained in the light of applicable statutory law as construed in relation to the problem at hand.

So far as here material, the facts in chronological order appear as follows: On February 17, 1947, appellant, a licensed physician and surgeon, upon entry of a plea of guilty, was convicted of a violation of section 11164 of the Health and Safety Code (furnishing narcotics "to an addict, or to any person representing himself as such, except as permitted"). A sentence of six months' imprisonment in the county jail was imposed, but the execution thereof was suspended and appellant was placed on probation for a period of two years upon condition that he pay a $500.00 fine. On August 5, 1947, respondent board filed an accusation against appellant for his criminal dereliction, and on August 22, 1947, the matter was tried before a hearing officer as provided by statute. Gov.Code, sec. 11512. On January 23, 1948, respondent board made an order rejecting the hearing officer's proposed decision of December 4, 1947, and specifying it would consider the matter "upon the record, including the transcript, without taking additional evidence, and upon written argument presented to" it.

Upon completion of one-half of the probationary period theretofore prescribed and in response to appellant's motion made on February 20, 1948, the superior court ordered that his "probation be terminated and [he be] discharged therefrom under Section 1203.3 Penal Code, that plea of 'Guilty' be changed to 'Not Guilty' and that cause be dismissed under Section 1203.4 Penal Code." On March 2, 1948, appellant presented to respondent board at its regularly scheduled meeting a certified copy of the court's order. However, said board concluded that such order "terminating probation and dismissing the information" did not in the disciplinary proceeding before it "remove or wipe out the conviction suffered by" appellant; and upon reciting the facts "resulting in the conviction"—that appellant had made a sale of "two vials containing forty tablets of a preparation of morphine" to a state narcotic officer for "$125.00 in marked money"—said board determined that appellant had been convicted of "an offense involving moral turpitude" and by reason of such conviction was "guilty of unprofessional conduct." Accordingly, respondent board as of March 15, 1948, ordered the suspension of appellant's license for ninety days and placed him on probation for three years. Appellant thereupon applied to the superior court for a writ of mandate to compel respondent board to set aside its order and decision. Argument was had upon respondent board's demurrer filed in return to appellant's petition, and it was sustained without leave to amend. The court then entered its judgment denying relief to appellant. From such judgment this appeal is taken.

[1] The sole question to be determined is the effect of section 1203.4 of the Penal Code upon the authority of respondent board to order the suspension of appellant's license. As here material, said section provides: "Every defendant * * * who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; * * * and * * * the court shall thereupon dismiss the accusations or information against such defendant, *who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted.*" (Emphasis added.) Appellant concedes that respondent board could have found him guilty of unprofessional conduct without reference to the criminal proceeding, but he contends that inasmuch as said board elected to base its decision wholly upon appellant's prior conviction, its action was an improper imposition of a penalty contrary to the italicized language of the statute, following the dismissal of the criminal charge against him under the prescribed procedure. But such contention cannot be sustained in challenge of respondent board's order as a disciplinary measure reflecting considerations of appropriate punishment by reason of the adjudication of appellant's guilt, and so without the scope of the so-called

"expunging of penalty" premise of the cited statute.

[2] Respondent board has authority to suspend the license of a physician who is found to be guilty of unprofessional conduct, and it is expressly provided by statute that "conviction * * * of any offense involving moral turpitude constitutes unprofessional conduct," with the "record of the conviction" serving as "conclusive evidence" thereof. Bus. & Prof. Code, sec. 2383. There is no question here but that appellant's violation of section 11164 of the Health and Safety Code was an offense involving moral turpitude. So pertinent is the case of In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644, holding that an attorney disbarred after his conviction of a crime involving moral turpitude was not entitled to have his name restored to the roll of practicing attorneys upon dismissal of the criminal proceeding against him in pursuance of section 1203.4 of the Penal Code. After noting that "the order granting probation is based upon the premise of the defendant's guilt," this court discussed the effect of the probation procedure as follows, 17 Cal.2d at page 61, 109 P.2d at page 347, 132 A.L.R. 644: "The powers possessed by the trial courts under the probation statutes, Penal Code, § 1203 et seq., are concerned with mitigation of punishment and confer discretion upon the courts in dealing with a convicted defendant. The power of the court to reward a convicted defendant who satisfactorily completes his period of probation by setting aside the verdict and dismissing the action operates to mitigate his punishment by restoring certain rights and removing certain disabilities. But it cannot be assumed that the legislature intended that such action by the trial court under section 1203.4 should be considered as obliterating the fact that the defendant had been finally adjudged guilty of a crime. This is made clear by the provision that the fact of the defendant's conviction can be used against him in any later prosecution, despite dismissal of the action under section 1203.4. In brief, action in mitigation of the defendant's punishment should not affect the fact that his guilt has been finally determined according to law. Such a final determination of guilt is the basis for the order of disbarment in this case. That final judgment of conviction is a fact; and its effect cannot be nullified for the purpose here involved, either by the order of probation or by the later order dismissing the action after judgment."

The rationale of the Phillips case is significant in that it was decided at a time when the State Bar Act referable to conviction of a crime involving moral turpitude as cause for suspension or disbarment (Bus. & Prof. Code, secs. 6101–6102, Stats.1939, ch. 34, sec. 1, p. 357) was essentially the same as the present provisions of the Medical Practice Act (Bus. & Prof. Code, sec. 2383, Stats.1937, ch. 399, p. 1275), and the plea or verdict of guilty was deemed the "record of the conviction" in "conclusive evidence" of the unprofessional conduct. After the date of the Phillips decision, section 6102 of the Business and Professions Code was amended (Stats.1941, ch. 1183, sec. 1, p. 2942) to provide for the disbarment "irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code." Such amendment served to settle the question of legislative intent in conformity with what this court had held was the proper construction of the probation statute as a nonoperative factor in relation to a disbarment order as the outgrowth of a disciplinary proceeding.

Appellant argues that the Phillips case—involving an attorney—does not present parallel considerations to the instant case—involving a physician—because this court in the exercise of its inherent judicial power may discipline its own officers without interference from the legislature, while respondent board as an administrative agency created by the legislature is not likewise free from legislative restraint, so that its suspension of a physician's license could properly be construed as a "penalty" or "disability" released under the probation statute. But such consideration in connection with the Phillips case was simply "noticed" as a "preliminary point" of observation, 17 Cal.2d pages 59–60, 109 P.2d 344, 132 A.L.R. 644, citing In re Lavine, 2 Cal.2d 324, 41 P.2d 161, 42 P.2d 311, and did not constitute the premise of the decision—that the discharge from probation and the dismissal of the criminal proceeding could not obliterate the fact of adjudication of guilt in support of a disciplinary order, 17 Cal.2d page 61, 109 P.2d 344, 132 A.L.R. 644. Nor is the Phillips case, as appellant maintains, "invalidated as an authority" in this case in that the disbarment there antedated the dismissal of the criminal proceeding against the attorney under the provisions of the probation statute, while here the reverse situation prevails in that respondent board, though having had the disciplinary action against appellant pending before it for some time, did not make its order of suspension against him until *after* he had been accorded the statutory relief in question. Such variant course in the chronology of the proceedings is an immaterial consideration, for whether the discharge from probation and the accompanying relief granted by the trial court precede or follow the disciplinary order, its propriety stems from the adjudication of guilt constituting the basis of the "conviction" and, as such, it is not a "penalty" or "disability" within the contemplated release of the probation statute. As so analyzed, the Phillips case in principle of decision is determinative of this case, and appellant's effort to distinguish it allegedly upon "two separate grounds," one legal and the other factual, is of no avail.

Like views have prevailed in other situations limiting the effect of a dismissal after conviction, insofar as the existence of guilt by reason of commission of the criminal act is recognized, despite the benefits accorded by the probation statute. Thus (1) an express proviso in section 1203.4 of the Penal Code makes the conviction count against the defendant under the prior conviction statutes if he is subsequently convicted, People v. Hainline, 219 Cal. 532, 535, 28 P.2d 16; People v. Barwick, 7 Cal.2d 696, 699, 62 P.2d 590, or if it is offered for impeachment purposes in a subsequent prosecution, People v. James, 40 Cal.App.2d 740, 746, 105 P.2d 947; (2) the conviction must be considered for the purpose of suspending or revoking a driver's license. Veh.Code, sec. 309, nullifying the rule of Sherry v. Ingels, 34 Cal.App.2d 632, 635, 94 P.2d 77; see Ellis v. Department of Motor Vehicles, 51 Cal.App.2d 753, 757-758, 125 P.2d 521); and (3) not only the fact of previous conviction was properly raised in a second prosecution for failure to provide for a minor child (Pen. Code, sec. 270) after dismissal of the first upon satisfactory completion of probation, but all matters inherent in such conviction were admissible in evidence—the adjudication that the defendant was the father of the child as conclusive on the issue of parentage. People v. Majado, 22 Cal.App.2d 323, 324, 325, 70 P.2d 1015. As the release of the "penalties and disabilities" clause of the probation statute has been so qualified in its application, it does not appear that it was thereby intended to obliterate the record of conviction against a defendant and purge him of the guilt inherent therein (cf. Sherry v. Ingels, supra, 34 Cal.App.2d 632, 94 P.2d 77) or to "wipe out absolutely" and for all purposes the dismissed proceeding as a relevant consideration and "to place the defendant in the position which he would have occupied in all respects as a citizen if no accusation or information had ever been presented against him." People v. Mackey, 58 Cal.App. 123, 130, 208 P. 135, 138. From this standpoint, appellant's theory that the import of the probation statute and the dismissal proceeding is to expunge the record of the crime, Sherry v. Ingels, supra; People v. Mackey, supra, cannot prevail.

Consistent with the foregoing considerations, it is our conclusion that the respondent board was clearly acting in the premises pursuant to its statutory authority, and that appellant's subjection to such disciplinary proceeding and the consequences thereof cannot be construed as a "penalty" or "disability" which was released under the probation statute. In re Phillips, supra, 17 Cal.2d 55, 61, 109 P.2d 344, 132 A.L.R. 644.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The construction placed upon section 1203.4 of the Penal Code by the majority of this Court is wholly unwarranted and is, furthermore, directly opposed to the reason for the enactment of the section.

Section 1203.3 of the Penal Code reads, in part: "The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence. *It may at any time when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it,* terminate the period of probation and discharge the person so held * * *." [Emphasis added.]

Section 1203.4 of the Penal Code provides: "Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, *who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted.* The probationer shall be informed of this right and privilege in his probation papers. The probationer may make such application and change of plea in person or by attorney authorizing [authorized] in writing; provided, that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed."

The Superior Court, on February 20, 1948, pursuant to the above provisions, ordered that appellant's probation be terminated and that he be discharged therefrom, that his plea of guilty be changed to one of "not guilty" and that the cause be *dismissed. Thereafter,* respondent Board, relying *solely* on the record of conviction, pursuant to Section 2383 of the Business and Professions Code, ordered the suspension of appellant's license for ninety days, and placed him on probation for three years. Section 2383, Bus. & Prof. Code, provides that: "The conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct."

The majority rely heavily on the case of In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644. I did not agree with the majority in that case, and I most certainly am not in favor of extending the harsh rule there laid down so that it may be applied to a factual situation such as is here presented. In the Phillips case, the order of disbursement was made *before* the conviction had been set aside. In the instant case, the Board made the order of suspension and probation *after* the conviction had been set aside. Not only that, but the action was based on a judgment of conviction which was no longer in existence except for the exception made in the statute. That exception has no application here. Appellant concedes that the Board could have taken disciplinary measures against him because of his prior conduct, but contends that all of the counts of the accusation filed against him, with the exception of the one based on the judgment of conviction, were dismissed.

In the Phillips case, the majority opinion stated [17 Cal.2d 55, 109 P.2d 348]: "* * * action in mitigation of the defendant's punishment should not affect the fact that his guilt has been finally determined according to law." This holding, which is approved by the majority in this case, nullifies the effect of the proceeding had in the Superior Court under section 1203.4 of the Penal Code, and, in effect, obliterates the section. In the original action, appellant was fined, sentenced and placed on probation for two years. This conviction was set aside under the section providing that he be *released from all "penalties and disabilities."* Notwithstanding this action, this Court allows the respondent Board to impose even greater penalties and disabilities upon appellant than those to which he had been subjected by reason of his conviction.

The "Decision" of respondent Board states that it is based upon *"the record, including the transcript,* without taking additional evidence, and upon written argument presented to the Board." [Emphasis added.] Since the accusations or information against the defendant had been dismissed by the Superior Court *prior* to the decision of the Board, how could the record of the original trial be used as the basis for the Board's decision? The statute (Penal Code, sec. 1203.4) makes one exception, and only one, where the subsequently dismissed conviction may be used against a defendant. This Court has added another.

Mr. Justice Shenk, in his dissenting opinion in the Phillips case, pointed out that the majority had deviated from the rule laid down in a number of previous cases. At the present time, the Business and Professions Code, section 6102, is in line with the decision in that case, but the Code has not been so amended with respect to physicians and surgeons.

The majority point out that the Legislature could not have intended that the proceeding under Section 1203.4 of the Penal Code was to wipe out the defendant's guilt because (1) of the express proviso contained in the section; (2) because the conviction may be used for impeachment purposes, People v. James, 40 Cal.App.2d 740, 746, 105 P.2d 947; (3) because it may be used for the purpose of suspending or revoking a driver's license (Vehicle Code, sec. 309); (4) because it may be used in a second prosecution for failure to provide for a minor child, and because all matters inherent in the conviction (that is, the adjudication on the issue of parentage) were admissible in evidence. People v. Majado, 22 Cal.App.2d 323, 70 P.2d 1015.

I would like to point out, in this connection, that in People v. James, supra, the defendant was charged with the crime of grand theft. The fact that he had been previously convicted and the conviction dismissed pursuant to section 1203.4 of the Penal Code was used to impeach him. This case does not add another exception to the statute, but falls squarely within the one there contained. The Court in the James case said [40 Cal.App.2d 740, 105 P.2d 951]: "It seems highly probable that by the amendment to this section (the exception) after the decision in People v. Mackey, supra, the legislature intended to broaden the section in its application and particularly provided that in any subsequent *prosecution* of the defendant prior convictions may be pleaded and proved." [Emphasis that of the court.] It was also said that "We therefore conclude that where a defendant who has been previously convicted of a felony and granted probation and a dismissal obtained as in the instant case, and is subsequently *prosecuted* for another offense, in becoming a witness in his own behalf, he subjects himself to impeachment upon the ground that he has been convicted of a felony." [Emphasis that of the Court.]

And in People v. Majado, supra, the defendant was found guilty, under section 270 of the Penal Code, of failure to provide for a minor child. The only question raised there was whether the Court erred in admitting in evidence the record of a prior conviction which had been subsequently dismissed pursuant to section 1203.4 of the Penal Code. Note that this case, too, falls squarely within the exception to the section and is not additional thereto. Both People v. James, and People v. Majado, supra, cite with approval statements made in the case of People v. Hainline, 219 Cal. 532, 28 P.2d 16. In that case it was said, 219 Cal. at page 534, 28 P.2d at page 17: "If, prior to the 1927 amendment, any doubt existed in the minds of lawyers, judges, and laymen as to the status of those who committed a *second felony,* such doubt was removed by said amendment (St.1927, p. 1493), *which strips them of all the privileges and rights which were restored to them by the provisions of the original act* upon the completion of their probationary term. * * *

"The concluding portion of the act, which provides that if the probationer *commits a second offense he shall forfeit all the rights with which he was clothed at the time the court ordered the information dismissed,* constitutes the amendment of 1927. * * *

Said amendment simply and justly provides that persons who have refused to profit by the grace extended to them upon the first offense shall, upon conviction of a subsequent felony, suffer the penalty of the law as prescribed for the punishment of all other offenders." [Emphasis added.]

Section 309 of the Vehicle Code is an express additional statutory exception to the Penal Code section under consideration. It reads as follows: "A termination of probation and dismissal of charges pursuant to Section 1203.4 of the Penal Code shall not affect any revocation or suspension of any license of the probationer under the provisions of this chapter. The probationer's prior conviction *shall be considered a conviction for the purpose of revoking or suspending any license* issued to him on the ground of two or more convictions."

If appellant's suspension and probation is to be based upon the dismissed conviction, it would seem that he had gained no rights and no privileges of which he could be stripped. If the defendant is to be considered guilty for all purposes, despite the fact that there are only two statutory provisions whereby he may be so considered, it would seem that section 1203.4 of the Penal Code makes provision for a useless procedure.

It appears to me to be obvious that the Legislature intended that a person whose conviction has been set aside, and the accusation against him dismissed, should not suffer the stigma usually attached to such a conviction unless he is later prosecuted for another offense. If the Legislature did not so intend, why is the defendant permitted to withdraw his plea of guilty and enter one of not guilty? The section clearly contemplates giving the offender a second chance to take his place in the community. Inherent in this contemplation is the thought that he shall not be branded a pariah, having paid his debt to the satisfaction of the Court. In holding to the contrary, the majority appear to be oblivious to the broad and liberal humanitarian concept embraced within the above quoted sections of our Penal Code.

SHENK and SCHAUER, JJ., concur.

92 Cal.App.2d 536

Ex parte MEAD.

Cr. 2147.

District Court of Appeal,
Third District, California.

June 21, 1949.

1. Criminal law 🔑1202(1)

Where conviction in another state was of larceny, and property taken was of value of $20, and California statute then defined grand larceny as the taking of property of value of more than $50, the conviction could not be considered as a felony conviction within statute prescribing punishment for habitual criminals. Pen.Code, § 644.

2. Pardon 🔑6

Statutory provision that persons previously adjudged to be an habitual criminal under section 644 of the Penal Code, as that section read prior to effective date of statutory provision, shall be eligible for release on parole after serving seven years of prison term, is not applicable to a person convicted of primary offenses enumerated in section 644 as it read prior to 1945, and as amended in 1945, Pen.Code, §§ 644, 3048.5.

3. Constitutional law 🔑265

Since allegation, in information under which defendant was sentenced as an habitual criminal, that defendant was an habitual criminal would have been but the allegation of a conclusion, failure of information to charge defendant with having been an habitual criminal was not a denial to defendant of due process of law. Pen. Code, § 644.

Proceeding in the matter of the application of Elzia Edward Mead for a writ of habeas corpus.

Writ discharged with direction to Adult Authority.

Elzia Edward Mead, Represa, for appellant.

Fred N. Howser, Atty. Gen., Gail A. Strader, Sacramento, for respondent.

ADAMS, Presiding Justice.

Petitioner, in his petition for a writ of habeas corpus, seeks to have his term of imprisonment and his eligibility for parole redetermined, contending that while he was adjudged an habitual criminal with three prior convictions and sentenced to imprisonment for life without possibility of parole, at least one of the alleged priors was not one of the offenses set forth in section 644 of the Penal Code, and that he, therefore, is not ineligible for parole.

[1] In December, 1940, petitioner was convicted in Los Angeles County of three counts charging robbery of the first degree. He admitted three prior felonies alleged in the information, one of which was an alleged conviction of burglary and larceny in Missouri in 1916. It is conceded by respondent in this proceeding that the Missouri conviction was of the crime of larceny only, and that the property taken was of the value of $20.00; and that as the applicable California statute at that date defined grand larceny as the taking of property of the value of more than $50.00, such conviction did not come within our Penal Code section 644. In re McVickers, 29 Cal. 2d 264, 176 P.2d 40; In re Wolfson, 30 Cal. 2d 20, 180 P.2d 326.

Petitioner also questions whether his alleged prior conviction in Oklahoma in October, 1917, should be considered as within section 644. The records of that conviction, however, show that the charge was the taking of automobile tires and other property of the value of $600.00, and that defendant pleaded guilty to the offense charged and served a term of imprisonment in the Oklahoma state penitentiary.

The third prior conviction was for second degree burglary in Missouri in 1918 and is not challenged by petitioner.

We therefore conclude that petitioner is an habitual criminal, but chargeable with two and not three priors; and that he is, therefore, not ineligible for release on parole under Penal Code sections 3047 and 3048.

[2] Petitioner also urges that it should be determined in this proceeding that he is now eligible for release on parole under Penal Code section 3048.5, having already served more than seven years. That section was enacted in 1945, Stats.1945, p. 1747, but its seven year provision does not apply to persons convicted of primary offenses enumerated in Penal Code section 644 as that section read prior to 1945, and as amended in 1945; and the primary offense of which petitioner was convicted is robbery which was then, and still is, enumerated in that section. See In re Harincar, 29 Cal.2d 403, 407–408, 176 P.2d 58.

[3] Petitioner also suggests that he was denied due process of law because the information charging his primary offenses did not charge him with "the crime of being an habitual criminal." Penal Code, section 969, prescribes the procedure to be followed in charging prior convictions, and the prescribed course was followed in this case. Being an habitual criminal is not a crime in itself, and an allegation in the information that defendant was an habitual criminal would have been but the allegation of a conclusion that followed as matter of law the allegations of the commission of the primary offenses by one who had previously suffered two or more prior convictions of offenses enumerated in section 644, and the service of terms of imprisonment therefor. Also see Sturtevant v. Commonwealth, 158 Mass. 598, 33 N.E. 648, 649.

The writ is discharged with directions to the Adult Authority to redetermine the length of time petitioner shall serve as an habitual criminal with two, and not three, prior convictions, and to consider petitioner's eligibility for parole accordingly.

SCHOTTKY, J. pro tem. and THOMPSON, J., concur.

92 Cal.App.2d 312

COLEMAN v. COLEMAN.

No. 14067.

District Court of Appeal, First District, Division 1, California.

June 9, 1949.

1. Appeal and error ⚿1010(1)

Finding of trial court as to husband's residence in Nevada for purpose of determining validity of divorce decree obtained therein, when supported by evidence, was binding on District Court of Appeal.

2. Divorce ⚿327

Evidence sustained finding that husband's residence in Nevada was bona fide so that divorce decree obtained therein was entitled to full faith and credit in wife's action for separate maintenance in California.

◆

Appeal from Superior Court, San Francisco County; Edward Molkenburh, Judge.

Action by Edythe Elvera Coleman against Mervin Coleman for separate maintenance, wherein defendant filed a cross-complaint. From a decree for defendant, plaintiff appeals.

Affirmed.

Waldo F. Postel, San Francisco, for appellant.

Leonard A. Worthington, San Francisco, for respondent.

WARD, Justice.

This is an appeal from a California judgment establishing a Nevada divorce decree as a valid foreign judgment.

Plaintiff filed a complaint charging extreme cruelty and failure to provide and prayed for separate maintenance, community property, attorney fees and costs. Defendant answered by denying the allegations of cruelty and failure to provide and set up an absolute decree of divorce secured November 18, 1946 in the state of Nevada. Attached to the answer is a copy of the decree. By way of cross complaint defendant prayed that the Nevada decree should be accorded full faith and credit. Plaintiff answered the cross complaint by alleging an absence of jurisdiction on the part of the Nevada court and prayed that it be declared a nullity. Thereupon defendant filed an amendment to his answer and cross complaint alleging that for six months prior to the separation the plaintiff and cross defendant was guilty of extreme mental cruelty which caused him to suffer mentally and physically. Attached to the amendment is a cause of action for annulment. A motion to strike out the amended cross complaint was granted, but defendant was permitted to answer and cross complain upon allegations for divorce and not otherwise. Defendant complied by filing an amendment confined to the divorce allegations on the ground of extreme cruelty, but eliminated the cause of action praying for an annulment. The California court decreed that plaintiff take nothing by her complaint and that the defendant have judgment establishing the decree of divorce rendered in the state of Nevada.

The appeal is from the whole of the judgment. If the judgment establishing the Nevada divorce judgment as a foreign judgment of a sister state in full force and effect on the date of the judgment, November 18, 1946, which purported to sever the marital status of plaintiff and defendant was a valid and absolute decree of divorce then all other questions raised by plaintiff or defendant or by the court's findings are without avail to either party and need not be considered.

[1, 2] The California court found that for the statutory period prior to the filing of the Nevada complaint "the Defendant was a bona fide resident of the County of Washoe, State of Nevada, which said County and State were then and there the matrimonial domicile of the Defendant. That the said District Court of Nevada had jurisdiction of the parties, that Defendant's residence in said State was bona fide, and that the Decree thus entered is entitled to full faith, credit and recognition by this Court." The opening brief for appellant states that defendant went to Nevada for the sole purpose of securing a divorce. It is also mentioned that he left Nevada on

the day following the completion of the residence requirement in Nevada. The record shows that defendant testified, as a witness under Code of Civil Procedure section 2055, that he went to Reno, Nevada on August 4, 1946 and did not leave until September 17 of the same year. There was some effort to show that he was in San Francisco on August 6, based upon a letter mailed on that date. Defendant testified: "Yes, I left on a Sunday, and I forgot to mail the letter, and I had the letter all written and the envelope all addressed ready to go, and I had forgotten to mail it. When I got to Reno I phoned up and asked them to mail it. I told them I had forgotten to mail the letter." The evidence shows that from August 7, 1946 he lived at a specified address in Reno which he gave as his permanent address on his social security card. This address has never been changed. During his stay in Nevada he made inquiry as to permanent business engagements. In this respect defendant produced corroboration of some of his efforts. There is evidence from which a reasonable inference may be drawn that defendant intended to make Reno his permanent home. The evidence also shows that he returned to San Francisco because of the illness of his brother and brother-in-law. The illness and the subsequent death of the parties caused defendant to return to the furniture business with which he was previously connected. There is evidence that plaintiff knew of defendant's presence in Reno. She visited Reno during the period her husband remained there and interviewed lawyers about her husband's pending divorce, but took no action toward a contest. Plaintiff construes the evidence as establishing that defendant only intended to make Nevada his temporary residence. In view of the evidence noted this court is bound by the finding of the trial court.

Primarily, plaintiff relies upon Crouch v. Crouch, 28 Cal.2d 243, 169 P.2d 897, and Kegley v. Kegley, 16 Cal.App.2d 216, 60 P.2d 482. In the Kegley case, 16 Cal.App. 2d at page 221, 60 P.2d at page 484, the court stated: "A foreign divorce obtained through assumed residence is not in good faith, and is open to attack in the state of the true matrimonial domicile, and the parties sought to be bound by it may always impeach its validity and escape its effect by showing that the court which rendered it had no jurisdiction over the parties or the subject matter of the action, and its jurisdiction may be controverted by extraneous evidence." In accord, Dandini v. Dandini, 86 Cal.App.2d 478, 195 P.2d 871. A holding to the same effect is found in Crouch v. Crouch, supra, but the court prefaced such statement with the following: "The rule of decision long followed in this state is that when a foreign divorce decree is relied upon, and the record shows compliance with the foreign law, a presumption of validity arises, and in the absence of a successful attack upon the ground that the foreign court had no jurisdiction, the foreign decree will be recognized here." 28 Cal.2d at pages 249-250, 169 P.2d at page 900. In the Crouch case the court considered leading cases dealing with the same subject: Haddock v. Haddock, 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867, 5 Ann.Cas. 1; Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366; Esenwein v. Pennsylvania, 325 U.S. 279, 65 S.Ct. 1118, 89 L.Ed. 1608, 157 A.L.R. 1396, and other cases.

The present appeal is in many respects similar to Windsor v. Windsor, 42 Cal. App.2d 464, 109 P.2d 363. In that case the husband testified that he visited Nevada for the purpose of buying a ranch. During his stay he established a residence for the period required by law prior to the filing of his divorce action. An inference might have been drawn that Windsor had not established a bona fide residence in Nevada. In the Windsor opinion, 42 Cal.App. at page 466, 109 P.2d at page 364, the court stated: "The most that can be said is that under the evidence the trial court might have decided the disputed issue of fact either way and under such circumstances, an Appellate Court may not interfere after the trier of the facts has made its determination. See Davis v. Davis, 71 Cal.App. 2d 150, 162 P.2d 62; Estin v. Estin, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561, 1 A.L.R.2d 1412, and Rice v. Rice, 69 S.Ct.

751, are not inconsistent, but rather in harmony with the views expressed herein.

The judgment establishing the Nevada decree as a valid and absolute decree of divorce is affirmed.

PETERS, P. J., and BRAY, J., concur.

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92 Cal.App.2d 360

PEOPLE v. BROWN.

Cr. 4298.

District Court of Appeal, Second District,
Division 1, California.
June 13, 1949.

1. Criminal law 🔑1144(13)

In determining whether evidence was sufficient to sustain conviction, District Court of Appeal was required to consider the evidence in the light most favorable to the prosecution.

2. Poisons 🔑9

In prosecution for having possession of heroin, evidence was sufficient to establish that powder found in defendant's apartment was heroin. Health and Safety Code, § 11500.

3. Criminal law 🔑1036(1)

Objection to admission of evidence could not be raised for the first time on appeal.

4. Criminal law 🔑1036(1)

Where proffered evidence is allegedly imperfect because of lack of preliminary proof which might or might not have been supplied by a party offering such evidence, a specific objection must be made at the trial, pointing out the claimed defect, and if such is not done, objection cannot be urged on appeal.

5. Poisons 🔑9

Where evidence in prosecution for possession of heroin was legally sufficient to identify substance admitted in evidence as the substance taken from defendant's apartment beyond the realm of mere speculation, and where such substance was admitted in evidence without objection, weight of evidence was for the trier of fact. Health and Safety Code, § 11500.

6. Criminal law 🔑1159(2)

An appellate tribunal is not authorized to consider the weight of the evidence unless it can be said to amount to no substantial evidence whatever warranting an inference of guilt.

7. Criminal law 🔑322

In determining whether evidence sustained conviction for possession of heroin found in apartment to which defendant, his wife, and police officer had access, officer's access could be eliminated, since it could not be assumed that officer utilized his access to apartment other than in performance of his official duty. Code Civ.Proc. § 1963, subd. 15.

8. Poisons 🔑9

Evidence sustained conviction of possession of heroin. Health and Safety Code, § 11500.

9. Criminal law 🔑260(11)

In prosecution for possession of heroin, contention of defendant that he had no knowledge of the presence of heroin found in his apartment, merely created, at most, a conflict with the prima facie case made out by the prosecution, and such defense was for consideration of the trial judge. Health and Safety Code, § 11500.

◆

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

J. B. Brown was convicted of having heroin in his possession, and from the judgment of conviction and order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Fred N. Howser, Attorney General, Stanford D. Herlick, Deputy Attorney General, for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with a violation of section 11500, Health and Safety Code, a felony, in that he did on or about April 14, 1948, have in his possession a preparation of heroin.

Following entry of a plea of not guilty and waiver of a jury, the cause proceeded to trial before the court, resulting in a decision adjudging the defendant guilty. Motion for a new trial was denied and defendant was sentenced to serve a term of one year in the county jail.

From the judgment of conviction and the order denying his motion for a new trial, defendant prosecutes this appeal.

[1] Since the sole ground urged for a reversal is that the evidence was insufficient to sustain the judgment, it becomes necessary to set forth the evidence, which, narrated in the light most favorable to the prosecution, as it must be following an adjudication of guilt, reveals that on April 14, 1948, at about 10:15 p. m. Police Officer A. M. Barr went to an apartment house located at 4309 South Main Street in the City of Los Angeles. Accompanied by Officer McKinnon, the witness proceeded to apartment 109, where he knocked on the door. Receiving no answer, he opened the door with a key. The two officers thereupon entered the apartment and commenced a search thereof. In a dressing room situated between the front room and the bathroom Officer Barr found a blue glass jar on a shelf. On top of the jar were two cuff buttons. He removed the cuff buttons, opened the jar and found therein a piece of newspaper. Unwrapping the newspaper, he discovered it contained a brown powder, a small portion of which turned red when he applied nitric acid. Thereupon, he rewrapped the paper containing the powder, placed it on top of the shelf under a hatbox, put the cover back on the glass jar and the two cuff buttons on top of it. Both officers then left the apartment.

Going to the rear of the apartment house, they "staked" themselves in the alley at a point from which they could look down the hallway and observe the only door to apartment 109. Here they waited, keeping this door under constant observation until about 11:10 p. m. the same evening, at which time they saw defendant enter the apartment. From the time the officers left the apartment they saw no one enter until the defendant himself entered. After a five-minute wait, Officer Barr knocked on the door and requested the defendant to open it. A voice from within inquired, "Who is it?" Officer Barr replied that it was "Bolie". Receiving no further answer, Officer Barr again knocked on the door, saying, "J. B., open up." Again the voice from within inquired, "Who is it?", and again the officer said it was "Bolie". Receiving no further answer and hearing some noise from within the apartment, Officer Barr again used his key and effected an entrance. At this time defendant was seated on a couch with a telephone in his hand. A search was made of the room and Officer Barr found the newspaper bindle in the same place he previously had placed it. At this time, he noted that the cuff buttons had been taken off the jar; that the cover had been removed therefrom; that numerous bottles which had previously been in an orderly position on the dressing table were moved; that a doilie had been removed; that one lefthand drawer of the dressing table had been pulled open. Defendant was alone in the apartment.

Further search was made and a Los Angeles newspaper dated April 13, 1948, was found, from which the lower right corner had been removed. The piece of newspaper in which the brown substance was wrapped fitted the torn corner of said newspaper. Also found in the apartment were two envelopes, identified by the officer as having been addressed to the defendant, together with a small green bottle. When quizzed by the officers, defendant denied any knowledge of the bindle, denied that he "snuffed" heroin, though his nostrils, according to the testimony of the officer, appeared inflamed at the time. Officer Barr then asked defendant if he thought the officers had planted the substance, to which he replied, "No, I know you didn't." Defendant was questioned concerning the whereabouts of his wife and stated that she did not live in the apartment any longer; that he did not know where she was; that the feminine clothing and the perfume in the apartment were not necessarily hers; and that his wife knew nothing about the bindle.

The officers marked the newspaper bindle for identification, placed it in a small manila envelope, which in turn was marked for identification, and sealed with red sealing wax on which Officer Barr placed his thumb print. The small envelope thus sealed was in turn placed in a larger manila envelope along with the other exhibits which also had been marked in Officer Barr's handwriting. This large envelope and contents were booked on the 15th day of April at the Police Crime Laboratory, 318 West First Street, at approximately 12:30 a. m.

The witness, Officer Barr, was shown a portion of People's Exhibit "A" for identification, namely a portion of a newspaper containing a substance which had previously been identified as heroin by Police Chemist Don Mann. Officer Barr recognized it as the newspaper bindle he took from defendant's apartment. He pointed out the identifying marks, viz., the initials of both officers, a notation of the time, apartment number and street address.

The expert qualifications of Police Chemist Don Mann were stipulated. He was shown an envelope and contents marked "People's Exhibit 'A'" for identification, and testified that he first saw the envelope when he received it from the Property Clerk at the police property division, 318 West First Street at 9 o'clock on the morning of April 15, at which time it was sealed with three red sealing wax seals on the back thereof. He took possession of the exhibit at that time. Breaking the outer seal and removing the middle seal, he opened the envelope and abstracted therefrom two small envelopes, a postal envelope and a newspaper. One of these envelopes contained a small bottle, the other a paper bindle containing a "brownish-white powder." His chemical analysis of this powder revealed that it was about one-half gram of a narcotic known as heroin. After making this analysis, the chemist kept the exhibit in his possession until it was by him brought to court. This exhibit was offered and received in evidence without objection.

Defendant testified in his own behalf that on the day he was arrested he had left his apartment about 2:30 o'clock in the afternoon; that he returned about 10 o'clock p. m.; that after he was home for about thirty or forty minutes Officer Barr came into the apartment; that he (defendant) never saw the paper bindle before; that it was not his and he knew nothing about it; that he never had given Officer Barr a key to the apartment; that the only person to whom he had given a key was his wife; that on two or three previous occasions he had arrived home to find things in the apartment disturbed, but assumed that his wife was responsible for this.

On cross-examination defendant testified that he had disturbed nothing on the day in question; that he did not pick up his cuff links nor move anything on the bureau. He further testified that he was not separated from his wife and that she was living with him at the time he was arrested. According to the testimony of the defendant, his wife was at a theater when he was arrested but had been in the apartment when he left earlier in the day. It was also brought out on cross-examination that the defendant had been convicted of a felony in 1946 for violation of the so-called federal White Slave Act, 18 U.S.C.A. §§ 2421–2424.

Testifying on behalf of the defendant, Rosie Haynes stated that she lived at 221 East 46th Street and that she saw Officer Barr there on April 14, 1948 (the date of defendant's arrest), at about 9:30 p. m., and that he left her home at 10:30 or 10:45 o'clock on the same night.

In rebuttal, Officer Bar admitted that he had been at the residence of the last-mentioned witness on the evening in question but departed therefrom at about 9:30 p. m. He testified that he was able to fix the time because he had arrested a man in front of Rosie Haynes' house on a charge of "wildcat cabbing" and had taken him to the University Police Station where, according to the booking slip, Officer Barr and the man he had arrested arrived at 10:18 p. m.

Officer Barr testified that immediately after booking the prisoner above mentioned he left the University Police Station and went directly to defendant's apartment which was about two miles away.

[2] Appellant urges that the evidence is insufficient to support the judgment in two particulars, the first of which is that "There is no identification that a powder found in the apartment is the same that was testified to as being heroin." This contention is without merit. Officer Barr specifically testified, "Yes, this is the newspaper bindle I took from there. It bears my partner's and my initials, the time 11:15 p. m.; apartment 109, and 4309 South Main Street." This answer referred both to the newspaper and the heroin contained therein. The uncontradicted testimony hereinbefore narrated shows that Officer Barr sealed the bindle in an envelope, using red sealing wax, and making an imprint of his thumb thereon, and deposited it at the Police Crime Laboratory. Officer Mann, the Police Chemist, received the package some nine hours later from the Police Property Clerk, made his examination, and kept the exhibit in his possession until he produced it in court.

[3] When the exhibit was produced in court appellant had an opportunity to examine it for any signs that the same was tampered with, or to present any evidence, by way of cross-examination or otherwise, to that effect. The record discloses no objection by appellant either to the condition of the exhibit, or to the testimony of the Police Chemist. Such an objection cannot be raised for the first time on appeal. People v. Reyes, 133 Cal.App. 574, 577, 24 P.2d 531.

[4-6] For the same reasons, appellant's contention that the prosecution failed to prove that Officer Barr's thumb prints were on the seals broken by Chemist Mann must be rejected. Here again, he had an opportunity at the trial to examine the seals and compare the thumb prints, and cause a comparison to be made. Where the proffered evidence is allegedly imperfect because of the lack of preliminary proof, which might or might not have been supplied by the party offering such evidence, a specific objection must be made at the trial, pointing out the claimed defect. If this is not done, the objection cannot be urged on appeal. People v. Duffy, 110 Cal. App. 631, 636, 294 P. 496. Since the evidence was legally sufficient to identify the substance in question as the same as that taken from appellant's apartment beyond the realm of mere speculation or surmise, and since it was admitted into evidence without objections, its weight was a matter for determination by the trier of fact. People v. Salas, 17 Cal.App.2d 75, 77, 61 P.2d 771. An appellate tribunal is not authorized to consider the weight of the evidence unless it can be said to amount to no substantial evidence whatever warranting an inference of guilt. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

[7] The second particular wherein appellant contends that the evidence fails to support the judgment is that it "shows that someone else had access to the apartment." The record reflects that three persons had access to the apartment, namely, appellant, his wife and Officer Barr. The officer's access thereto may be eliminated for it cannot be assumed that he utilized such access other than in the performance of his official duty. Code Civ.Proc. § 1963, subd. 15.

Though appellant's wife had a key, it was shown by his admission that she no longer lived at the apartment in question. True, appellant denied this fact at the trial, but such denial operated only to raise a conflict in the evidence. This conflict was resolved in favor of the prosecution by the trial judge, and will not therefore, be overturned on appeal. People v. Dant, 68 Cal.App. 588, 591, 229 P. 983; People v. Campbell, 80 Cal.App.2d 798, 800, 182 P.2d 626; People v. Yankee, 79 Cal.App.2d 431, 435, 179 P.2d 582.

[8, 9] In the instant case there is also the positive testimony of the officers that upon their first visit to the appellant's apartment, they replaced the jar with the cuff links on top thereof and departed; that they had the apartment under observation

at all times until they returned; that no one other than appellant entered the apartment during that time; that when the officers returned to the apartment and encountered appellant, the jar in question had been opened and the cuff links removed. This testimony alone warrants an inference of appellant's knowledge and possession of the narcotic in question. That is to say, an "immediate and exclusive possession and one under the dominion and control of defendant." People v. Gory, 2 Cal.2d 450, 455, 170 P.2d 433, 436; People v. Hoff, 84 Cal.App.2d 398, 400, 190 P.2d 616. Appellant's contention that he had no knowledge of the presence of the heroin in his apartment merely created, at most, a conflict with the prima facie case made out by the prosecution. This defense was for the consideration of the trial judge.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and DRAPEAU, JJ., concur.

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92 Cal.App.2d 413

PEOPLE v. COYNE.

Cr. 2570.

District Court of Appeal, First District, Division 2, California.

June 15, 1949.

Homicide 🔑294(2), 340(1)

In murder prosecution of defendant who, while intoxicated, shot his brother, wherein defendant tendered an instruction in language of statute providing in first paragraph that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of such intoxication, and providing in second sentence that, whenever motive or intent is a necessary element to constitute any particular species or degree of crime, jury may consider the intoxication, giving of instruction embodying only first sentence of statute was reversible error. Pen.Code, § 22.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

William Coyne was convicted of first-degree murder, and he appeals from judgment of conviction and order denying new trial.

Judgment and order reversed and cause remanded for a new trial.

David S. Lull, San Jose, for appellant.

Fred N. Howser, Attorney General, David K. Lener, Deputy Attorney General, for respondent.

GOODELL, Justice.

By an information the appellant was accused of murder, in that on December 19, 1947, in Santa Clara county he did "willfully, unlawfully, feloniously, and with malice aforethought, kill and murder Raymond Coyne." Incidentally, he was charged with carrying a deadly weapon, a 25 caliber Colt automatic pistol, without a license. He pleaded not guilty.

He was tried by jury and a verdict of guilty of murder of the first degree was returned, fixing the punishment as confinement in the State Prison for life. Incidentally, the jury found that appellant was armed with a deadly weapon at the time of the murder. A motion for new trial was denied and this appeal was taken from the judgment and from the order denying a new trial.

There were several eye-witnesses to the homicide, which occurred in an inn near Cupertino on the evening of December 19, 1947.

The principal question presented for decision is whether there was prejudicial error in an instruction relating to intoxication.

Raymond Coyne was a brother of appellant, the decedent having been aged 27, and appellant 39, at the time. The brothers had not seen each other for four or five years until the day in question but they were apparently on good terms; at any rate no ill-feeling had existed as far as the record shows.

On the afternoon of December 19 decedent called at appellant's home, while appellant was at work. On arriving from work appellant had dinner and with it drank considerable port wine. After dinner decedent returned to appellant's home and brought his wife with him. He had with him a "fifth" of whiskey most of which the two brothers drank at the house. Their mother was visiting in Santa Clara county and the brothers decided to call on her. On leaving his home appellant put into his pocket a 25 caliber Colt automatic so that, according to his testimony, it would not be available to a 14-year old boy who lived at the house. On their way to visit their mother they stopped at a bar where each of them had two drinks.

According to the testimony the brothers were on friendly terms at that time and place, and appellant appeared to be sober. From there the two went to another bar, where they were joined by decedent's wife and another woman, and the brothers had two or three more drinks. A witness who arrived about 11 p. m. testified that she observed decedent arguing with several patrons, and later saw decedent and appellant engaged in an argument in which the former said to the latter, "You are my brother, and I don't want to fight you" to which appellant replied, "Don't try to make a monkey out of me." She testified further that appellant grabbed decedent's shirt, and tore it, but she added that she thought this was only horse-play. She said "it sounded like when people are drinking they will boisterously catch hold of each other." About ten minutes later appellant jostled or shoved decedent's wife, whereupon decedent told his brother to desist. The same witness testified that the next thing she knew appellant said "I'll kill you" and in the same breath the shots were fired. She saw appellant take the pistol from his pocket and fire it.

Section 22 of the Penal Code reads: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

Appellant tendered an instruction in the exact language of the section. Instead of giving it the court instructed the jury as follows: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition." This is the exact language of the first sentence of section 22 but the second sentence thereof was omitted. The court then added "In other words, voluntary intoxication is never a defense, neither is it an excuse. And the reason for that salutary rule is too obvious to require any comment at my hands, because if it were otherwise, if a person wanted to commit a crime, all he would have to do would be to go out and get drunk, commit it, and he would have a perfect defense. That is not the law in this state."

The case of People v. Hill, 123 Cal. 47, 55 P. 692, 693, is directly in point. There a youth of 18 was convicted of murder of the first degree and sentenced to life imprisonment. He had been drinking prior to the shooting and there was testimony that he was intoxicated. Defendant requested an instruction reading as follows: "If you should believe from the evidence that at the time of the killing the defendant in this case was intoxicated, or under the influence of intoxicating liquors, you may and should take into consideration such fact, in determining the degree of the crime of which the defendant is guilty, if you believe him guilty of any crime." The court refused it and gave no instruction at all on the subject of intoxication. The Supreme Court said, "There is no doubt that this instruction was correct, and that appellant was entitled to have it given, unless some special reason appears, warranting its refusal. * * * and it has been repeatedly held that, in a trial for murder, the jury, in determination whether there was that 'willful, deliberate, and premeditated killing' which constitutes murder in the first degree, may consider the fact that the accused at the time of the homicide was intoxicated. [Citations]." It was claimed by the attorney general in that case that there was not sufficient evidence of intoxication to make the instruction applicable, but the court held otherwise.

The importance of the failure in the instant case to give the instruction in the language of section 22 in its entirety is made clear by the following language in the Hill case: "Of course, if a person kills another under such circumstances that the killing is neither manslaughter nor excusable or justifiable homicide, he is guilty of murder, although he may have been intoxicated at the time of the homicide; but murder is not necessarily murder in the first degree. In order to be of the first degree, the killing must have been 'willful, deliberate, and premeditated.' In determining whether or not the killing was so willful, deliberate, and premeditated as to constitute murder in the first degree, it is proper for the jury to consider how much his mental condition at the time was affected by intoxication; and, there being an express statutory declaration upon the subject of intoxication, a defendant in a murder case is entitled to have an instruction embracing such statutory declaration given by the court to the jury, where there is evidence which makes is applicable; and for the refusal of the court to give the instruction under discussion the judgment must be reversed, and a new trial ordered."

Respondent concedes that it would have been better had the instruction been given in the language of section 22 in its entirety, but argues that the question "is whether the record shows evidence of intoxication to the extent that appellant was incapable of forming a deliberate attempt [intent?] essential to murder in the first degree." It is true that there was some difference of opinion among the several witnesses with respect to appellant's intoxication and the extent or degree thereof. Two physicians examined him after the shooting and gave him a test. These varying opinions as to appellant's condition need not be discussed at any length. The fact that an instruction on intoxication (though inadequate) was given, indicates that the trial judge had satisfied himself that the evidence was, as said in the Hill case, sufficient to put that question "within the province of the jury." His judgment on this question would seem to settle all doubts in the matter.

The appellant complains also of the failure of the court to give eight other instructions. We see no necessity to pass upon these other problems. In recent years our Supreme Court has decided a number of cases wherein it has laid down definitive rules respecting instructions in felony cases. It is to be assumed that on the retrial of this case such rules will be followed with respect to instructions which must be given on the court's own motion, and otherwise.

The failure to give the instruction in the language of section 22 was unquestionably prejudicial error.

The judgment of conviction and the order denying a new trial are reversed and the cause remanded for a new trial.

NOURSE, P. J., and DOOLING, J., concur.

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92 Cal.App.2d 392

HAYTER v. FULMOR.

Civ. 7613.

District Court of Appeal, Third District, California.
June 14, 1949.

1. Fraud 🔑58(1)

Evidence sustained finding that defendant, with full knowledge that she had previously waived her claim of title to portion of Alaska lands, intentionally misrepresented to plaintiff that she owned such lands, thereby inducing plaintiff to go to Alaska as her agent to sell such land so that plaintiff was entitled to recover damages sustained. Civ.Code, § 1572.

2. Fraud 🔑3

"Actual fraud" consists of acts or conduct by party to a contract performed with intent to deceive the other party and may consist of a positive assertion, in a manner not warranted by information of person making it, of that which is not true, though he believes it to be true. Civ.Code, § 1572.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Actual Fraud".

3. Fraud 🔑4

When one deliberately makes false representations of material facts, knowing them to be untrue, law supplies fraudulent intent to deceive.

4. Fraud 🔑13(2)

Defendant who had relinquished rights to certain lands was bound to know that she no longer owned them so that employment of plaintiff to sell lands on representations that she owned such lands constituted "actionable fraud" entitling plaintiff to recover damages resulting therefrom. Civ. Code, § 1572.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Actionable Fraud".

5. Fraud 🔑6

Constructive fraud may be actionable even though material misstatements are made without a fraudulent intent to deceive. Civ.Code, § 1573.

6. Fraud 🔑23

Where defendant employed agent to sell certain lands on misrepresentation that she owned them, although in fact she previously had waived her claims thereto, agent was not barred from recovering damages resulting from such fraudulent misrepresentation on ground he previously had lived in area where land was located and that he knew of such land.

7. Fraud 🔑23

Where defendant employed agent to sell certain lands on misrepresentation that she was owner, although in fact she previously had waived her claim thereto, agent was not barred from recovering damages resulting from such fraudulent misrepresentation on ground agent was charged with knowledge of titles appearing in public records.

8. Fraud 🔑20

Generally, when positive statements of ownership of property are deliberately made to one who has neither knowledge nor reason to disbelieve them, if they are false and detrimental, they may furnish basis of an action for damages for fraud.

Appeal from Superior Court, Humboldt County; Samuel F. Finley, Judge.

Action by W. R. Hayter against Bertha A. Fulmor for fraud in procuring plaintiff to execute a written contract of employment. From a judgment for the plaintiff, defendant appeals.

Affirmed.

Harry W. Falk, Eureka, for appellant.

Thomas Cotter, and Michael McHugh, Eureka, for respondent.

THOMPSON, Justice.

The defendant has appealed from a judgment of $2,106, which was rendered against her in a suit for damages for fraud exercised in procuring plaintiff to execute a written contract of employment as her agent to go to Alaska and sell properties to which she positively claimed title and ownership, when in fact she knew, or was charged with knowledge, that she did not own a substantial portion thereof. The contract required plaintiff to first sell the properties to which the defendant had no title before he was permitted to dispose of any of the other land. Relying upon such misrepresentations, plaintiff signed the contract and went to Alaska, incurring costs and expenses before he learned of the falsity of her statements regarding her ownership and title to the properties. He was precluded by the terms of the contract from disposing of any of the properties.

The record shows that plaintiff resides at Crescent City, California. The defendant lives at Eureka. Captain Albert Filmore, a cousin of the defendant, lived at Seldovia, Alaska. Prior to his death he filed on a government homestead, consisting of 160 acres of land in Sections 31 and 32, Township 8 South, Range 14 West, S. M. Alaska, which included lands claimed by a man by the name of Jones and another man by the name of Morris, both of which tracts the defendant positively told plaintiff she owned. It also included a portion of the townsite of Seldovia. Albert Filmore died

February 13, 1919. By the terms of his will the 160-acre homestead tract was devised to the defendant. His estate was probated in Alaska. The final decree, which was rendered July 3, 1932, distributed to the defendant the homestead property. The defendant made final proof in the United States Land Office July 23, 1930, on 91.86 acres only of said land. She previously relinquished her claim of title to Lots 1, 2, 3, 4 and 5 of Section 31 of that homestead property, which included a portion of the townsite of Seldovia. Her title to the balance of the 160-acre homestead, comprising 91.86 acres of land, was confirmed by the United States Land Office.

In response to defendant's advertisement for sale of her Alaska land, the plaintiff met her in the office of her attorney, Kenneth D. Sevier, at Eureka, about November 18, 1940, and discussed with them the proposition of his going to Alaska as her agent to sell the land. In response to the inquiry at the trial of this case as to whether she then told him she owned the entire tract of land in Sections 31 and 32, the plaintiff replied, "Absolutely, yes, sir." He also testified that at no time did she tell him she had waived or relinquished title to any portion of the original 160-acre tract filed upon by her deceased cousin Albert Filmore. The record discloses the following testimony in that regard:

"Q. Now when Miss Fulmor made these representations to you with respect to which you have testified did she ever indicate to you that the Albert Filmore application as originally made for homestead had been denied or changed in any way? A. She did not.

"Q. Did she ever mention the fact that she, as Bertha Fulmor, had applied for a homestead? A. Yes, sir, Albert Filmore's homestead. * * *

"Q. And did she ever state to you that she had relinquished any portion of the Albert Filmore homestead? A. She never did. * * *"

Yet the photostatic copy of the United States Land Office record shows that on "March 12, 1923, the entrywoman [Miss Fulmor] filed a relinquishment of all her right, title and interest to said Lots 1, 2, 3, 4 and 5 Sec. 21."

During plaintiff's interview with the defendant he was shown maps and diagrams of Sections 31 and 32 of Township 8, in which the lands were located, and she pointed out the lots and parcels which she claimed to own. She said nothing to him of her previous relinquishment to portions of those properties. On the contrary, she led him to believe that she owned the entire Albert Filmore homestead tract.

As a result of their conference, the respective parties executed a written contract, November 18, 1940, by the terms of which the defendant employed plaintiff as her agent to sell all of her designated Alaska property, which she claimed she owned, in consideration of specified percentages of the proceeds of such sales, to be paid to plaintiff for his services. That contract provides in part:

"Whereas, the party of the first part is the owner of certain real property situated in the village of Seldovia, Seldovia Precinct, Third Division, Territory of Alaska. A portion of said property is in the possession of a Joe Jones who operates a pool room, bar room and dance hall. Another portion of said property is in the possession of a man named Morris who operates a store thereon.

* * * * * *

"Either the portion now in the possession of the man named Morris or the portion in the possession of Joe Jones is to be sold first. * * *

"All the remaining property then owned by the party of the first part shall be sold as one parcel, and the party of the second part is to receive ten (10) percent of the net proceeds of said sale as compensation for his efforts in effecting same.

"The party of the second part is to make a search of the title to the property owned by the party of the first part, and if any steps are necessary toward clearing the same, he shall at once proceed to do so at his own expense, it being understood that the fifty (50) percent allowed him upon the first sale shall reimburse him for any moneys advanced by him for that purpose. * * *."

Pursuant to said contract of employment, and in complete reliance upon said representations by defendant that she owned all of said land, the plaintiff went to Alaska, employed an attorney, interviewed the interested parties and investigated the public records of said land. He then discovered, and so testified at the trial, that the "Joe Jones property," which was one of the properties required to be first sold, was located on lot two of block thirty-four of the townsite of Seldovia, to which townsite the defendant had relinquished her claim of title. The townsite was not included in the United States patent to the 91.86 acre homestead tract to which the defendant received title in 1930. She had previously waived her claim to that Jones property, and failed to inform plaintiff of that fact.

With respect to the Morris property referred to in the contract, which is the other tract of land required to be first sold before other properties could be disposed of, the plaintiff testified that "The Morris *residence* is in the townsite." The defendant had relinquished her claim of title to that portion to the townsite. There is evidence that the Morris store building is situated across an alley upon the defendant's 91.86 acre tract to which she was granted a patent. But it thus appears that at least a portion of the Morris property to which the defendant had relinquished her title did not belong to her. She failed to call plaintiff's attention to that fact. The plaintiff also testified that he discovered that Morris held his property by a quitclaim deed from one Antone Johannson, and that he had acquired title thereto by adverse possession.

After having discovered that the defendant, contrary to her representations to plaintiff, had waived her title to the Jones property and to a portion of the Morris property, which lots were required by the contract to be first sold, and that she did not own those lands, the plaintiff asked the defendant to modify the contract to permit him to sell the balance of the lands, which she refused to do. The plaintiff returned to Eureka, and this suit for damages was then commenced.

The trial court adopted findings favorable to the plaintiff, and determined, in effect, that the defendant, by her written instrument, previously waived her claim of title to a portion of her Alaska land, including the Jones and Morris properties, and that she did not own the last-mentioned properties; that she nevertheless deliberately, wilfully and positively represented to the plaintiff that she owned all of said 160 acre tract of land, including the Jones and Morris properties, and thereby induced plaintiff to execute the written contract, requiring him to first sell the Jones and Morris lands before he could dispose of any of the balance of the Alaska property, and that in reliance upon her statements of ownership of all of said properties, he executed the contract and expended time and money in going to Alaska, as her agent, to sell said land, to his detriment in the sum of $2,106. The court further found that the defendant made said false statements of ownership of said land, without reasonable ground to believe they were true.

The appellant contends that the evidence fails to support the findings and judgment, for the chief reason that plaintiff did not rely on defendant's claim of ownership of the properties since he had independent knowledge of the Albert Filmore homestead claim, and that he was charged with knowledge of the actual titles which were disclosed by the public records thereof, to which he had access. In support of those assertions the appellant cites numerous authorities among which are Andrew v. Bankers and Shippers Insurance Company of New York, 101 Cal.App. 566, 281 P. 1091, and 3 Restatement of the Law of Torts, p. 66, sec. 528. Those authorities, however, are readily distinguishable from the facts of this case.

In a former appeal from a previous judgment in this case, rendered pursuant to an order sustaining a demurrer to the complaint without leave to amend the pleading, this court reversed the judgment and held that since the defendant executed to plaintiff a general power of attorney authorizing him, as her attorney in fact, to sell and convey the Alaska property, it is immaterial that the plaintiff was not a licensed real estate broker. Hayter v. Fulmor, 66 Cal.App.2d 554, 152 P.2d 746. That issue is not involved on this appeal.

[1] Although there is a conflict of evidence regarding the defendant's statements of ownership of the property, we are satisfied there is ample proof to support the findings and judgment involved on this appeal. It satisfactorily appears that the defendant, with full knowledge that she had previously relinquished and waived her claim of title to a material portion of the Alaska lands involved in this suit, to-wit, the Jones and Morris properties, nevertheless positively and intentionally misrepresented to plaintiff that she owned all of said properties and thereby induced him to execute the contract and accept employment as her agent to go to Alaska and sell the properties. It also appears that the plaintiff relied upon said statements as true, and went to Alaska, but was prevented from disposing of any of said land by discovering that defendant did not own the Jones or Morris tracts, which, by the terms of the contract were required to be first sold before other lands could be disposed of, and that the defendant refused to modify the contract in that respect, or at all. Those material assertions of ownership and title to said lands, under the circumstances of this case, constituted actionable fraud which rendered the defendant liable for damages resulting therefrom.

[2] The defendant was not warranted in representing that she owned all of the Alaska land in question, since she had previously relinquished and waived title to a material portion thereof, to-wit, the Jones and Morris tracts. Actual fraud consists of acts or conduct by a party to a contract, performed with intent to deceive the other party, and may consist of "The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." Civil Code, sec. 1572.

[3, 4] A fraudulent intent to deceive another may be inferred from a material statement which is made with full knowledge that it is false. When one deliberately makes false representations of material facts, knowing them to be untrue, the law supplies the fraudulent intent to deceive. Boas v. Bank of America National Trust and Savings Ass'n, 51 Cal.App.2d 592, 598, 125 P.2d 620; 37 C.J.S., Fraud, § 22, p. 259. The defendant in this case was bound to know she did not own property, the title to which she had relinquished and waived by a formal instrument in writing.

[5] Constructive fraud, which is sometimes referred to as negligent or careless misrepresentations, may be actionable even though material misstatements are made *without a fraudulent intent to deceive.* Section 1573 of the Civil Code defines constructive fraud as that which consists:

"1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or,

"2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."

In the present case we are satisfied the defendant was guilty of actual fraud in positively representing to the plaintiff that she owned all of the Alaska property referred to in the written contract, when she knew, or should be charged with knowledge, that she did not own all of it because she had previously relinquished her claim of title to a substantial portion of it. Her knowledge and her intent to deceive and defraud the plaintiff are inferred by her previous relinquishment of her title to portions of the property, and by her subsequent refusal to permit a modification of the contract so as to authorize plaintiff to sell the balance of said property.

[6] The defendant was not relieved of liability for her false statements of ownership of the properties by her contention that plaintiff once lived in Seldovia, and knew of the Albert Filmore homestead claim, or that he was charged with knowledge of the true titles to said properties because they were matters of public record. It is true that plaintiff once lived at Seldovia, and that he had heard of the Albert Filmore claim, but it appears that he had no knowledge of what properties were contained therein. He had lived in Mariposa County, California, for sometime before the contract was made. It was executed in 1940 at Eureka, in the office of defendant's attorney. There is no evidence that plaintiff

had any previous knowledge of the extent or location of the Albert Filmore claim. Nor was he charged with knowledge of the record titles to said properties in the Territory of Alaska. Those public records were not readily accessible to him. He had a right to rely upon her positive statements of ownership and title to the lands. He had no reason to disbelieve her representations of ownership.

[7, 8] It has been frequently held that when a purported owner makes material false statements with respect to his ownership or title to real property, with the intent to deceive another person, he may be held liable for damages resulting therefrom, in spite of the fact that an inspection of the public records may disclose the falsity of such statements. That is especially true when the public records are at a remote place to which the party does not readily have access. Ordinarily, when positive statements of ownership of property are deliberately made to one who has neither knowledge nor reason to disbelieve them, if they are false and detrimental they may furnish the basis of an action for damages for fraud. Seeger v. Odell, 18 Cal.2d 409, 414, 115 P.2d 977, 136 A.L.R. 1291; Rogers v. Warden, 20 Cal.2d 286, 125 P.2d 7; Hargrove v. Henderson, 108 Cal.App. 667, 674; Jackson v. Meinhardt, 99 Cal.App. 283, 287, 278 P. 462; 37 C.J.S., Fraud, § 34 c. p. 281; 23 Am.Jur. 816, sec. 50. In the Seeger case, supra, it is said, 18 Cal.2d at page 414, 115 P.2d at page 980, 136 A.L.R. 1291, that:

"* * * If, however, the opinion or legal conclusion misrepresents the facts upon which it is based or implies the existence of facts which are nonexistent, it constitutes an actionable misrepresentation. Rest.Torts, sec. 539; see cases cited in 12 Cal.Jur. 727, 728. Negligence on the part of the plaintiff in failing to discover the falsity of a statement is no defense when the misrepresentation was intentional rather than negligent. See cases cited in 12 Cal.Jur. 758, 759; Prosser, Torts, 748. As a general rule the negligence of the plaintiff is no defense to an intentional tort. See Prosser, Torts, 402. The fact that an investigation would have revealed the falsity of the misrepresentation will not alone bar his recovery (Rest.Torts, sec. 540; see cases cited in 12 Cal.Jur. 758, 759), and it is well established that he is not held to constructive notice of a public record which would reveal the true facts. Rest.Torts, sec. 540 (b); see cases cited in 12 Cal.Jur. 759, 764; Prosser, Torts, 750, 751. The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations, but to bona fide purchasers for value."

We conclude that the evidence in this case amply supports the findings and judgment. There appears to be no doubt the plaintiff was deceived by defendant's positive statements of her ownership of material portions of her Alaska property, and that he thereby suffered substantial damages. The amount of the judgment is not challenged.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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92 Cal.App.2d 409

MILLER et al. v. FOWLE et al.

BOYNTON v. MILLER et al.

NORDSTROM v. MILLER et al.

Civ. 13980, 13981.

District Court of Appeal, First District,
Division 2, California.

June 15, 1949.

Rehearing Denied July 15, 1949.

Hearing Denied Aug. 11, 1949.

1. Dedication 🔑1, 31

Dedication is a matter of contract, requiring an offer and an acceptance.

2. Dedication 🔑19(3)

Where intention of one offering realty to a city for a street, is clear that he did not propose to offer some portion of the realty shown on map filed, there is no dedication of that portion. St.1913, p. 568; St.1915, p. 1512.

3. Dedication ⚷33

Where subdivider of tract of realty located partly in City of Oakland and partly in City of Berkeley filed a map showing streets, and City of Oakland accepted the map, but City of Berkeley refused, and map was corrected to limit tract to that portion only which lay within Oakland boundaries, there was no dedication of streets within the City of Berkeley to the City of Oakland.

4. Municipal corporations ⚷57

A municipal corporation has generally no extraterritorial powers of regulation, and it may not exercise its governmental functions beyond its corporate boundaries. Const. art. 11, § 11.

5. Dedication ⚷60

The acceptance by a municipality of a dedication of a public street carries with it an obligation on part of municipality to maintain and repair the street.

6. Easements ⚷36(3)

Evidence was insufficient to establish a way of necessity for street purposes over the lands of another.

7. Easements ⚷32

Alleged way of necessity for street purposes, if it ever existed, was lost through adverse possession for more than 25 years.

◆

Appeal from Superior Court, Alameda County; Ralph E. Hoyt, Judge.

Suit by Robert C. Miller and another against Al Fowle, Judd Boynton, and others to enjoin the construction of a street through the plaintiffs' realty, wherein Judd Boynton filed a cross-complaint. Action by Victor Nordstrom against Robert C. Miller and another to establish an easement for street purposes through the realty of Robert C. Miller and another. From judgments in favor of Robert C. Miller and another, Al Fowle, Judd Boynton, and others and Victor Nordstrom appeal.

Judgments affirmed.

Roscoe E. Jordan, San Francisco, Charles C. Boynton, San Francisco, for appellants.

Hagar, Crosby & Crosby, Price, Macdonald & Knoz, Oakland, for respondents.

NOURSE, Presiding Justice.

These two cases were consolidated for trial. Miller sued Boynton and others to enjoin the construction of a street through his property. Nordstrom sued Miller and others to establish an easement for street purposes through the Miller property. Both judgments were for Miller. The notices of appeal are limited to Fowle, Boynton and Nordstrom and these join in a brief which states the issues to be (1) whether the land involved is in a duly dedicated public street, and (2) whether appellants acquired the right to use the land as a way of necessity.

The facts may be stated briefly. Appellants' predecessor subdivided a tract of land and prepared and filed a map showing lots, streets and public parks, approximately nine-tenths of which lay in the city of Oakland, and one-tenth in the city of Berkeley. The land in dispute is in that part of the tract within the city of Berkeley.

The city council of the city of Oakland accepted the map as presented and purported to accept the proffered dedication of all the streets and public places designated on the map. However, the city council of the city of Berkeley refused to accept dedication of the portion lying within its boundaries and the map was accordingly changed (by the use of red lines) to limit the tract to that portion only which lay within the Oakland City boundaries. As so corrected the map was then recorded as required by the provisions of the Map Act (Statutes 1913, p. 570) (N.B. The original Map Act of 1907, St.1907, p. 290, was amended by Stats.1913, p. 568, and Stats. 1915, p. 1512. The existing law is found in Bus. & Prof.Code, secs. 11500 et seq. The law applicable to these proceedings is found in the amendments to the Map Act of 1913 and 1915.) The conceded facts upon which the decision must rest are that, though the council of the city of Oakland by resolution accepted the entire map showing portions of the proposed subdivision within the city of Berkeley, the Berkeley council refused to accept the map—and hence refused to accept dedication of the public ways—and the map was then altered and recorded with the portions lying within the Berkeley limits encircled by a red line to show deletion.

The principal questions of law arising from these facts are two—first, was there a common law dedication of the streets in the city of Berkeley and second, was the council of the city of Oakland empowered to accept those streets lying within the city of Berkeley boundaries?

[1–3] There was no common law dedication of the streets designated as lying within the Berkeley City limits because the owner did not offer these streets to the city of Oakland. He did offer them to the city of Berkeley and the offer was rejected. Dedication is a matter of contract requiring an offer and an acceptance. Where the intention of the offeror is clear that he did not propose to offer some portion of the land shown upon the map filed there is no dedication of that portion. Manhattan Beach v. Cortelyou, 10 Cal.2d 653, 662, 76 P.2d 483. The want of an intention of the owner to offer to the City of Oakland dedication of the streets within the city of Berkeley is the more clear since he must have known that the law did not permit the City of Oakland to accept an offer of dedication of streets in the city of Berkeley, as will now appear.

[4] This question of power presents no legal difficulties. The two cities are incorporated under the Constitution and their respective charters with power to control and maintain public streets within their respective corporate limits. "A municipal corporation has generally no extraterritorial powers of regulation. It may not exercise its governmental functions beyond its corporate boundaries. Const. art. XI, § 11; Von Schmidt v. Widber, 105 Cal. 151, 38 P. 682; Mulville v. City of San Diego, 183 Cal. 734, 192 P. 702; 4 McQuillin on Corporations, § 1434; 18 Cal. Jur. p. 803. "City of Oakland v. Brock, 8 Cal.2d 639, 641, 67 P.2d 344, 345. Section 11 of article XI of the Constitution empowers each city to enforce "within its limits" all local regulations. Section 19 of the same article empowers each municipal corporation to establish and operate public works for the benefit of "its inhabitants", but denies the right to furnish "any service" to the inhabitants of any other municipality without the latters' consent. Though this section relates primarily to the development of public utilities it represents the principle upon which the authorities cited by appellants are based. But there is a marked distinction between this power of a municipality to acquire and operate properties "outside" the city limits (i.e. in unincorporated areas) and the suggested power of one city to acquire and operate public properties "inside" the boundaries of another municipality.

[5] The weakness of appellants' argument may be thus illustrated—if the city of Oakland had power to accept dedication of the streets and public places lying within the limits of the city of Berkeley then it became the duty of the city of Oakland to grade, improve and maintain such streets and public places and to levy taxes or assessments for those purposes. But, under the Oakland charter, it was empowered only to grade and maintain such streets and public places as lay "within the city of Oakland." Stats.1911, Part 2, p. 1591, sec. 51, sub. 46. N.B. The subdivision was amended in 1925, Stats.1925, p. 1411, but since these proceedings were had in 1917, the change is not applicable. Since the acceptance by a municipality of a dedication of a public street carries with it an obligation of maintenance and repairs the denial of the power of maintenance and repair of streets beyond the municipal boundaries carries with it a denial of the right or power of acceptance of an offer of dedication.

We conclude that the city of Oakland was without power to accept dedication of any portion of the proposed streets within the city of Berkeley and that the approval of the map of the subdivision did not work an acceptance beyond the city limits because of this lack of power.

This conclusion is fortified by the authorities without conflict. See 26 C.J.S., Dedication, n. 32, p. 103; Hayes v. Kansas City, 294 Mo. 655, 242 S.W. 411; City of St. Louis v. St. Louis University, 88 Mo. 155, 159; Gault v. Town of Lake Waccamaw, 200 N.C. 593, 158 S.E. 104, 108.

[6] Appellants' claim to a way of necessity is equally untenable. Appellant Nordstrom purchased his lot in 1917. Predecessors of Fowle and Boynton purchased in the same year. In 1918 the land involved, including the so-called "Dwight Way" was conveyed to Dane Coolidge. In 1945 the executor of the Coolidge estate conveyed to respondents Miller. The premises were then, and for many years had been, fenced off, planted with trees and shrubbery and had not at any time been opened or used as a public street, nor as a private right of way.

[7] The conceded facts deny the existence of a way of necessity. Assuming such right of way may have accrued when appellants or their predecessors acquired the parcels here involved, such easement was lost through the adverse possession of respondents and their predecessors for a period of more than twenty-five years. 17 Am.Jur. p. 1030; 9 Cal.Jur. p. 962; Glatts v. Henson, 31 Cal.2d 368, 371, 188 P.2d 745.

Judgments affirmed.

GOODELL and DOOLING, JJ., concur.

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92 Cal.App.2d 533

PEOPLE v. SALAIS.

Cr. 2135.

District Court of Appeal
Third District, California.
June 21, 1949.

1. Rape 🔑57(1)

In rape prosecution, whether defendant had time to commit acts to which prosecuting witness testified was for jury.

2. Criminal law 🔑1159(4)

A conviction will not be reversed on ground that testimony of prosecuting witness is inherently improbable, even though it may contain contradictions, unless it is so clearly false and unbelievable that reasonable minds may not differ in that regard or facts asserted are physically impossible.

3. Criminal law 🔑742(1)

In rape prosecution, credibility of prosecuting witness was for jury.

4. Rape 🔑53(2)

Evidence sustained conviction of assault with intent to rape.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Robert Salais was convicted of assault with intent to commit rape, and he appeals.

Affirmed.

Herbert E. Paul, Modesto, for appellant.

Fred N. Howser, Atty. Gen., Doris H. Maier, Deputy, for respondent.

ADAMS, Presiding Justice.

In an information filed in Stanislaus County appellant was charged with an assault with intent to commit rape, upon the person of Mary Corman. A verdict of guilty was returned by the jury, a motion for a new trial was denied, and from the court's judgment and order denying a new trial defendant has appealed on the sole ground that the evidence is insufficient to support the judgment.

Mrs. Corman was employed in Modesto and lived in a trailer on the property of John Daggs. Defendant lived in a cabin about 120 yards from Mrs. Corman's trailer. The parties had known one another for two years.

Mrs. Corman testified that late in the night of May 16, 1948, she returned from work and was preparing to retire when she heard one of her pet kittens crying. She left the trailer to find the kitten, and with the aid of a flashlight located it under the trailer. As she stooped to pick it up Salais seized her about the throat, and, choking her, dragged her around behind the trailer, and finally struck her on the head whereupon she lost consciousness. When she recovered her senses her clothes were over her head, her underclothes were torn off, and they and the flashlight were lying near her. She heard someone calling and Mr. Daggs appeared on the scene.

Mr. Daggs testified that on the night of the assault, when he had just returned from a dance, he heard someone calling for help; that he seized his flashlight from his car and ran to Mrs. Corman's trailer; that he saw defendant on top of Mrs. Corman, but as he threw his flashlight on the scene defendant ran and jumped over a fence; that Mrs. Corman was staggering, with blood running out of her mouth, and her clothes torn and dirty; that he took her to his house and then contacted the sheriff's office.

Mr. Hawley, a deputy sheriff, who responded to the call, testified that he saw Mrs. Corman, that she had blood on her mouth and marks on her throat, that there were foxtails and weeds in her hair and on her clothes, and she was in a hysterical condition. He then went to Salais' house and found him in bed. He asked defendant to come with him, and when he dressed saw blood on his underwear. He took defendant to Mrs. Corman who identified him. He then took Mrs. Corman to the hospital.

Dr. Clague testified that Mrs. Corman was brought to the county hospital about 3:00 a.m.; that he examined her and found a swollen lip, bruises on her throat, and dirt and minor abrasions about the entrance to the vagina; and that she was menstruating.

Salais testified on his own behalf that he had previously answered flashlight signals from Mrs. Corman when she had something wrong with her trailer; that the night of the offense charged he had been in town drinking, that he returned to his trailer home about 2:00 a.m. feeling sick; that he saw flashes of light from Mrs. Corman's trailer, so went over there; that Mrs. Corman said she needed some money, but he would not lend it to her; that she said "Let's go again," and sat down on the grass; that he pulled her dress off and started to pull her pants off, but, feeling sick again, changed his mind; that he then turned and saw Mrs. Corman with his wallet in her hand; that he "must have got mad or something" and slapped her; that she did not "holler," but that he saw Mr. Daggs' flashlight and left after getting his wallet back.

On rebuttal Mrs. Corman denied the testimony of defendant.

On this appeal it is urged by appellant that, when viewed from the standpoint of "time element" the evidence of the prosecution is physically impossible; that Mr. Daggs was on the scene so soon after the events to which Mrs. Corman testified that they could not have happened; that there was insufficient lapse of time between her calls for help and the appearance of Mr. Daggs for such actions on defendant's part as were shown by the testimony.

[1] But it was for the jury to determine whether or not there was time for defendant to commit the acts to which Mrs. Corman testified. Defendant's own testimony tends to show that there was a considerable lapse of time after he appeared at Mrs. Corman's trailer, and that there was a struggle between the two during which, as he says, Mrs. Corman extracted his wallet from his pocket and he forcibly recovered it; so it is obvious that, at the trial, defendant did not rely upon the "time element"; and he also said that Mrs. Corman did not "holler."

[2-4] A judgment of conviction will not be reversed upon the ground that the testimony of a prosecuting witness is inherently improbable, even though it may contain inconsistencies and contradictions, unless it is so clearly false and unbelievable that reasonable minds may not differ in that regard, or the facts asserted are physically impossible; and it is the sole province of the jury or the trial judge to determine the credibility of witnesses and the weight to be given their testimony. People v. O'Moore, 83 Cal.App.2d 586, 598, 189 P.2d 554; People v. Jefferson, 84 Cal.App.2d 709, 713, 191 P.2d 487; People v. Jackson, 63 Cal.App.2d 586, 147 P.2d 94.

The judgment is affirmed.

SCHOTTKY, J. pro tem. and THOMPSON, J., concur.

92 Cal.App.2d 93

In re BALL'S ESTATE.

HOWE et al. v. BAYLISS et al.

Civ. 16949.

District Court of Appeal, Second District, Division 1, California.

May 26, 1949.

Rehearing Denied June 10, 1949.

Hearing Denied July 21, 1949.

1. Husband and wife 🔑**247**

Statutory amendment adding the words "heretofore or hereafter" to statute defining community property to include realty situated in the state, and personalty wherever situated, "heretofore or hereafter" acquired while domiciled elsewhere, which would not have been the separate property of either husband or wife if acquired while domiciled in the state, showed that retroactive application was intended. Civ.Code, § 164.

2. Husband and wife 🔑**248½, 274(1)**

Where loan which husband used to purchase personalty in a common law state before marriage constituting his separate estate was paid off after marriage and spouses subsequently moved to California, personalty was community property and on death of wife intestate before death of husband intestate, statutory heirs at law of the wife were entitled to a one-half interest in the personalty, and the heirs at law of the husband were entitled to the other half. Probate Code, §§ 201.5, 225, 228, 229; Civ.Code, § 164.

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Proceeding in the matter of the estate of Arthur Ball, deceased, wherein Lyla Brown Howe and others, opposed by Alice Bayliss and others, filed a petition for determination of heirship. From an adverse judgment, Alice Bayliss and others appeal.

Judgment affirmed.

Collins, Hastings & Johnson, Marshall Stimson and Noel Edwards, Los Angeles, for appellants.

Henry H. Draeger, Beverly Hills, and Louis Thomsen, Los Angeles, for respondents.

DRAPEAU, Justice.

By a petition for determination of heirship, the heirs at law of Cathryn Braun Ball, the predeceased spouse of the intestate, Arthur Ball, seek distribution to them under sections 228 and 229 of the Probate Code of all of the separate property of Cathryn Braun Ball, and one-half of all of the community property of said predeceased spouse and decedent.

In opposition to such petition, the heirs at law of Arthur Ball contend that the entire estate was decedent's separate property; hence they are entitled to distribution thereof, to the exclusion of the relatives of the predeceased spouse. Sec. 225, Probate Code.

Section 228, supra, provides: "If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead, or in a joint tenancy between such spouse and the decedent or was set aside as a probate homestead, such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of said deceased spouse and to their descendants by right of representation."

It is conceded that Cathryn Braun and Arthur Ball were married on September 3, 1903, and that they moved to California in December of 1917; that Mrs. Ball died on October 26, 1933, and Mr. Ball died on November 12, 1946, leaving no surviving spouse or issue, and that the estate was then valued at $900,000. Neither party left a will.

Petitioners in an effort to prove that Mrs. Ball possessed a community interest in the estate here under review, presented evidence to the following effect:

Ella May Hall testified that she became acquainted with decedent at Beaver Falls, Pennsylvania, in about 1902; that when he married in 1903, he and his wife lived "in the other side of our house" which was a duplex, from that time until they bought the house next door in 1906 or 1907; that Standard Connecting Rod Company was organized in 1902 at which time J. T. Moltrup (husband of Mrs. Ball's sister) was general manager and decedent was secretary of said company; that in 1906, said witness Hall was employed as secretary to decedent; that decedent told her that he borrowed in 1901 or 1902 the sum of $2,000 from Alfred Leigh, with whom he was then living, in order to buy stock in Standard Connecting Rod Company; that decedent also told her that it was through the influence of J. T. Moltrup that he was able to secure the loan with which to buy 25 shares of the company's stock; that "he had said, many times * * * when I worked for him, that if it hadn't been for Mr. Moltrup, he never would have had a start. It was through Mr. J. T. Moltrup that he got his start. You see, Mr. Moltrup brought him from the Tile Works, to the Connecting Rod Company, and it was on account of Mrs. Ball being Mrs. Moltrup's sister. That was the whole thing." This witness further testified that in 1906 or 1907 decedent had not completed payments on the loan of $2,000 from Mr. Leigh; that many times in later years, Mrs. Ball told her that she saved in order to help her husband pay his indebtedness; that subsequent to 1917 decedent visited in Beaver Falls and on his last trip there at the time he sold his stock in Republic Steel he told the witness: "Now I have $125,000 which I am taking to California to invest. * * * Ella, I never allow a dollar to be idle. Every cent I have has to work for me. * * * I am going back and I am going to make a fortune."

On cross-examination this witness testified that decedent told her he had bought 25 shares of stock of the Standard Connecting Rod Company and that the $2,000 which he borrowed from Mr. Leigh was in part payment for those shares; that the records of the company showed that he owned 25 shares; and his own records showed that he owed Alfred Leigh $2,000 which he borrowed before he married, in the "latter part of 1901 or the early part of 1902"; that decedent told her he had bought 25 shares of stock with the $2,000 borrowed from Mr. Leigh; that decedent paid $25 or $30 per month on the loan.

Mrs. Anna Margaret Moltrup, sister of Mrs. Ball and the widow of J. T. Moltrup, testified that decedent terminated his employment with Standard Connecting Rod Company after it merged with the Standard Guage Co. about 1910 and to her knowledge was not again employed after that date; that he moved to California in 1917 where he made his permanent home.

William Albert Braun, a brother of Mrs. Ball, testified that after his sister married Mr. Ball in September, 1903, he worked for them i. e., ran errands, made garden, cut the grass and raked the yard, for which he was paid only a few pennies, his sister commenting that "she had to be close, she had to save her money to pay off a debt"; that his father died in 1922 and each of the children including Mrs. Ball received in the neighborhood of $325 or $350 from his estate.

Contestants produced one witness, Mrs. Alice Bayliss, sister of decedent, Arthur Ball who presented a letter written by her brother, dated Jan. 19, 1903, in which he makes reference to a loan made to him by the witness and her husband, to-wit: "I also enclose my twenty-four months note, dated Dec. 11th, 1902, for the amount of $750.00, with interest at 5% per annum, payable semi-annually, in accordance with our recent correspondence. Attached to the note you will find Standard Connecting Rod Co.'s stock certificates No. 2 and 22, for 2½ and 5 shares respectively, making a total of 7½ shares, par value of $100.00 each, to be held as collateral.

"However, I will be able to take care of this note when due, but it is best that you have this collateral so that in case anything happens to me it will make you secure. As you did not answer my question regarding the time you preferred me to make this note for, I made it twenty-four months, and trust you will find this satisfactory."

This witness testified that the note was paid but she did not recall when it was paid, whether in three or four years, but she thought that "Arthur Ball would have paid it up right away."

The court found, among other things, that decedent married Cathryn (Kate) Braun on September 3, 1903, and that they continuously thereafter resided in Beaver Falls, Pennsylvania, until December, 1917, when they removed to California, where they remained domiciled until their respective deaths; that when the parties married, decedent was in possession of not to exceed 25 shares of stock of Standard Connecting Rod Company, a corporation, of Beaver Falls, having a par value of $100 each, and at that date was indebted to Alfred Leigh, his landlord, in the sum of $2,000.00, and to his sister, Alice Bayliss, in the amount of $750.00, which sums he borrowed for the specific purpose of buying said stock; that all of said 25 shares of stock were paid for with savings from the earnings of decedent after marriage.

It was further found that said shares of Standard Connecting Rod Company stock, originally costing $2500, by subsequent "mergers" with or "changes" into Standard Guage Steel Company stock, then Union Drawn Steel Company stock, and, finally, Republic Steel Corporation stock, increased in value to from $100,000 to $125,000 at the time decedent and his said wife came to California in December, 1917.

That an investment in 1916 of $20,000 in 200 shares of stock of Moltrup Steel Products Company of Beaver Falls, produced over $100,000 in dividends in thirty years, and increased in par value, by stock dividends and some additional purchases, to $76,850 in the same period.

That decedent was a shrewd, miserly man, continually poring over his investments and always urging his money to increase and making shrewd investments; that his said wife added materially to his opportunity to invest and reinvest the proceeds of his wise investments by her extreme thrift and frugality in household and personal expenses, running the home on $5.00 per week (and then accounting to her husband therefor), and later, when they were worth a third of a million dollars, on $7.00 per week; that by 1938 the fortune had more than trebled; and that thereafter by transmutations, rents, issues and profits of assets acquired during the married life of decedent and his said wife, the assets increased to over $900,000 at the date of his death; that neither spouse acquired any property after marriage by gift, devise, bequest or descent, except that said wife received $325 or $350 from the estate of her father in 1922 or 1923.

That other than the 25 shares of stock purchased with borrowed funds before marriage, which borrowings were repaid after marriage, the entire estate of decedent consists of property, and the rents, issues and profits and transmutations of property acquired during the marriage; that all of said property, so acquired during marriage, belonged or went to decedent upon the death of his said wife, by virtue of its community character, or reclassification for purposes of succession as community property, or became vested in decedent on the death of such spouse by right of survivorship in joint tenancies between such spouse and decedent.

Based upon such findings, the court made its conclusions of law that petitioners, the relatives of Cathryn Braun Ball, are statutory heirs at law of decedent and entitled to succeed to an individed one-half interest in the personal property of decedent in proportionate amounts pursuant to the laws of succession; and that contestants, as heirs at law of decedent, are entitled to succeed to an undivided one-half interest in the personal property of the estate and to all of the real property thereof, pursuant to the laws of succession of the state of California.

From the decree entered in accordance with such findings and conclusions, this appeal is prosecuted by contestant heirs at law of decedent.

It is here contended by appellants that section 228 of the Probate Code is applicable only to property "which was community property of the decedent and a previously deceased spouse"; and that property acquired by a husband in a common law state as his separate property does not become community property by reason of its removal by the owner to California, either upon such removal or upon the death of the owner, or at any other time, but retains its original character. Kraemer v. Kraemer, 52 Cal. 302; Shumway v. Leakey, 67 Cal. 458, 8 P. 12; Estate of Burrows, 136 Cal. 113, 68 P. 488; Estate of Niccolls, 164 Cal. 368, 129 P. 278; Estate of Warner, 167 Cal. 686, 140 P. 583; Estate of Arms, 186 Cal. 554, 199 P. 1053; Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343.

In 1917, the Legislature redefined community property to include "real property situated in this state, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either (husband or wife) if acquired while domiciled in this state." Sec. 164, Civil Code, as amended, Stats.1917, ch. 581, p. 827. Thereafter, in Estate of Frees, 187 Cal. 150, 155, 201 P. 112, it was held that the expanded definition was not to be construed retroactively, consequently it did not apply to property of married persons who had become domiciled in this state and brought their property here prior to the date of such amendment.

[1] In 1923, section 164 was again amended by inserting the following italicized language so as to include "personal property wherever situated, *heretofore or hereafter* acquired while domiciled elsewhere * * *", thus making it clear that retroactive application was intended. Civ.Code, sec. 164, as amended, Stats. 1923, Ch. 360, p. 746.

"But power to legislate as to the character of property brought to this state prior to 1917 was again held wanting, since it would abridge vested rights of the husband. Estate of Drishaus, 199 Cal. 369, 373, 249 P. 515." Thereafter, in Estate of Thornton, 1 Cal.2d 1, 5, 33 P.2d 1, 92 A.L.R. 1343, "it was held that to attempt thus to convert separate property into community property, even prospectively, was an unconstitutional impairment of vested property rights acquired in another jurisdiction." In re Miller, 31 Cal.2d 191, 196, 187 P.2d 722, 725.

The effect of the decision in the Thornton case was avoided by the enactment in 1935 of section 201.5 of the Probate Code, a statute of descent, declaring in substance that on death of a spouse one-half of all property that was acquired by parties elsewhere and that would not have been separate property if acquired in California shall go to the survivor.

In construing this section, the Supreme Court in In re Miller, 31 Cal.2d 191, 196, 187 P.2d 722, 725, stated: "Unlike the earlier legislation which had been declared unconstitutional, this statute does not purport to rearrange property rights between living husbands and wives in marital property brought into this state upon their change of domicile to California. On the contrary, it is a succession statute apparently enacted in pursuance of the theory of the dissenting opinion in the Thornton case, that such legislation affecting the descent of property would not contravene constitutional guarantees since 'the rights of testamentary disposition and succession are wholly subject to statutory control.' Estate of Thornton, supra, 1 Cal. 2d 1, 7, 33 P.2d 1, 3, 92 A.L.R. 1343."

The court then proceeded to enumerate three possible interpretations suggested by the wording of the code section, and decided that interpretation (2) to the effect that the section "applies to personal property in that *form at death* which is derived from any property acquired while domiciled elsewhere which would not have been separate property if acquired while domiciled in California; * * * not only would conform as well with the express wording of the statute but would have the added advantage of giving a wider application to the section consistent with the recognized principles of property classifications prevailing under the law of this state. The statute relates to the disposition 'upon * * * death of * * one-half of all personal property, wherever situated * * *' language evidencing that the reference is made to personal property at the time of death rather than at the time of acquisition. Such wording would reasonably include personal property that in California has been transmuted into another form of personalty at the date of death. Estate of Schnell, supra, 67 Cal.App.2d 268, 273, 274, 154 P.2d 437."

Respondents contend that the Estate of Perkins, 21 Cal.2d 561, 134 P.2d 231, is decisive of the instant cause, for the reason that the controversy there turned upon the question as to whether sections 228 and 229 of the Probate Code applied to property acquired in common law state, which was brought to California and the surviving spouse died while domiciled in California.

In construing sections 228 and 229 of the Probate Code, the court in Estate of Perkins, supra, 21 Cal.2d at page 569, 134 P.2d at page 236 stated: "By these sections, * * * the Legislature intended that a lineal descendant of the predeceased spouse should succeed to all property of the surviving spouse in which the predeceased spouse owned an interest; if there were no lineal descendants of either spouse, the property should then be divided equally between the respective families of the two spouses by whose efforts it was accumulated. If, however, the property had originally come to the predeceased spouse by other means than his efforts during the existence of the marriage, such as acquisition before marriage, or by gift, devise, or bequest subsequent to the marriage, then the Legislature intended that such property should descend, upon the death of the survivor, entirely to the family of the predeceased spouse. (See cases cited supra.)

"The only way in which that legislative purpose may be given effect is by applying sections 228 and 229 to all property subject to probate proceedings in California, regardless of its prior status in a foreign jurisdiction. Implicit in this construction, of course, is *the reclassification, for the purposes of succession only, of property acquired in the foreign jurisdiction in accordance with the community property law of California.* Although this court in Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343, held that section 164 of the Civil Code was unconstitutional insofar as it purported to reclassify the property of a spouse who acquired it in a common-law state and later brought it to California, the decision was expressly limited to a reclassification during the lifetime of the spouse. * * *

"Under sections 228 and 229 of the Probate Code, the issue or kindred of the predeceased spouse are statutory heirs of the surviving spouse, and their rights under those sections do not vest until the death of the latter. Estate of Watts, 179 Cal. 20, 23, 175 P. 415; Estate of Bixler, 194 Cal. 585, 595, 229 P. 704. The property acquired outside of this state during the marital relation is subjected to the laws of succession in California by the fact that, at the time of the death of the surviving spouse, he or she was domiciled within its borders; it may therefore be reclassified under the law of the domicile. In Estate of Allshouse, 13 Cal.2d 691, 91 P.2d 887, this court held that, under section 229 of the Probate Code, the origin of an estate may be traced into a foreign jurisdiction and the California classification of property applied to the property there acquired. But the decision was qualified by the requirement that the nature of the foreign ownership must be substantially the same as that which the property would have if acquired in this state. Upon a reconsideration of the reasoning of that case, it seems obvious that the limitation of section 229 to property, which, in the foreign jurisdiction, had substantially identical incidents to the classification of property in a community property state has no reasonable foundation and is not consistent with the legislative intent expressed in sections 228 and 229 of the Probate Code. As those statutes affect succession only, their purpose is fully carried out if the probate court distributes the property upon the basis of its classification had it been acquired in California."

The evidence adduced at the trial herein amply supports the trial court's findings:

"IV. That decedent was in possession of, not to exceed 25 shares of stock of $100 par value, in the Standard Connecting Rod Company, a corporation, of Beaver Falls, Pennsylvania, at the time of his marriage to Kate Braun; that at the time of said marriage decedent was indebted to Alfred Leigh, his landlord, in the sum of $2,000, and to his sister, Alice Bayliss, in the sum of $750, which sums he had borrowed for the specific purpose of buying the stock; that all of said 25 shares of stock were paid for with savings from the earnings of decedent after marriage.

* * *

"IX. That other than the 25 shares of stock purchased with borrowed funds before marriage, which borrowings were repaid after marriage, the entire estate of decedent consists of property, acquired during the marriage of decedent and said wife, other than by gift, bequest, devise or descent (except that said wife inherited $325 to $350 as heretofore found); that all of said property, so acquired during marriage, belonged or went to decedent upon the death of his said wife, by virtue of its community character, or reclassification for purposes of succession as community property, or became vested in decedent on the death of such spouse by right of survivorship in joint tenancies between such spouse and decedent."

Apropos to the instant cause is the following statement appearing in 3 Cal.Jur. Supp. p. 511, sec. 31: "If the husband or wife owned an inchoate right to property before marriage, but paid the purchase price afterwards, the courts in the more recent cases apportion the property with reference to the original value and the value after the payment out of community funds. In re Caswell's estate, 105 Cal.App. 475, 288 P. 102. See also, Vieux v. Vieux, 80 Cal.App. 222, 229, 251 P. 640; Estate of Clark, 94 Cal.App. 453, 271 P. 542. So, where a husband owned a contract of purchase before marriage, and paid the installments of the purchase price during marriage, the property is community to the extent that community funds went into its purchase price, and it is separate property of the husband to the extent that his separate funds were used for its purchase. Vieux v. Vieux, supra."

[2] Applying the foregoing principles of law to the facts presented herein, the trial court properly reclassified, for the purposes of succession after the death of both husband and wife intestate, property acquired in a foreign jurisdiction in accordance with the community property laws of this state.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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92 Cal.App.2d 417

MISSLER et al. v. SOMMER et al.

Civ. 16942.

District Court of Appeal, Second District, Division 1, California.

June 15, 1949.

Municipal corporations 🔑**530**

Under statute relating to time for sale of land under public improvement assessment lien, the word "sell" does not contemplate every act required to be performed in the process, and a sale is void unless last act is performed within four years of due date of the improvement bond or before January 1, 1947, and a sale was valid where improvement bond foreclosure proceedings were duly instituted before limitations ran under the statute, although sale was made subsequent to period prescribed by statute. Code Civ.Proc. § 330; Civ Code, § 2911.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Sell".

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Quiet title action by J. J. Missler and J. G. Colburn, against Carrie M. Sommer and others. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

Arthur V. Kaufman, Los Angeles, for appellants.

Byron R. Bentley, Los Angeles, for respondent.

DORAN, Justice.

The within action to quiet title involves a lot sold to the State for delinquent county and city taxes for the fiscal year 1931–32 and purchased by plaintiffs from the State at a tax sale on August 22, 1945.

On May 16, 1947, the same lot was sold by the Treasurer of the City of Los Angeles to one E. A. Stevens as the result of proceedings for the foreclosure of an improvement bond issued December 26, 1928, payable in ten installments commencing January 2, 1930, the final installment being due January 2, 1939. No payment of principal or interest had been paid on this bond since July 2, 1931.

Defendant Cora W. McCoye is the successor in interest to the above mentioned E. A. Stevens, the original purchaser of the bond.

The court found in substance that by reason of the purchase of said lot, plaintiffs "have a lien on said lot for the sum of $650.00 and that the defendant Cora W. McCoye has a lien thereon for the sum of $4,205.78, and that plaintiffs, together, are the owners of an undivided one-half interest in said property and that defendant Cora W. McCoye is the owner of the other one-half interest in said property." The judgment provided the plaintiffs and defendant were tenants in common and that each had a lien on the property for the above-mentioned sums each had invested.

Plaintiff's appeal from the judgment is based on the contention that the holder of the bond, "failed to cause a sale to be made by the Treasurer within the time permitted by Section 330 of the Code of Civil Procedure, and that, therefore, the lien of the said bond was extinguished under the provisions of Section 2911 of the Civil Code"; that the sale by the City Treasurer of Los Angeles on May 16, 1947, was void and that the lien existing by virtue of the bond no longer existed because of the failure to sell the property on or before January, 1947.

Appellant relies on Rombotis v. Fink, 89 Cal.App.2d 378, 201 P.2d 588, pointing out that "The facts in this case are almost identical." At the trial of the action it was shown that "a demand for foreclosure was duly made upon the Treasurer of the City of Los Angeles on October 16, 1946, at which time his charges of $15.00 were paid by the holder of the bond."

Respondent points out the facts in the within action differ from the facts in the Fink case in that in the latter case, "no foreclosue proceedings were commenced prior to January 1, 1947, nor at all, whereas in the case at bar foreclosure proceedings were duly instituted with the County Treasurer on October 16, 1946." Also that in the Fink case "the plaintiff purchased the property after January 1, 1947, whereas in the case at bar appellants purchased and obtained title on August 22, 1945, before the 1945 amendments in question took effect and while respondent's bond was in good standing." It should also be noted that the opinion in the Fink case recites that the questions involved are [89 Cal.App.2d 381, 201 P.2d 590]: "(1) Is the 1945 amendment to section 2911 of the Civil Code a valid statute of limitations as to preexisting bonds? (2) Is the statute of limitations on foreclosure of street improvement bonds tolled while the property is in state ownership under a tax deed?"

Section 330 of the Code of Civil Procedure provides that when the official has the authority to sell the property, "said official may sell at any time prior to the expiration of four years after the due date of said bond or of the last installment thereof or of the last principal coupon attached thereto, or prior to January 1, 1947, whichever is later, but not thereafter." It is appellant's contention in substance that the word *sell* in section 330 is all-inclusive and contemplates each, all and every act required to be performed in the process. And that unless the last act is performed within the four years or before January 1, 1947, the sale is void. The Fink case does not support such a construction. Indeed such a strict and limited interpretation of section 330 would not only defeat the purpose of that section, but by analogy would complicate other provisions of Chapter II and Title II of the Code of Civil Procedure. The sale of the property in the within action in the circumstances was according to law as contemplated by the above provisions.

The judgment is affirmed.

WHITE, P.J., and DRAPEAU, J., concur.

92 Cal.App.2d 375

PEOPLE v. WATKINS.

Cr. 4335.

District Court of Appeal, Second District, Division 3, California.

June 14, 1949.

Hearing Denied July 14, 1949.

1. Criminal law 🔑997

An applicant for a writ of coram nobis must show that facts upon which he relies were not known to him and could not in exercise of due diligence have been discovered by him at any time substantially earlier than time of his motion for the writ.

2. Criminal law 🔑997

A showing of due diligence in seeking a writ of error coram nobis is a prerequisite to availability of such relief.

3. Criminal law 🔑997

Where facts relied on for issuance of writ of coram nobis were known by defendant at time of murder prosecution and no satisfactory explanation was presented for not filing petition for such relief until 2½ years after judgment, writ of coram nobis would not be issued.

4. Criminal law 🔑997

Contention that defendant was not properly represented by his counsel in matter of offering evidence as to self-defense in murder prosecution could not be considered in a coram nobis proceeding.

5. Criminal law 🔑997

Where defendant's contentions could have been presented on a motion for a new trial or appeal from judgment, and he has failed to avail himself of either remedy, writ of error coram nobis will not be entertained to review alleged errors.

6. Criminal law 🔑997

Alleged misconduct of district attorney in murder prosecution which could have been presented on appeal from judgment would not be considered in a coram nobis proceeding.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Herman Lee Watkins was convicted of murder, and, from an order denying his petition for a writ of error coram nobis, he appeals.

Affirmed.

Herman Lee Watkins, in pro. per., for appellant.

Fred N. Howser, Attorney General, and Frank Richards, Deputy Attorney General, for respondent.

WOOD, Justice.

Appeal from order denying petition for writ of error coram nobis. Appellant was convicted of murder of the first degree, and the jury fixed the punishment at life imprisonment. Judgment on the verdict was rendered on May 29, 1946, and no appeal was taken therefrom.

On June 13, 1947, appellant made a motion for a "Writ of Review and Request for a new trial," and on that day the court denied the motion.

On October 18, 1948, appellant filed a petition in the superior court for a writ of error coram nobis wherein he asked that the judgment be set aside and a new trial be granted. He alleged in his petition that his counsel, who was appointed by the court, refused his request to introduce testimony which would show that appellant shot the deceased in protection of his life and home; and that his counsel neglected to have the court give an instruction as to self-defense and justifiable homicide. He also alleged therein that he could have shown that the deceased was shot in appellant's home; that the deceased, against appellant's requests, was repeatedly calling at appellant's home in his absence and seeking to alienate his wife's affections; and that the deceased had repeatedly stated he would do bodily harm to appellant if appellant interfered with his announced purpose of separating appellant and his wife. He also alleged therein that the failure to introduce such testimony and to have the court give an instruction as to self-defense and justifiable homicide deprived appellant of a fair trial, his constitutional rights and due process of law. The petition was heard and denied on December 20, 1948.

[1-3] Since appellant asserts that his counsel refused to offer evidence as to self-defense, which was requested by appellant, it appears that the alleged facts, which he now wants the court to consider on a retrial, were known to him when the case was tried. A writ of coram nobis should not issue when the facts relied upon for issuance of the writ were known to the petitioner at the time of trial. An applicant for a writ of coram nobis "must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief." People v. Shorts, 32 Cal.2d 502, 513, 197 P.2d 330, 336. A showing of due diligence in seeking the writ "is prerequisite to the availability of relief by motion for coram nobis." People v. Shorts, supra, 32 Cal.2d at page 512, 197 P.2d at page 336. In the present case appellant did not file this petition for such relief until approximately 2½ years after judgment, and there is no satisfactory explanation of such delay.

[4, 5] Appellant's contention that he was not properly represented by his counsel, in the matter of offering evidence as to self-defense, cannot be considered in a coram nobis proceeding. See People v. Krout, 90 Cal.App.2d 205, 202 P.2d 635. Such a contention could have been considered on a motion for a new trial. "Where defendant's contentions could have been presented on (1) a motion for a new trial, or (2) appeal from the judgment, and he has failed to avail himself of either remedy, a writ of error coram nobis will not be entertained to review the alleged errors." People v. Young, 88 Cal.App.2d 601, 199 P.2d 21; see also People v. Goold, 90 Cal.App.2d 640, 203 P.2d 118. Appellant's failure to make a motion for a new trial until more than a year after judgment is, in effect, the same as not making the motion at all.

Furthermore, as to the matter of self-defense, it appears from the answer to the petition that appellant testified that he acted in self-defense in shooting the deceased, that he shot because he felt he was in imminent peril due to the fact that the deceased reached toward his pocket, and appellant thought the deceased had a gun or knife in his pocket. Appellant's wife, called as a witness by his counsel, testified that she had observed a knife in the hand of deceased shortly before the shooting but did not see it at the time of the shooting, and that she observed the deceased raise a stick toward appellant and then they started fighting. The judge gave eight instructions regarding self-defense. It appears therefore that self-defense was an issue at the trial.

[6] Appellant also contends, as stated in his briefs, that the district attorney was guilty of misconduct in that: He stated in his remarks to the jury that elements of self-defense had not been shown by the defense; he told the jury that if appellant had not been arrested as soon as he was arrested the court would be trying him for two murders instead of one; he told the jury that the knife of deceased was so small that the district attorney did not bring it into court; he handed the pistol to the jury; he exhibited to the jury a photograph of the body of the deceased. These contentions at to such alleged misconduct of the district attorney could have been presented on appeal from the judgment. He did not appeal therefrom. Such

matters regarding alleged misconduct of the district attorney were not included in the petition and therefore were not before the trial court, but even if they had been included in the petition they could not be considered in this proceeding for such a writ, since those matters could have been considered on appeal from the judgment.

The ruling of the court denying the petition for the writ was correct.

Order affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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92 Cal.App.2d 371

McNEIL et al. v. GRANER et al.

COMMONWEALTH ROYALTIES, Inc. v. GRANER et al.

LAMBERT v. GRANER et al.

Civ. 16910–16912.

District Court of Appeal, Second District, Division 2, California.

June 13, 1949.

Hearing Denied Aug. 11, 1949.

1. Appeal and error ⚿1009(2)

Finding of trial court that the assets of the defendant were in danger of being lost and dissipated, to the irreparable injury of the plaintiffs, was sustained by substantial evidence, and order appointing a receiver pending the determination of the action was required to be affirmed.

2. Receivers ⚿6

The general rule is that a receiver pendente lite will not be appointed when the rights of the applicant may be as well secured by injunction or other adequate remedy.

3. Receivers ⚿8

Under statute providing that a court may appoint a receiver in all other cases where receivers have heretofore been appointed by the usages of courts of equity, the court has all the discretion formerly utilized by the chancellor. Code Civ.Proc. § 564, subd. 1.

4. Appeal and error ⚿954(2)

The trial court's determination that under detailed circumstances injunctive relief would be inadequate, and that resort should be made to receivership, would not be disturbed on appeal in the absence of a clear showing of abuse of discretion. Code Civ.Proc. § 564, subd. 1.

Appeals from Superior Court, Los Angeles County; Hanson, Judge.

Separate actions by Myrtle G. McNeil and others, by Commonwealth Royalties, Inc., and by C. A. Lambert against George V. Graner, individually, and doing business under the fictitious firm name and style of Graner Oil Company, and others for fraud in commingling oil from different wells, in overcharging for operating expenses, and in submitting false royalty statements. From orders appointing receivers, George V. Graner appeals.

Orders affirmed.

R. G. Akers, Long Beach, for appellant.

John E. Sisson and Edward J. Cotter, Los Angeles, for respondents McNeil, Helms, and Keitel.

Butts & Grosenbaugh, Hollywood, for respondent Commonwealth Royalties.

John E. Sisson, Los Angeles, for respondent Lambert.

MOORE, Presiding Justice.

Appeals from orders appointing a receiver in each action. The ensuing discussion involves the issues of cause 16910. The conclusions derived will be applied to the companion cases.

Appellant is the owner and operator of numerous oil-bearing properties in which respondents claim various interests. By a previous action respondents had been awarded a substantial judgment against appellant based upon his fraud in commingling oil from different wells, in overcharging for operating expenses and in submitting false royalty statements. The instant action was instituted to recover for similar activities subsequent to the prior judgment.

After their action was commenced, respondents filed application for the appointment of a receiver. Their pleading was supported by an affidavit of respondent Keitel. It was opposed by the affidavit of appellant. No oral evidence was taken at the hearing on the order to show cause but the file in the prior case was received in evidence.

Respondents' affidavit set forth the alleged fraudulent practices of appellant, the prior judgment substantiating them, and appellant's threats to abandon or shut down certain wells and to transfer his interests in others. Appellant's counteraffidavit set forth that he was a prosperous, affluent, of good name, reputation and credit and able to respond in damages; that he had not quitclaimed any of his leaseholds; that although he had intended to abandon one well he was presently engaged in activities designed to increase its productivity; that the prior judgment was based upon the trial court's misconstruction of the provisions of various oil assignments, which misconstruction was in the process of being rectified by appeal.

The trial court found that "the assets of the defendant * * * are in danger of being lost and dissipated to the irreparable injury of the plaintiffs" and appointed a receiver pending the determination of the action.

[1] In view of the fact that there is substantial evidence to support the order, it must be affirmed. At the trial of the matter the court had before it the file in the previous action. If the affidavit of respondents for the appointment of a receiver was itself deficient, such deficiency was cured by the trial court's review of the prior proceedings and its determination that in view of the former adjudication of fraud the appointment of a receiver had become appropriate. Based upon such evidence, though controverted by appellant, the action of the trial court cannot be said to be an abuse of discretion. Moore v. Oberg, 61 Cal.App.2d 216, 221, 142 P.2d 443; Baldwin v. Baldwin, 67 Cal.App.2d 175, 177, 153 P.2d 567. The cases relied upon by appellant are distinguishable. In A. G. Col. Co. v. Superior Court, 196 Cal. 604, 238 P. 926, the court held that the evidence was insufficient to warrant the substitution of one receiver for another. Rogers v. Smith, 76 Cal.App.2d 16, 172 P.2d 365, 368, held that the application for receivership was "predicated upon a nonexistent state of facts" and that the remedy of attachment was available and adequate. In neither case had there been a prior adjudication of fraud.

[2-4] Unquestionably, it is the rule that a receiver pendente lite will not be appointed when the rights of the applicant may be as well secured by injunction or other adequate remedy. Dabney Oil Co. v. Providence Oil Co., 22 Cal.App. 233, 239, 133 P. 1155; Golden State Glass Corp. v. Superior Court, 13 Cal.2d 384, 393, 90 P.2d 75. But it does not necessarily follow that this general rule is applicable in the instant action. In the Dabney Oil case the court was considering the applicability of only subdivision 1 of section 564 of the Code of Civil Procedure which provides for the appointment of receivers. It was held that the court has no power to appoint a receiver pendente lite, unless it is satisfied that the right of the plaintiff in the property or funds or the proceeds thereof is probable, and also that the property or fund is in danger of being lost, removed or materially injured. If the facts are insufficient to justify the issuance of an injunction against defendant's paying out the net proceeds of the operation of the property, it would be oppressive to apply the more stringent order of appointing a receiver to obtain a like result. Whereas the Dabney case involved subdivision 1 of section 564 of the Code of Civil Procedure, the instant action falls more clearly within the purview of subdivision 7, which provides that a court may appoint a receiver "in all other cases where receivers have heretofore been appointed by the usages of courts of equity." This broad provision gives to the court all the discretion formerly utilized by the chancellor. His determination that under detailed circumstances injunctive relief would be in-

adequate, and that resort should be made to receivership, will not be disturbed on appeal in the absence of a clear showing of abuse of discretion. Moore v. Oberg, supra. In the instant case there is no showing how injunctive relief would protect respondents from the continued perpetration of practices which prior litigation had determined to be fraudulent. The trial court had before it a record from which it could conclude that the appointment of a receiver was required by the facts established. Hence, its decision will not be disturbed.

The order in each case is affirmed.

McCOMB and WILSON, JJ., concur.

* * *

92 Cal.App.2d 343

GREGORY v. GREGORY.

No. 13992.

District Court of Appeal, First District,
Division 1, California.
June 10, 1949.

1. Divorce 🔑161

In an action for divorce the court will, upon a very slight showing, set aside a default if application for relief is made in due time. Code Civ.Proc. § 473.

2. Divorce 🔑11

The law is solicitous of preserving the integrity of the marriage relation, and an action for divorce concerns not only the parties immediately interested but also the state, and it is the duty of the court, representing the state, to guard strictly against fraud, collusion, or imposition when the husband or wife seeks to dissolve the marriage.

3. Appeal and error 🔑949

An appellate court, owing to the remedial character of the statute providing for relief against a judgment, order, or other proceeding and the policy of applying it liberally to permit an opportunity to present a substantial defense, listens more readily to appeal from an order denying relief than to one granting it. Code Civ. Proc. § 473.

4. Judgment 🔑143(3)

Under statute providing that the court may relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, where there is any doubt as to the setting aside of a default such doubt should be resolved in favor of the application. Code Civ.Proc. § 473.

5. Appeal and error 🔑982(1)
Judgment 🔑363

Whether a party shall be relieved from a judgment, order, or other proceeding on the ground of mistake, inadvertence, surprise, or excusable neglect, rests almost entirely in the discretion of the trial court, and appellate tribunals will rarely interfere and never unless it clearly appears that there has been a plain abuse of discretion. Code Civ.Proc. § 473.

6. Divorce 🔑161

Where an order setting aside a judgment of divorce and permitting the defendant to file an answer and cross-complaint is supported by substantial evidence that such judgment was entered through mistake, inadvertence, or excusable neglect of defendant, the appellate court cannot hold that trial court has abused its discretion. Code Civ.Proc. § 473.

7. Divorce 🔑184(4)

On appeal from order setting aside interlocutory judgment of divorce and permitting defendant to file answer and cross complaint, all conflicts in the evidence must be resolved in favor of the appellee. Code Civ.Proc. § 473.

8. Divorce 🔑161

An order setting aside interlocutory judgment of divorce and permitting defendant wife to file an answer and cross-complaint was sustained by substantial evidence. Code Civ.Proc. § 473.

9. Attorney and client 🔑26

Where attorney for one of the parties is compelled to deal directly with the other litigant, he is under a strict duty to deal with such litigant fairly and objectively, and agreement will be scrutinized carefully to be sure that there has been no overreaching, and attorney should make sure that each party is fully advised as to his legal rights and as to the right to independent counsel.

10. Divorce ⚷165(4)

In determining whether the application for relief against an interlocutory judgment of divorce was made in a reasonable time within the six months' period trial court has a much wider discretion than in other cases. Code Civ.Proc. § 473.

11. Divorce ⚷165(4)

A delay of 119 days from entry of interlocutory judgment of divorce against defendant wife before applying to set it aside was not an unreasonable one in view of fact that wife was without independent counsel and was in fear of losing custody of her child. Code Civ.Proc. § 473.

12. Divorce ⚷249(2)

In a divorce action the court has the power to approve or disapprove a property settlement agreement or to set aside the agreement if the facts justify it.

13. Divorce ⚷254

Plaintiff husband, who had agreed that property settlement agreement should be made a part of the decree, could not later take advantage of his failure to keep such agreement.

◆

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by A. B. Gregory against Vivian Gregory for a divorce. From an order setting aside a judgment of divorce and permitting defendant to file an answer and cross-complaint, the plaintiff appeals.

Order affirmed.

J. Rainey Hancock, San Jose, for appellant.

Robert Beresford and David H. Adams, San Jose, for respondent.

BRAY, Justice.

Appeal by plaintiff from an order of the superior court setting aside a judgment of divorce and permitting defendant to file an answer and cross-complaint, made on a motion under section 473 of the Code of Civil Procedure.

The sole question involved is whether the trial court in making such order abused its discretion.

Record.

In a divorce action brought by plaintiff husband against defendant wife, defendant agreed to a written property settlement, and signed an unverified answer and stipulation waiving notice of trial. An interlocutory judgment of divorce was entered June 27, 1947, granting a divorce to plaintiff on the ground of cruelty, and approving the property settlement agreement, which also provided for joint custody of the minor child of the parties, physical custody to be in the mother during the school term, and in the father during the summer, plus reasonable visitation rights. Thereafter a dispute arose concerning the custody of the child, and the following events occurred: (1) October 16, defendant obtained an order to plaintiff to show cause why he should not be punished for contempt for allegedly violating the custody order. (2) October 21, plaintiff served a notice of motion to modify the interlocutory judgment to allow the child to remain with plaintiff during the school term then beginning. (3) October 22, defendant notified plaintiff that she rescinded the property agreement because of mistake, fraud, duress, etc. (4) On October 24, defendant served upon plaintiff a notice of motion to set aside the interlocutory judgment on the ground that it was entered through mistake, inadvertence and excusable neglect. On the hearing of this motion the court set aside and vacated the judgment, granting defendant leave to file the answer and cross-complaint accompanying the motion. Plaintiff appealed from this order.

Law.

[1, 2] The facts upon which the application to set aside the judgment are based are controverted. Before examining them, it is well to consider the law applicable to a motion made, as here, under section 473 of the Code of Civil Procedure, which provides, in part: "The court may upon such

terms as may be just relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." As said in Rehfuss v. Rehfuss, 169 Cal. 86, 92, 145 P. 1020, 1022: "The rules of practice applicable to divorce actions differ in many respects from those which govern other actions. In an action for divorce, upon very slight showing the court will set aside a default, if application for relief be made in due time. * * * The law is at all times very solicitous to preserve the integrity of the marriage relation. That relation is the basis of the family, the foundation of society. * * * An action for divorce concerns not only the parties immediately interested, but also the state. * * * It is the duty of the court, representing the state, in accordance with the letter and policy of the law, to guard strictly against fraud, collusion, or imposition when the husband or wife seeks to dissolve the bonds that bind them together."

[3, 4] In Hambrick v. Hambrick, 77 Cal. App.2d 372, 377, 175 P.2d 269, 271, the court said: "As has been said repeatedly: '* * * An appellate court, owing to the remedial character of the statute and the policy of applying it liberally to permit an opportunity to present a substantial defense, listens more readily to an appeal from an order denying relief than to one granting relief * * *.' 14 Cal.Jur. 1076; see, also, Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148, supra, and cases cited; Brill v. Fox, 211 Cal. 739, 743–744, 297 P. 25. Even in a case where the showing under section 473 is not strong, or where there is any doubt as to the setting aside of a default, such doubt should be resolved in favor of the application. 14 Cal.Jur. p. 1076."

[5] "'* * * the proper decision * * * rests almost entirely in the discretion of the court below, and appellate tribunals will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion.'" Armstrong v. Armstrong, 81 Cal.App.2d 316, 320, 183 P.2d 901, 904, quoting from Miller v. Lee, 52 Cal.App.2d 10, 15, 125 P.2d 627.

[6] With these rules in mind, our task is to determine whether there is any substantial evidence to show that the interlocutory judgment was entered through the mistake, inadvertence or excusable neglect of defendant. If there is not, we would have to find that the court abused its discretion. If there is such substantial evidence, we would have to find that the court did not abuse its discretion.

Facts.

[7] Resolving in favor of defendant all conflicts in the evidence, there is substantial evidence of the following facts: Plaintiff is a professor in the Modern Language Department at San Jose State College. Defendant is a graduate of San Jose State College and the University of California. The parties married in 1937. The only child, Paul, was born in 1940. During the marriage defendant worked at times as a substitute teacher. For the last eight years of the marriage there had been no sexual intercourse between the parties. Each party blames the other as the cause. On March 31, 1947, plaintiff picked up at the general delivery window in the San Jose Post Office a letter addressed to defendant from one Townsend, a neighbor, who was in Chicago at the time. The language of this letter is equivocal. It might support the incriminating meaning given it by plaintiff, or it might support the explanation of it given by defendant and the writer to the effect that there were no improper relations between them, and that the writer had misunderstood defendant's attitude toward him. It later developed that Townsend wrote defendant another letter not so equivocal or incriminating.

Plaintiff did not reveal his possession of the first letter to his wife, but he immediately withdrew all funds from their joint bank account and then told her that he "knew everything" and that they both should see his lawyer the following day to "settle all our affairs." He stated that he would take the house and everything, and that if she fought, all the property would be used up in needless litigation.

Some time later he told her that he had intercepted the letter and believed she was having an affair. Defendant testified that she had never met Townsend except by chance, when they were both out walking on the public streets, and that most of the neighbors had had similar meetings with Townsend while he walked his dog. During one walk she had told him about her unhappy home life. He misconstrued her emotional condition and asked her to write him. She wrote a note to him and his reply was intercepted by plaintiff. Both defendant and Townsend denied that they had had an intimate relationship.

Plaintiff told her that if she got the divorce she would have to pay for it. She replied that it did not matter who obtained it; he could if he wished. She even told a friend that plaintiff was going to get a divorce and that she was not going to fight it. Plaintiff stated that his lawyer would handle it. He had two conferences with the lawyer. (The attorney of record on this appeal is not the lawyer herein mentioned.) Defendant then visited the lawyer. The property settlement was already arranged, but the lawyer assured her he would not take part in something which was not fair and just. She told the lawyer she thought she deserved something after ten years of marriage and he suggested $1000 in cash, payable in installments, to which she agreed. Under the proposed agreement she was to have custody of Paul during the school term. The lawyer suggested $50 a month for the support of the child, during that time, to which she also agreed. She did not at the time think these amounts were "fair" but was anxious to end the unpleasant situation and had no knowledge of her rights in the absence of such an agreement.

On April 24 both parties visited the office of the lawyer. Defendant read the agreement and signed it, after obtaining a promise that the letter would be returned to her, if she did so. This promise was made and later kept. By the terms of the property agreement plaintiff kept the home, a Buick car, his life insurance policies, and most of the household furnishings. Defendant received, in addition to the $1000, a typewriter, a sewing machine, and all of the linens. Plaintiff also waived any rights in her social security benefits. Defendant had understood at her first meeting with the lawyer that the property agreement would not cover household furnishings.

After defendant had signed the property agreement and a deed of her interest in the house, the lawyer told her to come in later and sign an answer in the divorce action and a stiplation waiving further notice, explaining that this would prevent the necessity of the sheriff serving papers at her home. She did not realize at that time that there was going to be a hearing in open court with sworn testimony and witnesses against her.

The lawyer did not tell her it was her privilege to have independent counsel, or suggest that she get independent counsel. Under cross-examination the lawyer conceded that he never told her what her rights would have been under the law, with respect to support for herself, rights in community property, custody of a child of tender years, etc. He did not tell her what was meant by "joint custody" and did not tell her how much of the property was legally community property. The lawyer was thereafter attorney of record for plaintiff in the divorce proceeding.

After signing the property agreement defendant remained a while longer in the home, carrying on her regular duties as mother and wife. She had suggested they try a temporary separation to see if they could avoid a divorce but plaintiff insisted that they go ahead with the property agreement and the divorce action. On June 13, the day the complaint was to be filed, plaintiff called her from the lawyer's office and asked if she would still like to try and make a "go of it." She thought it was strange that he called from the lawyer's office, and said that since he had made the decision to have a divorce and had refused a bona fide trial separation they might as well go ahead.

Defendant left the home on June 15, after which she stayed with friends, attended the Mills College summer session, and in September obtained a job with a school.

Although the evidence was conflicting, testimony was given that during April, May and June defendant was in poor health, and under visible physical and mental strain. She lost about 10 pounds during those months and had occasional emotional breakdowns.

The son, Paul, was with plaintiff during the summer months and in September started in at the school where defendant had obtained a job. After being there a month he visited plaintiff on a week-end. On October 12th plaintiff told defendant that Paul did not wish to return to the school, and that plaintiff would not return him.

[8] The record supports the conclusions: (1) That defendant may have a defense to the divorce action or even grounds for a divorce in her favor—it is not necessary to detail the facts set forth in her affidavit as to plaintiff's conduct towards her during their married life; (2) that she signed the property settlement (which on its face appears to be unfair to her) partly through fear of her husband's use of the intercepted letter and fear that her son would be taken from her; (3) that defendant was not represented by independent counsel, nor was she advised that she was entitled to such, nor as to her legal rights with reference to the community property or the custody of the child; (4) that she waived her right to contest the divorce action and signed the property settlement agreement without a full knowledge of the effect of both actions, due to her lack of legal advice and her condition of mental and physical exhaustion; (5) that the property settlement agreement which the court approved without examining, is not fair or just to her.

While there is evidence that would indicate, as charged by plaintiff, that defendant was completely aware at all times of what she was doing, and merely changed her mind after the judgment, as was the case in Elms v. Elms, 72 Cal.App.2d 508, 164 P.2d 936, cited by plaintiff, we cannot say as a matter of law that such construction of the facts is the only reasonable one.

[9] While it frequently occurs in negotiations between husband and wife for settlement of property matters that one attorney serves both parties, it has been said "that in fairness to both parties concerned, when negotiations for settlement of property matters between husband and wife are on hand, both parties should at all times be represented by counsel." Swart v. Johnson, 48 Cal.App.2d 829, 833, 120 P.2d 699, 702. And, as we said in Davidson v. Davidson, 90 Cal.App.2d 809, at page 819, 204 P.2d 71, at page 77, where the situation was quite different from that in the case at bar: "It is, of course, much better for all concerned if both sides have independent counsel, but there is no way by which a litigant can be compelled to secure an attorney. Where the attorney for one of the parties is compelled to deal directly with the other litigant he is under a most strict duty to deal with such litigant fairly and objectively, and the agreement will be scrutinized most carefully to be sure that there has been no overreaching." At least the attorney should make sure that each party is fully advised as to his or her legal rights and to the right to independent counsel.

At the time of the marriage, the title to the home was in plaintiff, subject to a $4600 mortgage. The home cost about $6600. The loan was later refinanced to get money for "ordinary expenses and for expenses at the birth of the child." The loan was paid off with community funds. Plaintiff was evasive when asked concerning its present value. Defendant in her cross-complaint alleged the property to be worth $30,000. Plaintiff admitted that one person had stated that she would give $20,000 for it, although he apparently felt the statement was not made in good faith. It is obvious that the community interest of defendant in the property is worth far more than the $1000 she received from plaintiff.

The construction given by the trial court is equally as reasonable as that urged by plaintiff, if not more so. Here the plaintiff received the bulk of the community property from a wife who, while under mental stress and physical exhaustion, and without legal advice, agreed to the distribution without realizing the full import of her acts. Having in mind, in addition to these facts, that the state has an interest in the proceeding, that the court did not consider the fairness or unfairness of the property settlement agreement, that the custody of a child is involved, it cannot be said that this is one of those "extreme" cases which the court in Hecq v. Conner, 203 Cal. 504, at page 509, 265 P. 180, said are the only cases in which an appellate court will interfere with the action of the trial court in determining that the facts showed that the defendant had permitted the judgment to be taken against her through excusable neglect to assert her rights.

Time of Application.

[10, 11] Plaintiff takes the position that as 119 days elapsed from the entry of the judgment, defendant by that fact alone must be held not to have made her application for relief within the "reasonable time, in no case exceeding six months" referred to in section 473, and cites Benjamin et al. v. Dalmo Mfg. Co., 31 Cal.2d 523, 190 P.2d 593. That was not a divorce case. In determining whether the application for relief in a divorce case was brought in a reasonable time within the six months period, the trial court has a much wider discretion than in other cases. Here the evidence justifies the conclusion that the effect of defendant's acts in entering into the property settlement agreement and in not opposing the divorce action, was not realized by her until the time when plaintiff refused to return the child to her as agreed, and then she realized that the fact that she had permitted plaintiff to obtain a divorce against her and to keep the home was to be used as a weapon against her in the contest for the custody of the child. She had not contested the action for fear of losing the child, and now for the first time she realized that her action might be the means of her losing the child. Under the circumstances of this case, we cannot say that her delay in realizing the effect of her acting without advice as to her legal rights was an unreasonable one.

Property Settlement Agreement.

[12, 13] The only reference to the property settlement agreement in the judgment is: "The property settlement agreement between the parties, dated April 24, 1947, is hereby approved." Plaintiff contends that by reason of this language the agreement is no part of the court's decree, and that to set the agreement aside will require an action in equity, citing Howarth v. Howarth, 81 Cal.App.2d 266, 183 P.2d 670, as authority therefor. The case is not in point. There the wife was endeavoring to enforce the provisions of the property settlement agreement. The court held that the agreement had not been incorporated into the decree so as to preclude subsequent action on the agreement itself. There is nothing in the case concerning setting aside the agreement. In a divorce action the court has the power to approve or disapprove a property settlement agreement, or to set aside the agreement if the facts justify it. Lorraine v. Lorraine, 8 Cal.App.2d 687, 48 P.2d 48. Incidentally, defendant testified that plaintiff agreed that the property settlement agreement was to be made a part of the decree. Now he attempts to take advantage of his failure to keep that agreement.

The order setting aside the judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

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92 Cal.App.2d 334

GONSALVES v. GONSALVES.

No. 13988.

District Court of Appeal, First District,
Division 1, California.
June 10, 1949.

1. Appeal and error ⚷989

On appeal challenging trial court's findings determination of appellate court ends with determination as to whether there is any substantial evidence contradicted or uncontradicted which will support findings; and when two or more inferences can be reasonably deduced from facts, appellate court is without power to substitute its deductions for those of trial court.

2. Husband and wife ⚷264

Evidence in divorce action justified finding that all property of parties including that claimed by wife as her separate property was community property.

3. Divorce ⚷252

In cases of divorce on ground of extreme cruelty, court must award innocent party more than one-half of community property, although question of amount to be made in excess of 50 per cent rests largely in discretion of trial court.

4. Divorce ⚷286

On appeal from award of community property in divorce action, appellate court has power to revise award for any apparent degree of error though not amounting to an abuse of discretion. Civ.Code, §§ 146, 148.

5. Divorce ⚷252

Where court in divorce action found that all property of parties including that claimed by wife as her separate property was community property and divorce was awarded to wife on ground of extreme cruelty, but cruelty proved was not an aggravated type and evidence justified finding that parties contributed approximately equally to the community, grant to wife of only ten per cent over her half of community property was not an abuse of discretion. Civ.Code, §§ 146, 148.

◆

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Action by Marie Gonsalves against Joseph Gonsalves for divorce, wherein defendant filed a cross-complaint. From those portions of an interlocutory decree awarding plaintiff only 60 percent of the community property, plaintiff appeals.

Interlocutory decree and judgment affirmed.

Edmund J. Holl, San Francisco, George H. Sullivan, San Francisco, for appellant.

Edward A. Cunha, Dean Cunha, San Francisco, for respondent.

BRAY, Justice.

Plaintiff in a divorce action appealed from those portions of an interlocutory decree of divorce which awarded her only 60 per cent of the community property. The sole question involved is whether the trial court abused its discretion in granting plaintiff, to whom it awarded a divorce on the ground of extreme cruelty, only 60 per cent of the community property.

Pleadings.

Plaintiff wife brought an action against defendant husband on the ground of extreme cruelty, alleging that the sole community property consisted of approximately $900 in the bank. In the second and third causes of action she claimed title to all other property standing of record in the joint names, as separate property. There was a fourth cause of action, which was not pressed, and will be disregarded. Defendant answered, denying the acts of cruelty and claiming that the property described in the second and third causes of action, as well as additional property, was community property, and asked for a division thereof. Defendant also cross-complained for divorce, on the ground of cruelty. At the trial, however, defendant withdrew his cross-complaint and did not contest the cause of action for divorce. The issue as to the character of the property and its division was hotly contested. The court found that all of the property of the parties, including that claimed by plaintiff as her separate property, was community property. No attack is made on this finding. The court then decreed that it be awarded 60 per cent to plaintiff and 40 per cent to defendant.

The acts of cruelty proved at the trial were not particularly aggravated ones. The reporter's transcript contains 430 pages, all but seven of which are devoted to the property situation. There were 38 exhibits relating to the same subject.

Plaintiff's Contention.

Plaintiff contends that the trial court abused its discretion in not awarding a larger percentage of the property to her, and asks this court, under section 148 of the Civil Code, to revise the award. This contention is based primarily upon the claim that the evidence proves that plaintiff brought to the marriage (its date was November 7, 1942) the sum of $10,800, kept in a safe deposit box, and a profitable dress shop business; that defendant was an unemployed and penniless fisherman who brought nothing of financial value to the marriage; that during the marriage he did not work, but loafed around the business, which she alone built to a point where it was sold for a net sum of $23,750; that the latter sum, together with proceeds from the operation of the store, and the safe deposit box money, made up the purchase price of the properties which the parties had at the time of the divorce. If the court had found in accordance with this claim, then, probably, the court should have awarded plaintiff more than 60 per cent of the property which her money and efforts had accumulated. But, while the plaintiff's evidence, if believed, would support this claim, there was substantial evidence to the contrary, which showed that plaintiff did not have the money in the safe deposit box which she claimed to have, and that while she did have a dress shop, its value was about the same as the money which defendant brought into the community; that after the marriage defendant worked as diligently as plaintiff in building the dress shop business, and that the property of the parties was the fruit of their joint efforts, and that in view of the fact that the cruelty proved was not of any aggravated type, a grant to plaintiff of only 10 per cent over her half of the community property was, under the circumstances, fair to plaintiff and far from an abuse of discretion by the court.

Evidence.

It is not necessary to detail the evidence in the case. It will be sufficient to point out that there is substantial evidence to support the implied finding of the court that plaintiff's history of the financial situation of the parties is not true.

The Finances at Time of Marriage.

Plaintiff then (November 7, 1942) owned a ladies' ready-to-wear shop at 1937 Post Street. She testified that the store fixtures were worth about $3000 and the merchandise about $2000 or $3000. The record does not show what the debts of the business were. Plaintiff, in September, 1938, had been adjudicated a voluntary bankrupt. Defendant testified that plaintiff had told him she had intended taking in a partner who was to pay her $1000 for a half interest. Plaintiff testified that in connection with the business she maintained a commercial account in a certain bank of "a few hundred dollars or so." An employee of this bank testified that there was no such account. Plaintiff told defendant that at this time she was short of money. In view of the fact that plaintiff had been willing to sell a half interest in the business for $1000, the fact that the values of stock and fixtures were only plaintiff's estimates, and no estimate of the debts of the business was given, and plaintiff's testimony in many instances throughout the case, as well as in the instance of the bank account above mentioned, was shown to be unsatisfactory and unreliable, the fact that the business was conducted in premises rented by plaintiff at $30 per month which included her living quarters, the court could well have concluded that the value of this dress shop business was not any greater than the money which defendant claimed (and evidently the court believed) he brought to the community. He was a commercial fisherman. He owned a fishing boat and nets. On the latter he owed $900. He testified that plaintiff suggested that he sell his boat and that they move the dress shop to a location on Fillmore Street, where she had taken a lease, and that he put his money in the new store and that they become "fifty-fifty" partners. Less than three weeks before the marriage, and after their engagement, defendant sold his boat for $2600, $2250 in cash, the balance in installments which were paid within four months after the marriage. Of this money, defendant testified that $1549.55 went into the new store at 1618 Fillmore Street, where the dress shop had been moved three or four days after the marriage. He gave the details of the spending of this money, which was used principally for constructing living quarters for the parties at the store. In January, 1943, he sold the fishing nets for $1688, of which $1600 was placed in the joint safe deposit box of the parties. At the time of the marriage plaintiff owned a Chevrolet auto four years old. This auto was used in the dress shop business until 1943, when, at a value of $65, it was turned in on a 1941 Chevrolet taken in their joint names, and the balance of the purchase price was paid with community funds.

Plaintiff testified that in her safe deposit box at the time of the marriage she had

$10,800 in currency, which later went into the community properties. She first said it was in an envelope which she did not show to defendant when about three weeks after the marriage she placed the box in their joint names, and showed him her jewelry and the other contents of the box. She gave several versions as to the form in which this money was kept in the box and also as to its source. In view of her many contradictions, and the fact that in the bankruptcy proceeding four years previously she did not schedule the indebtedness of her brother to her which she testified then existed and in payment of which she claimed her brother gave her $5000, a portion of the money in the box, the court was justified in believing the testimony of defendant to the effect that he saw all of the contents of the box and that there was no such envelope or money in it.

Thus, there is substantial evidence that the parties started out their marriage on an equal or nearly equal financial basis.

The Store Business.

The store remained at 1618 Fillmore Street from a few days after the marriage until June, 1943. The lease had been obtained prior to marriage by plaintiff in plaintiff's name, but a few days after marriage defendant's name was added. Plaintiff testified this was done because of defendant's threats of bodily harm. This defendant denied. In June, 1943, the store was moved to 1640 Fillmore and in May, 1944, it was sold for a sum netting $23,750, after payment of its debts. The purchase money check was made payable to plaintiff. The bank account for the store at both locations was in the joint names. The source of the $500 deposit which was first made in the checking account was disputed, plaintiff giving several versions of its source, defendant contending it came from his Sausalito bank account. Plaintiff testified that defendant worked a short while as a longshoreman and then spent the most of the time loafing around the store. Defendant testified (and he was corroborated by one of the sales girls) that he took an active part in the management and operation of the business, including selling merchandise. On April 7, 1943, articles of copartnership were executed by the parties stating that each of the parties had contributed half of the assets in the dress shop at 1618 Fillmore. The lease of 1640 Fillmore was taken in both names and the booklets advertising the shop gave the names of both parties as proprietors. Income tax reports for the years 1943 and 1944 showed the business as a community one and showed also that in the year 1943 the store netted approximately $20,000 and in 1944 up to the time of sale netted over $6000. There is substantial evidence that in the operation of the business defendant worked equally as hard as plaintiff and was equally as responsible for its success.

Fishing Boat.

In June, 1943, the fishing boat "Julia G." which defendant had sold just prior to marriage was bought back for $3000, title being taken in the names of both as joint tenants. The source of $2000 of the purchase price is in dispute. The balance came from the community moneys. Plaintiff at one time claimed, as does defendant, that the $2000 came out of the store moneys, but later plaintiff testified it came from her safe deposit money. As the court evidently did not believe that plaintiff had this money, it is reasonable to assume that the entire price of the boat came from the community moneys.

Lincoln Way Property.

This property was purchased in joint tenancy in March, 1944, for $16,000, subject to a bank loan of $9000. The purchase agreement was signed by defendant alone, and $500 paid at that time. Later $6000 in cash was paid. This sum defendant took from the safe deposit box and paid to the title company. He testified that this sum was made up of $1600 from the sale of his fishing nets and $4400 from the dress shop business. Plaintiff testified that she was the one who took the $6000 from the box and paid it to the title company, and that it was a part of the money she claimed to have had in the box at the time of marriage. The title company receipt was made to defendant alone. Here again the court must have believed the defendant as against the plaintiff. We cannot say as matter of law that the court erred in that behalf.

The Ashbury Street Property.

Defendant had resumed commercial fishing after the sale of the store in May, and testified that except for brief intervals he was away fishing until November. Plaintiff deposited the net proceeds of the store in her own name in the bank. Out of this account came $9000 to pay off the mortgage on the Lincoln Way property. She then purchased the Ashbury Street property in June, 1944. The title was placed in joint tenancy. Of the $14,000 purchase price, $8000 was paid out of the bank account in which the store sale price had been deposited. Some difficulty was had with this building. The basement flooded, defendant repaired the sewer, jacked up the building, constructed a new foundation, and did other construction work. The property was sold for $16,000 in April of 1946, netting $10,095.61, check for which was made payable to the parties jointly. It was deposited in a joint account in the bank. At the time of the trial there was a balance of $10,260.10.

1941 Chevrolet.

The history of the purchase of this automobile has heretofore been given. Except for the $65 turn-in value of the car which plaintiff had before marriage, this was paid for with community moneys. It was taken in the joint names of the parties.

Prior Divorce Action.

While plaintiff is not attacking the court's finding that the properties in question are community property, in view of the claim at the trial that all property except a $900 bank account was plaintiff's separate property, it is interesting to note that in a divorce action filed by plaintiff in November, 1945, she alleged that all of the real property (except the San Mateo property, which had not then been purchased), and the auto, the fishing boat, household furnishings, and moneys in various banks in an unknown amount, were community property.

San Mateo County Property.

A house and nine lots were acquired in August, 1946, in plaintiff's name alone. Immediately plaintiff executed a gift deed of the property to her sister. In December plaintiff acquired title by a tax collector's deed to five adjoining lots. She then executed to her sister a gift deed of these lots. Plaintiff contends that she purchased the property with $4000 in currency given her by her sister which she took directly to the title company. The sister testified that the money was a part of $7500 which she had accumulated without her husband's knowledge and which she hid in a coffee can in her Hayward home. However, the title company records showed that plaintiff gave the title company, not $4000 in cash, but a cashier's check on a Haight Street bank in the sum of $3800, which was the amount which she withdrew from that bank on July 29, when she closed that account which had contained deposits from rentals and defendant's earnings as a fisherman. Later plaintiff changed her story and claimed that she had not taken the $4000 in currency to the title company, but had bought a cashier's check with $3800 of it. In July, plaintiff wrote defendant two letters in which she stated that she was looking for a country home for them, and had decided to buy some property in San Mateo County. Defendant testified that in September they went to look at the property in question and she stated that they were going to see "our place" and that he worked there a couple of days. The evidence fully justified the court in finding that this property was purchased with community moneys and was community property.

No Abuse of Discretion.

[1, 2] We have not attempted to detail all the evidence in the case. On the whole there was more corroboration of defendant's testimony than there was of that of plaintiff. Had the trial court believed plaintiff the situation would have been different. But the court obviously believed defendant, and therefore, the case does not come within the rule expressed in Pereira v. Pereira, 156 Cal. 1, where the court found that the husband had invested in the community business some $15,500 of his separate estate. As plaintiff has challenged the sufficiency of the evidence to sustain the court's findings she is required "to demonstrate that there is no substantial evidence to support the * * * find-

ings." Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552. The following quotation from that case applies here: "As was stated in the oft-cited case of Crawford v. Southern Pacific Co., 3 Cal.2d 427, at page 429, 45 P.2d 183, at page 184: '* * * the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' which will support the findings, and when 'two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' See, also, Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660; Fischer v. Keen, 43 Cal.App.2d 244, 248, 110 P.2d 693; Laherty v. Connell, 64 Cal. App.2d 355, 357, 148 P.2d 895; Wuest v. Wuest, 72 Cal.App.2d 101, 104, 164 P.2d 32. Careful review of the record here, in the light of these fundamental principles of law, does not sustain defendants' attack upon the propriety of the trial court's determination, and the judgment must be affirmed."

There was no abuse of discretion by the lower court in awarding plaintiff 60 per cent and defendant 40 per cent of the community property. Moreover, we do not feel that the circumstances of the case justify us in exercising the power given under section 148 of the Civil Code to revise in any particular the award made by the trial court.

[3-5] While section 146 of the Civil Code requires that in cases of divorce on the ground of extreme cruelty, the court must award the innocent party more than one-half of the community property, Eslinger v. Eslinger, 47 Cal. 62; Falk v. Falk, 48 Cal.App.2d 762, 120 P.2d 714, and section 148 grants to an appellate court the power to revise the award for "any apparent degree of error, though not amounting to an abuse of discretion", Strozynski v. Strozynski, 97 Cal. 189, 191, 31 P. 1130, it is clearly settled that the question of the amount of the award to be made in excess of the 50 per cent rests largely in the discretion of the trial court. The situation is well expressed in Falk v. Falk, supra. Referring to section 146 the court said, 48 Cal.App.2d pages 770, 771, 120 P.2d page 719: "The section confers upon the court a discretion in determining the amount of community property to be awarded to the respective parties when a divorce is granted on the ground of either adultery or extreme cruelty. That discretion must accord with justice in the light of the facts of the particular case and the condition or circumstances of the parties as provided by that section of the code. From the language of the second paragraph of that section, standing alone, it would seem that a division of the community property, under the circumstances contemplated therein, should not be disturbed on appeal except for an abuse of discretion. Section 148 of the Civil Code, however, confers authority on a court of review to revise the award of distribution of community property, regardless of the discretion vested in the trial court, so as to render justice pursuant to the provisions of section 146, as it appears to exist according to the judgment of the members of the reviewing court. * * * there is still a sound discretion imposed upon the trial court to determine under all the facts and circumstances of the case, including the status of the respective parties and their needs, how much in excess of one-half of the community property shall be awarded to the innocent party. We have no disposition to interfere with that discretion of the court, even if we have the authority to do so." In Crouch v. Crouch, 63 Cal.App. 2d 747, page 756, 147 P.2d 678, page 682, the discretion of the trial court is discussed as follows: "* * * section 146 of the Civil Code confers upon the trial court a wide latitude for the exercise of its judgment and discretion in assigning the community property to the respective parties and in every case it will be presumed that such discretion has been wisely and properly exercised, and though impliedly requiring that more than one-half of the community property shall be awarded to the innocent party, it does not otherwise limit the discretion of the trial court in making the award. The proportion should depend upon the particular circumstances of each case, and where the trial court has exercised a legal discretion this court, though clothed with the power of revision under the statute, will be slow to interfere with

that discretion. [Citing cases.]" See also Price v. Price, 71 Cal.App.2d 734, 163 P.2d 501, and Tompkins v. Tompkins, 83 Cal. App.2d 71, 187 P.2d 840.

In view of our decision of the case on the merits, we do not deem it necessary to consider the contentions raised by defendant as to the form of the notice of appeal.

The interlocutory decree and judgment of divorce is affirmed.

PETERS, P. J., and WARD, J., concur.

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92 Cal.App.2d 430

PEOPLE v. PERHAB.

Cr. 802.

District Court of Appeal, Fourth District, California.

June 15, 1949.

Hearing Denied July 14, 1949.

1. Robbery 🔑27(1)

Where court fully instructed jury as to definition of robbery as set forth in penal code, defendant could not complain that neither he nor jury was fully informed of the nature and elements of robbery charge against him. Pen.Code, § 211.

2. Robbery 🔑24(1)

Evidence that proprietor of grocery store placed canvas bag holding day's receipts on box in front of store and reentered store, that he saw defendant reach for bag, that he hurried out of doorway and was accosted by defendant and that proprietor and defendant exchanged shots as defendant fled, sustained conviction of "robbery" in first degree. Pen.Code, §§ 211, 211a.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Robbery".

3. Criminal law 🔑829(3)

In robbery prosecution, defendant's proffered instruction that force and fear must be employed before or at time of taking, was sufficiently covered by instruction that victim must have been compelled to give up his property because of force and fear used on him by defendant, and that use of force or fear must have preceded or have been a concomitant. Pen.Code, §§ 211, 211a.

4. Robbery 🔑27(6)

Where evidence in robbery prosecution was that proprietor of grocery store placed bag holding day's receipts on box in front of store, that he reentered store, that he saw defendant reach for bag, that he hurried out of doorway and was accosted by defendant who had a gun, and that when defendant fled he exchanged shots with proprietor, court was justified in refusing to give defendant's proffered instructions as to lesser offenses of grand or petit larceny. Pen.Code, §§ 211, 211a.

5. Criminal law 🔑829(3)

Refusal of defendant's requested instruction in robbery prosecution that if jury did not believe that robbery was committed but a theft was committed, jury should find defendant guilty of petit theft or grand theft, according to value of property taken, was not prejudicial error, where court told jury that if evidence failed to show that force and fear were used at the time jury must acquit defendant. Pen. Code, §§ 211, 211a.

6. Criminal law 🔑824(3)

Where evidence in robbery prosecution was that proprietor of grocery store placed bag holding day's receipts on box in front of store, that he momentarily entered store, that he saw defendant reach for bag, that he hurried out of doorway and was accosted by defendant who had a gun, and that when defendant fled with the bag, he exchanged shots with proprietor, court was justified in failing to give jury, without a request from defendant, a form of verdict as to second degree robbery. Pen.Code, §§ 211, 211a.

* * *

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Albert H. Perhab was convicted of robbery of the first degree, and he appeals.

Affirmed.

Albert H. Perhab, in pro. per.

Fred N. Howser, Attorney General, Dan Kaufman, Deputy Attorney General, for respondent.

GRIFFIN, Justice.

Defendant was charged, by information, with the crime of armed robbery in that "he did, while armed with a certain deadly weapon, to wit, a gun, rob one Carl Torres." He admitted three prior felony convictions in 1932, of armed robbery, first degree, and that he served a term therefor in San Quentin, and a fourth previous felony of assault with a deadly weapon with intent to commit murder, committed in 1940, and that he served a term in Folsom prison. At the trial counsel was appointed for defendant at his request.

Torres operated a grocery store in Fresno. On the night of October 15, 1948, he left that store about 7 p. m. through the front door and carried with him a paper bag containing groceries and another paper bag which contained a canvas bag holding the day's receipts of currency in the sum of $50, $165 in silver, and certain checks. Torres's truck was parked in the rear of the store. When he reached it he realized he had forgotten his keys thereto, whereupon he returned to the front door of the store. There was a box located there and he placed both bags upon it. He momentarily entered the store and reached for the keys at the check counter near the entrance to the store. At that time he observed out of the corner of his eye, a person's head "bob down" and his arm reach in the direction of the bags. He hurried out of the doorway and was accosted by defendant who was standing straight up with the money bag in his left hand and a gun in his right hand. Defendant "pushed" the gun into Torres's stomach. Defendant then stepped back and ordered Torres to the truck, keeping the gun pointed at him at all times. Torres refused to get into the truck as ordered by the defendant. He was then ordered to go back toward the store but instead he hid behind a bush and watched defendant standing near the truck for two or three minutes, at which time defendant started to run. As he left, Torres drew a revolver and fired three shots at him. Defendant returned two shots from his gun. Torres positively identified defendant as the man who held him up.

[1] Defendant cashed checks in the sum of $73.50 and $90.40 at stores and was identified by their employees as the one who cashed them. He also endeavored to cash one in San Francisco. In the course of the identification defendant became suspicious and started to run away but was apprehended by the store detective. Defendant failed to take the witness stand to testify in his own behalf. His motion for a directed verdict was denied. The jury returned a verdict of guilty as charged and fixed the degree as robbery of the first degree. His motion for new trial was denied. He was sentenced to State prison and was adjudged an habitual criminal under section 644(a) of the Penal Code. He now, in proper person, appeals from the judgment and order denying a new trial on three grounds: One, that the information failed to charge a public offense and failed to give defendant notice of the purported charge against him. No demurrer to the information was interposed. See People v. Perfetti, 88 Cal. App. 609, 264 P. 318. The question of the sufficiency of this form of information was decided against defendant's contention in People v. Flohr, 30 Cal.App.2d 576, 86 P.2d 862. It should be again stated here, as we have said before, see People v. Israel, 91 Cal.App.2d 773, 206 P.2d 62, that the brevity of the information is not to be approved for general use. However, in the absence of a demurrer, it sufficiently apprised defendant of the offense charged. The court fully instructed the jury as to the definition of robbery, as set forth in section 211 of the Penal Code. Under the circumstances defendant cannot complain that neither he nor the jury were fully informed of the nature and elements of the charge against him. People v. O'Neal, 2 Cal.App.2d 551, 38 P.2d 430; Secs. 960 and 1404, Penal Code; People v. Fallai, 99 Cal.App. 297, 278 P. 449; People v. Summers, 107 Cal.App. 250, 252, 290 P. 464; People v. Kent, 90 Cal.App.2d 77, 202 P.2d 376; People v. Sampsell, 104 Cal. App. 431, 435, 286 P. 434.

[2] The second ground is that the undisputed evidence did not support the charge of robbery, i. e., that the money was taken from the person of or immediate presence of and possession of Torres by means of force or fear at the time. Robbery is defined by sec. 211 of the Penal Code as the felonious "taking" of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. Penal Code sec. 211a provides that all robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree. It must be conceded that the property was not taken from the person of the complaining witness. However, the evidence does justify the conclusion that he had sufficient possession of it to satisfy the statute and that it was taken from his immediate presence and within his sight.

In People v. Dean, 66 Cal.App. 602, 226 P. 943, where a safe in a theatre, located within 25 feet of the janitor and watchman employed to watch the building, was robbed, it was held that there was sufficient possession of the safe and its contents as against the thief to constitute robbery as distinguished from larceny. See, also, People v. Davis, 106 Cal.App. 179, 289 P. 194, where defendant held up a cashier at a theatre while she was sitting in a box office rolling up some money. She screamed, ran to the door of the theatre a good many feet away, and while there defendant took the money and ran. Possession of the money in the cashier was upheld.

The question whether there was a felonious "taking" of the property accomplished by means of force and fear in the instant case is worthy of note. This question was thoroughly discussed and considered in People v. Wallace, 36 Cal.App.2d 1, 97 P.2d 256, 257. Hearing denied by the Supreme Court. There three defendants came into a service station and one asked the attendant for gas. One dollar was paid for it and the attendant went into the station to make change. Defendants followed him in and one defendant, who had his hand in his pocket, said "All right, Doc, let's have it". The attendant put up his hands and went to the back of the station about three feet from the cash register. The attendant was searched by one defendant and a 38 revolver was found on him. This defendant took it from him and pointed it at him. Before this time the other defendants had looted the cash drawer and were at this time on their way out of the station. It was the contention there that the taking of the personal property from the attendant, in his immediate presence, was accomplished without the use of a deadly weapon. This claim was held to be without merit. It was said that under section 211 of the Penal Code a robbery is defined as the felonious "taking" of personal property in the possession of another, etc.; that this section is followed by section 211a, which provides that any robbery which is "perpetrated" by a person being armed with a dangerous or deadly weapon is robbery in the first degree; that "From a reading of the facts of this case it is at once apparent that appellants were engaged in the 'taking' of the personal property of the victim * * * at the time they became armed with the 38 caliber revolver. Appellants being thus armed while they 'perpetrated' the robbery, it matters not from what source they obtained the dangerous or deadly weapon in question. It is the law that the 'perpetration' of the crime of robbery is not completed the moment the stolen property is in the possession of the robbers. The escape of the robbers with their ill-gotten gains by means of arms is as important to the execution of the robbery as gaining possession of the property"; that "not only was the gun used and pointed at the complaining witness, but his own gun was taken from him, and it obviously constituted a means of preventing the complaining witness, by the use of his revolver, from making any attempt to frustrate or thwart the perpetrators of the crime". The court then quotes from People v. Boss, 210 Cal. 245, 290 P. 881, 883, to the effect that "The escape of the robbers with the loot, by means of arms, necessarily is as important to the execution of the plan as gaining possession of the property. Without revolvers to terrify, or, if occasion requires, to kill any person who attempts to apprehend them at the time of or immediately upon gaining possession of said property, their plan would be childlike." People v. Dowell, 204 Cal. 109, 266 P. 807, 811, is also cited where the robber was fleeing from the scene of the robbery carrying what he thought was the bag and money of the victim and fired upon and killed a pursuing officer of the law in order to effect his escape while retaining the stolen property. The Supreme Court there said: "We are satisfied that the crime of robbery had not been completed in any sense at the time of the unlawful shooting, but on the contrary the murder was committed in the perpetration of such crime." It is likewise said in People v. Wallace, supra, that "Robbery, being a combination of the crime of assault with that of larceny, includes, as does larceny, the element of asportation; and the appropriation of another's property at the scene of the hold-up is a transaction which continues after the perpetrators depart from the place where the property was seized." (Citing cases.)

In People v. Stevens, 32 Cal.App.2d 666, 90 P.2d 595, 597, it is said that: "Statutes should be construed, whenever reasonably possible, with a view to carrying out the intent and purpose which actuated their adoption and to secure the objective sought to be achieved by the legislation in question. The laws here in question were designed for the protection of the community and its residents, and not the lawbreaker." Again it was there said that to achieve the manifest purpose of the legislation "it must be held, and we do so hold, that any defendant participating" in a robbery who becomes armed, either during the "taking" incidental to the robbery or while the offense is being "perpetrated" is guilty of robbery of the first degree. See, also, cases cited in People v. Dean, supra, 66 Cal. App. 607, 226 P. 943.

In People v. Jefferson, 31 Cal.App.2d 562, 88 P.2d 238, it was said that when the property was taken under circumstances reasonably creating grave apprehension on the part of the owner, of receiving bodily injury at the hands of the thief, the crime amounts to robbery.

Under the facts of the instant case defendant was still in the process of taking the victim's property and was still at the box from which he had removed the money when he accosted his victim with a gun. Where a person comes to the scene armed with a loaded gun, accosts his victim with it, forces him to obey his commands at the point of a gun and in departing exchanges shots with the victim, it appears to us that there is sufficient evidence to submit to the jury the question of his guilt of the offense of robbery as charged.

The third question involves the failure to give defendant's proffered instructions: One, to the effect that force and fear must be employed, before or at the time of the taking, and it is contended that the law does not permit a charge of robbery to be sustained by showing a retention of the property, or an attempt to escape, by use of force or fear, citing State v. Holmes, 317 Mo. 9, 295 S.W. 71, 58 A.L.R. 656; and another instruction to the effect that if the jury did not believe that a robbery was committed but a theft was committed by the defendant the jury are instructed to find the defendant guilty of petty theft or of grand theft, according to the value of the property taken.

[3] As to the first instruction refused the court sufficiently and substantially covered it in another instruction given at defendant's request. It reads:

"You are instructed that the elements of the crime of robbery are as follows:

"1. Felonious taking of personal property in the possession of another, from his person or immediate presence.

"2. That said taking must be against his will.

"3. That the taking was accomplished by means of force or fear.

"In this connection, you are instructed that the alleged victim must have been compelled to give up his property because of force or fear used upon him by the defendant. The use of force or fear must precede or be concomitant, that is, at the same time as of the delivering up of the property."

Another instruction given was as follows:

"You are instructed that the 'fear' necessary to constitute robbery is defined as follows:

"One. * * * The fear of an unlawful injury to the person or property of the person robbed. * * *"

Then followed an instruction in the language of section 211a of the Penal Code that if the jury found the defendant guilty of robbery it was its duty to determine the degree thereof and to state that degree in its verdict. The court then instructed the jury that the burden was on the prosecution to prove defendant guilty as charged beyond all reasonable doubt and upon failure of such proof defendant was entitled to an acquittal, and that it was the sole duty of the jury to determine whether he was "guilty or not guilty of the crime with which he is charged" and that it may bring in a verdict of guilty of armed robbery as charged and fix the degree or it may find the defendant not guilty.

The chief complaint therefore is that, under the evidence, the jury was not instructed that it could have returned a verdict of guilty of grand or petty larceny, an included offense, and defendant cites this as prejudicial error on the part of the court. Such form of verdict was not submitted by the defendant.

In People v. Dean, supra, this same question arose and it was there held, under the circumstances of that case, that the court did not err in failing to give such an instruction. However, in People v. Driscoll, 53 Cal.App.2d 590, 128 P.2d 382, 385, it is said that a defendant on trial for robbery, where the evidence warrants it, is entitled to have the jury instructed that it may find him guilty of either of the lesser offenses of assault with a deadly weapon or simple assault, which are included offenses within the charge of robbery. In that case, however, the court refused the proffered instruction on simple assault and sustained the robbery conviction and said:

"The defendant may not complain of the failure to give that instruction, for the prosecution, under no circumstances, asked that the defendant be convicted of a lesser offense. Moreover, the jury and the trial court evidently believed that he did take from the prosecuting witness $70 in cash, by means of force and fear. The evidence supports that conclusion. It has been uniformly held that a defendant may not complain of erroneous instructions or of the refusal to give to the jury instructions where the verdict clearly shows that he was not prejudiced thereby.

"It has also been held that when one has been convicted of a higher crime he may not complain of erroneous instuctions which were given to the jury upon a lesser offense included within the one of which he was convicted."

People v. Riley, 65 Cal. 107, 3 P. 413, is cited, holding that a defendant who was charged with and convicted of the crime of robbery may not complain of erroneous instructions which were given to the jury regarding the lesser offense of larceny which was contained therein, provided the jury was properly instructed on the subject of robbery.

[4] We adopt the theory announced in the cited cases that the "taking" of the property in the possession of the complaining witness, from his immediate presence and possession, is not necessarily completed the moment the thief places his hands upon it. The crime of robbery also includes the element of asportation and appropriation of another's property. The escape of the thief with his illgotten gains by means of arms is as important to the execution of the robbery as gaining possession of it. The trial court, therefore, was justified, under the circumstances of this case, in refusing to give the proffered instructions as to the lesser offenses included in the charge. Since the prosecution did not seek a conviction on a lesser charge but relied upon their ability to establish all the elements of the crime of robbery including force and fear at the time, or, in the alternative accept a verdict of not guilty if they failed to establish such elements, defendant cannot claim he was prejudiced by the failure to give an instruction as to an included offense where the uncontradicted evidence

fully supports the verdict of robbery. People v. McCoy, 25 Cal.2d 177, 187, 153 P.2d 315; People v. Cipolla, 155 Cal. 224, 226, 100 P. 252; People v. Driscoll, supra.

[5] Even if it could be claimed to be error to refuse such an instruction under these circumstances it would appear that defendant would not be prejudiced thereby since in the instructions given the trial court told the jury that if the evidence failed to show that force and fear were used at the time the jury must acquit the defendant. By the proffered instruction the defendant asked that the jury be instructed that if the prosecution failed to establish these same elements he should be convicted of grand or petty theft, an included offense.

[6] Finally, there was no error on the part of the trial judge in failing to give the jury, without a request from the defendant, a form of verdict as to second degree robbery, under the facts related. People v. Mundt, 31 Cal.App.2d 685, 88 P.2d 767.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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92 Cal.App.2d 401

PACIFIC GAS & ELECTRIC CO. v. MINNETTE et al.

Civ. 7628.

District Court of Appeal,
Third District, California.
June 14, 1949.

Rehearing Denied July 14, 1949.
Hearing Denied Aug. 11, 1949.

1. Pleading 🔑225(2)

In suit to quiet title and for an injunction, where answer presented an issue of fact as to whether there was an encroachment on plaintiff's easement and answer also alleged an equitable defense at least defectively, sustaining a general demurrer to the answer without leave to amend, and which demurrer did not assert that the answer was uncertain, frivolous, or defective in form, was an abuse of discretion. Code Civ.Proc. §§ 443, 444.

2. Pleading 🔑406(7)

Where there was no motion to strike out answer or any portion thereof on the ground that it was uncertain or frivolous, but a general demurrer was interposed, alleged defects were waived.

3. Pleading 🔑122

Generally, when a fact may be readily ascertained by inspection of a public record, it cannot be made an issue by mere allegations of denials based on information and belief.

4. Pleading 🔑122

In suit to quiet title to an easement and enjoin obstruction thereof, answer, alleging on the information and belief that building was not constructed on the easement, was not insufficient because the easement was duly recorded, where a mere inspection of the record would not enable the defendants to locate the easement on the ground to definitely determine whether the building was located thereon.

5. Pleading 🔑122

In action to quiet title to an easement and enjoin an obstruction thereof, answer, alleging on information and belief that building was not constructed on the easement, was not insufficient in view of positive denial in the answer that building was constructed upon the easement or that the easement was obstructed thereby.

6. Easements 🔑61(8)

In action to quiet title to an easement for electric power line and to enjoin obstruction thereof, answer, admitting that a portion of building was constructed "beneath the wires", was sufficient to raise an issue as to whether a building invaded any rights of plaintiff in view of denial that building was built upon the easement and affirmative allegation that power lines and wires were erected on property other than that described in the easement.

7. Estoppel 🔑112

In action to quiet title to easement for power lines and enjoin obstruction thereof, answer, alleging that plaintiff with full knowledge permitted construction of building by defendants at great cost over eight months on the alleged easement without objection, was sufficient to raise the issue of estoppel in pais against plaintiff where removal of the building would result in great loss of labor and expense.

◆

Appeal from Superior Court, Solano County; Harlow V. Greenwood, Judge.

Action by the Pacific Gas & Electric Company against Christino Minnette and others for injunction and to quiet title to an easement. From a judgment in favor of plaintiff rendered pursuant to an order sustaining a demurrer to the amended answer of the defendants without leave to amend, the defendants appeal.

Reversed with directions to overrule the demurrer.

Leo C. Dunnell, William H. Herbert, and Adey May Dunnell, Fairfield, O'Hara, Randall, Castagnetto & Kilpatrick, Vallejo, for appellants.

Robert H. Gerdes and W. R. Dunn, San Francisco, W. U. Goodman, Fairfield, for respondent.

THOMPSON, Justice.

The defendants have appealed from a judgment in favor of plaintiff, rendered pursuant to an order sustaining a demurrer to the amended answer without leave to amend the pleading. The judgment restrains defendants from constructing or maintaining an automobile garage and repair shop on plaintiff's right of way and easement beneath the wires and electric lines on and across defendants' land. The building in question was constructed of concrete blocks by the owners of a lot, to replace a frame building which had previously existed thereon beneath the electric wires of a power line which plaintiff's complaint alleges was constructed by it along the center line of its 40-foot right of way and easement across the property of defendants Christino Minnette (Cristino Minnitte) and Mary T. Minnette in Solano County. The poles and wires were maintained by plaintiff to supply electric light and power to the residents in that vicinity.

The defendants contend that their amended answer adequately presents issues regarding the location of their building and other equitable issues which entitle them to a hearing on the merits, and that the court abused its discretion in sustaining the demurrer without leave to amend.

This suit is equitable in nature. It was brought to quiet title to an easement across a lot, and to enjoin the successors in interest of that lot from maintaining thereon a concrete building which they constructed in 1947.

The amended complaint which was filed in Solano County December 3, 1947, alleges plaintiff is a public utilities corporation engaged in the business of furnishing electric lights and power in Solano County; that, on April 4, 1917, M. Dos Reis and A. Dos Reis were the owners of a described tract of land in Vallejo in said county, adjacent to the Straits of Carquinez, across which land they executed to plaintiff, on the last-mentioned date, a grant to an easement in a 40-foot strip of land for a term of fifty years for the purpose of erecting and maintaining thereon a system of electric and power lines and poles, which easement contained a covenant that the first parties would not erect or maintain "beneath said lines of poles and wires" any building or structure; that said grant of easement was recorded April 11, 1917; that said owners of the land also executed to plaintiff on February 2, 1920, a similar grant of easement containing the same restriction, for the term of fifty years over and across other described adjoining lots, which was duly recorded March 16, 1920; that plaintiff entered into possession of said easements and erected and now maintains along the center lines thereof poles and wires by means of which it has and still does transmit and distribute to the public electricity for lighting and power purposes; that Louise Hommell, who subsequently became the owner of the described lot involved in this suit, sold and conveyed said lot to the defendants Cristino and Mary T. Minnette, on July 2, 1945; that with full knowledge of said easements and the restrictions therein contained, the grantees constructed in 1947 on said lot, beneath the wires of said power line, a basalt block building 50 feet in length, 42 feet wide and 21 feet in height for their use as an automobile garage and repair shop; that in March, 1947, said defendants executed to the Solano County Title Company a trust deed to their said lot to secure payment of a $2,000 loan which they obtained. Each of the said instruments was attached to the amended complaint and made a part thereof. The complaint prayed for a decree quieting title to said easements in plaintiff, and asking for a mandatory injunction requiring the removal of said building from the right of way and easements.

Separate demurrers to the complaint were overruled. The defendants joined in an answer to the amended complaint, setting up an issue of fact regarding the true location of the easement, and equitable defenses, including those of estoppel and laches. The amended answer states that "said concrete building so erected does not cover the entire portion of said alleged right of way but only a portion thereof and the same does not interfere with the ingress and egress of the said plaintiff." But the answer further denies the other material allegations of the complaint and affirmatively alleges that defendants had no information or knowledge of the existence of said easements; that *plaintiff's poles and wires were not erected or maintained on the easements;* that for a long time prior to the construction of said basalt block building, other buildings were permitted by plaintiff, without objection, to remain beneath said wires on the easements in that immediate vicinity, including defendants' said frame building; that defendants, with full knowledge on the part of plaintiff, tore down their frame building in January, 1947, and replaced it with a concrete block building at a cost of about $9,000, which building was under construction from January 7, 1947, to September 1st of that year, during all of which time "said plaintiff had full notice and knowledge that defendants were constructing said building beneath said wires at great cost and expense to said defendants." Paragraph IV of the amended answer denies on information and belief that plaintiff erected its line of poles and wires as alleged on the easements described in Exhibits "A" and "B" of the complaint, and on the contrary alleges that it "erected their said poles, wires and conduits *on lands other than that described in said Exhibits A and B * * *; that said easements * * * do not cross the lands of defendants; that plaintiff has constructed electrical wires and conduits across the lands of defendants but not upon the said rights of way described in said Exhibits.*" (Italics added.) In paragraph VI of the amended answer the defendants definitely deny that "said building was constructed upon the said easement and right of way described in said Exhibits A and B or either of said exhibits," and definitely deny that they have invaded plaintiff's easement by constructing or maintaining said building. The latter denials are not based on "belief" or upon "a lack of information." They are definite, unqualified denials. The amended answer further alleges that before the defendants Cristino and Mary T. Minnette purchased their lot in 1945, they employed the Solano County Title Company to examine the records and report to them the condition of the title thereto, and that said company reported to said purchasers that the lot was free and clear of "any recorded easements, liens or encumbrances whatsoever." The answer specifically sets up the defenses of estoppel and laches and prays for a decree that plaintiff take nothing by its action.

The plaintiff filed a general demurrer to that amended answer on the sole ground that it fails to state facts constituting a valid defense to the allegations of the complaint. The demurrer was sustained without leave to amend the pleading. Judgment was accordingly rendered for plaintiff, enjoining the defendants and their agents, successors and assigns from erecting or maintaining said building or any building on said easements. From that judgment this appeal was perfected.

The vital questions to be determined are whether the answer raises a valid issue of fact as to whether the concrete building was constructed *on plaintiff's right of way and easement* beneath the wires, and whether the allegations of the answer present equitable issues, or are susceptible of amendments presenting such issues, which would require a trial on its merits and the adoption of findings to support a judgment to that effect.

The appellants insist that the pleadings present issues of fact and equitable defenses which should be determined on the merits, and that it is unjust and inequitable, under the circumstances of this case, to require them to remove said concrete block structure at great labor and expense, since it was under construction during a period of eight months with full knowledge of plaintiff, and without objection on its part. The appellants assert that the court erred in sustaining the demurrer without leave to amend.

[1] We are persuaded the court erred in sustaining the demurrer to the amended answer in this case without leave to amend the pleading. The answer presents an issue of fact as to whether the defendants' building was constructed on plaintiff's right of way and easement. It also alleges an equitable defense. At least the amended answer attempts to allege those issues which, if defectively stated, should entitle defendants to amend their pleading. It follows that the court abused its discretion in sustaining the general demurrer without leave to amend the pleading. The general demurrer was filed under Sections 443 and 444 of the Code of Civil Procedure on the sole ground that the answer "does not state facts sufficient to constitute a defense." It did not assert that the pleading is uncertain, ambiguous, unintelligent, frivolous or defective in form. There was no motion to strike out the answer, or any portion thereof, on the ground that it is uncertain or frivolous. The last-mentioned defects, if any such exist, were therefore waived.

The respondent contends that paragraph IV of the answer fails to state a valid defense because it merely alleges "on information and belief" that the building was not constructed on plaintiff's right of way and easement, and that, since the easement was duly recorded, the defendants were charged with notice thereof requiring them to definitely determine by a survey whether the building is in fact located thereon. But a mere inspection of the record will not enable the defendants to locate the easement on the ground to definitely determine whether the building is located thereon.

[3-6] The respondent correctly states the general rule with respect to pleadings based on information and belief, that when a fact may be *readily ascertained* by inspection of a public record it cannot be made an issue by mere allegations or denials based on information and belief. Art Metal Construction Co. v. A. F. Anderson Co., 182 Cal. 29, 33, 186 P. 776; Santa Barbara Lumber Company v. Ross, 183 Cal. 657, 659, 192 P. 436; Smith v. Fidelity and Deposit Company of Maryland, 130 Cal.App. 45, 58, 19 P.2d 1018; Brooks v. Nelson, 95 Cal.App. 144, 149, 272 P. 610; 21 Cal.Jur. sec. 101, p. 150; 49 C.J. sec. 333, p. 266; 1 Bancroft's Code Pleading, sec. 415, p. 607. Our attention has not been called to any case, and we have been unable to find one, which holds that merely because a deed or grant of an easement has been recorded the issue as to whether a restriction therein contained has been violated, may not be alleged or denied on information and belief. The question as to whether a building or obstruction was or was not constructed on the easement does not appear from an inspection of the grant. Ordinarily, that fact cannot be readily ascertained by a mere inspection of the record. We are not prepared to hold that under such circumstances the recording of the instrument requires a pleader to survey the easement to definitely ascertain the fact before he may raise that issue. But, regardless of whether that rule applies, it appears to be immaterial in the present case because Paragraph VI of the answer positively and definitely denies "that said building was constructed upon the said easement and right of way," or that the right of way was obstructed thereby in any manner or at all. Certainly, the last-mentioned denial and allegation of the amended answer properly raise that issue. The answer does admit that a portion of

the building was constructed "beneath the wires". But, in view of the denial that it was built upon the easement, and the affirmative allegation that the line of poles and wires were erected on property *other than that described in the easement,* we think the issue is clearly raised as to whether the building invades any rights vesting in plaintiff by its grant to the easement.

The foregoing rule of pleading applies to the plaintiff in this case, notwithstanding the fact that it was engaged in furnishing electric light and power as a public utilities corporation.

We conclude that Paragraph VI of the answer raises issues which should be determined by the court, and that the demurrer should not have been sustained without leave to amend the answer.

[7] Moreover, we are of the opinion the estoppel in pais and the equitable defense raised by the answer that the plaintiff, with full knowledge of the construction of the basalt block building by defendants at great cost over a period of some eight months, without objection on the part of plaintiff, entitled defendants to have those issues determined. It is apparent that defendants may have been reasonably misled by the fact that Cristino and Mary T. Minnette acquired their lot in 1945, with the frame building thereon which had been previously maintained beneath the wires for several years and by the fact that the title company had reported to them that their lot was free and clear of all encumbrances, liens or easements, and that, without protest or notice from plaintiff, they were permitted to tear down the frame building in 1947 and to replace it, without objection or protest, with the basalt block building. Without determining those alleged equities, the injunction restrains defendants from maintaining that concrete building, the removal of which will necessarily result in great loss of labor and expense.

In view of our foregoing conclusion, it is unnecessary to determine whether the covenant contained in the grants of easements to the effect that "the parties of the first part" will not construct any building on said easements beneath the wires, is binding upon the grantors' assigns or successors in interest.

The appellants contend that since the covenants do not state that the *assigns or successors in interest* shall not construct such buildings on the easements beneath the wires, the covenants are therefore purely personal, applying to the grantors only, and that they do not run with the land or bind the assigns or successors in title. In support of that contention, appellants cite Pythian Castle Association of Sacramento v. Daroux, 172 Cal. 510, 157 P. 594, and Frederick v. Louis, 10 Cal. App.2d 649, 52 P.2d 533. In the Daroux case, the covenant in a deed which was sought to be enforced against a successor in interest of the grantor was much more explicit than that in the present case. That grant covenanted that the party of the first part "will never *himself*" erect any structure on the property involved. In the Frederick case the Appellate Court merely held that there was no evidence or finding that it was necessary to connect defendant's sewer pipe with the sewer belonging to plaintiff. The injunction and judgment was therefore modified to that extent. Neither cited case appears to be controlling with respect to the issue contended for by appellants in this case. We observe that the second paragraph of the easements in the present case granted to plaintiff and "its successors and assigns," the right to erect and maintain the poles and wires *on the rights of way* for specified purposes.

Nor do we deem it necessary to pass upon other issues presented by the appellants on this appeal.

For the foregoing reasons we are impelled to hold that the court abused its discretion in sustaining the demurrer of plaintiff to defendants' answer.

The judgment is reversed and the court is directed to overrule the demurrer.

ADAMS, P. J., and PEEK, J., concur.